

TABLE OF CONTENTS

EDITORIAL

THE IMPACT OF THE FINANCIAL CRISIS ON THE ITALIAN WRITTEN CONSTITUTION.....	1
<i>Tania Groppi</i>	

ARTICLES

THE CONSTITUTION YESTERDAY AND TODAY.....	15
<i>Valerio Onida</i>	

THE TROUBLED LIFE OF COMPETITION IN LOCAL PUBLIC SERVICES.....	38
<i>Fabio Merusi</i>	

GLOBAL LAW AND THE LAW ON THE GLOBE. LAYERS, LEGALITIES AND THE RULE OF LAW PRINCIPLE.....	53
<i>Gianluigi Palombella</i>	

THE QUALITY OF REGULATION THE MYTH AND REALITY OF GOOD REGULATION TOOLS.....	92
<i>Nicoletta Rangone</i>	

WITHDRAWAL OF ARTIFICIAL HYDRATION AND NUTRITION FROM A PATIENT IN A PERMANENT VEGETATIVE STATE IN ITALY: SOME CONSIDERATIONS ON THE ENGLARO CASE.....	122
<i>Viviana Molaschi</i>	

A COMPARISON OF EUROPEAN SYSTEMS OF DIRECT ACCESS TO CONSTITUTIONAL JUDGES: EXPLORING ADVANTAGES FOR THE ITALIAN CONSTITUTIONAL COURT.....	159
<i>Gianluca Gentili</i>	

SOCIAL SERVICES IN THE EU LEGAL SYSTEM: BALANCING COMPETITION AND THE PROTECTION OF NATIONAL-SPECIFIC PUBLIC INTERESTS.....	209
<i>Remo Morzenti Pellegrini</i>	

EDITORIAL

THE IMPACT OF THE FINANCIAL CRISIS ON THE ITALIAN WRITTEN CONSTITUTION

Tania Groppi*

TABLE OF CONTENTS

I. Political and socio-economic aspects of the crisis. A brief introduction.....	1
II. Constitutional Law n. 1/2012: a constitutional amendment in order to “reassure the financial markets”?.....	4
III. The former constitutional rules on budget.....	7
IV. The amendment to Art. 81 Const. and the necessary respect of the “balanced budget” principle.....	10
V. A “hasty” Constitutional amendment that undermines the Welfare State?.....	12

I. Political and socio-economic aspects of the crisis. A brief introduction.

The financial crisis that struck the Euro-zone in 2008 and which reached its peak in 2011 has not only affected the economic arena, but has also had highly relevant consequences at constitutional level in most of the countries affected.

This is something of a novelty, if we compare today’s crisis with previous ones, and it is linked, directly or indirectly, to what can be considered the main new feature of the crisis, namely, the role played by the supranational actors, and above all, the European Union (EU). In fact, since the establishment of the Economic and Monetary Union, many financial and economic functions are the province of the EU. However, as far as constitutional and institutional reforms are concerned, the EU lacks any kind of jurisdiction, and national governments are still required to enact EU reforms.

* Professor of Public Law, University of Siena

Within this context, the Italian experience may be considered to be of particular interest. In fact, economic and financial crisis are nothing new to Italy. In the early nineties for example, Italy suffered another deep crisis, but without leading to any kind of constitutional consequences (at least from the formal point of view).

The origin of the Italian economic crisis can be traced back to some weakness in the economic system dating back to the pre-Republican period, but it was further exacerbated as the main consequence of the enormous public debt that has seen a continuous and tremendous increase since the early sixties. There are both political and economic grounds for the contemporary crisis.

The causes of the growing public debt are many, one of which is the consociational political system that characterized the Italian political arena in the aftermath of World War II. This system lacked a real political opposition able to control the government majority. In fact, as a consequence of the Cold War, the main opposition political party, the Communist Party, was excluded from the possibility of winning the elections and becoming part of the Government, in what has been called a "*conventio ad excludendum*".

In effect, the various governments that came to power after 1948 were all dominated by the Christian Democratic Party and they had been able to enforce spending policies geared to the maintenance of a high consensus without any form of control, in a climate of increasing political clientelism and corruption.

This party system collapsed after the fall of the Berlin wall in the early nineties thanks to the operation involving high level judicial investigations known as "Clean Hands" ("*Mani Pulite*"), which involved many political actors.

Since then, governments, irrespective of their political orientation, have tried to approve debt reduction measures, primarily to meet the Maastricht criteria and to allow entry and permanent national presence in the Economic and Monetary Union.

This has resulted in several public administration and welfare reforms (especially concerning the pension system), which have, however, brought only limited savings. More specifically, since 2008, room for manoeuvre has become even smaller, because

the government has had to face the consequences of the international economic crisis, which has resulted in a reduction of the GDP and a consequent decline in tax revenues.

In addition, we have at the same time witnessed an increase in public spending in order to deal with the liquidity crisis faced by the banking sector and the difficulties facing the private sector (related, apart from the economic crisis, to the “credit crunch”), which has led to the increasing use of social safety nets (especially redundancy payments).

In 2011, financial speculation led to a marked increase in the interest rates of public debt bonds and in their spread compared with those of other countries (most notably Germany).

The very moment when Italian politicians could no longer ignore the crisis was August 5th, 2011, when the European Central Bank (ECB) sent a letter to the Italian Government, in which it asked Italy to adopt policies to deregulate its economy, to introduce more flexibility in employment and to increase privatisation.

Since that moment, an incessant chain of events has been underway: a constitutional revision bill was introduced in Parliament by the Cabinet in order to introduce the balanced budget principle into the Constitution (later approved through Constitutional Law 1/2012); the fourth Berlusconi Government collapsed due to the political (and personal) difficulties it was already facing, and a new Cabinet, led by Mr Mario Monti, was nominated.

The main focus of the European institutions was the lack of political credibility of the Italian Government especially with regard to the reduction of public debt and the adoption of the structural reforms necessary to contain public spending.

Therefore, as will be further explained in the following paragraphs, the very grounds for the constitutional consequences of the crisis, especially as far as constitutional amendment is concerned, are strictly related to the need to improve the credibility of the Italian institutions in the global context.

II. The impact of the crisis on the “written constitution”: A constitutional amendment in order to “reassure the financial markets”?

In Italy too, the financial and economic crisis has led, as in other countries, to the approval of a constitutional amendment. Constitutional Law no. 1/2012, of April 20th, has introduced the “balanced budget” principle into the text of the Constitution itself, modifying Art. 81.

In this regard, four aspects need to be underlined.

First of all, the timing of the revision, especially in connection with the development of the crisis.

Secondly, the analysis of previous constitutional rules on this matter.

Thirdly, the content of the reform.

Finally, the first comments on, and perspectives of, the implementation of the new rules.

Firstly, it should be underlined that formal amendments to the Italian Constitution are quite rare due to the prevailing legal culture that is not strictly linked to the text, and also because of the complexity of the process of constitutional amendment established by the Constitution itself.

In fact, according to Art. 138 of the Constitution, each of the two Chambers, the Chamber of Deputies and the Senate of the Republic, must proceed to a double reading of the constitutional bill. During the first reading, a majority of the deputies or senators present at the reading is required, while during the second reading a qualified majority of two thirds of the components of each Chamber is needed. Art. 138 provides the possibility to call for a referendum if, at the second deliberation, the qualified majority of two thirds is not reached, but there is at any rate an absolute majority. This complex procedure (whose rationale lies in the need to guarantee only those amendments on which a large consensus has been reached, equally as large as that reached in the Constituent Assembly) means that in the absence of a strong political will, many proposals are abandoned after approval by one Chamber and are not even submitted to the other.

In the case of the “balanced budget” amendment, after the approval of the Euro-plus agreement on March 11, 2011 by the Heads of State and Government of the Euro-zone, later shared also by the European Council of 24-25th March of the same year,

several constitutional bills have been filed in both Chambers, by the majority as well as members of the opposition.

However, only after the letter sent by the ECB to the Italian Government on August 5, 2011 (which stated that “a constitutional reform tightening fiscal rules would also be appropriate), the Government announced the presentation of a constitutional bill¹, filed on September 15, 2011 to the Chamber of Deputies². The amendment was finally approved by the Senate of the Republic on April 17, 2012, and promulgated by the President of the Republic, Giorgio Napolitano, on April 20, 2012³, thereby concluding a procedure that may be considered unique in the entire history of constitutional amendments in Italy.

First of all, it is very rare that such revisions are brought about through Government initiatives. Secondly, the process has been relatively fast, as shown by the dates of the deliberations⁴, and lastly, the majorities obtained have been very large⁵, thus obviating the necessity to call a referendum.

¹ This occurred on August 11, 2011, at the sitting of the Constitutional Affairs and Budget Joint Committee, urgently called after the interruption of parliamentary activity for the summer break.

² Bill no. 4620, Chamber of Deputies, XVI legislature.

³ Constitutional Law no. 1/2012

⁴ The Committee debate in the Chamber of Deputies began on October 5, 2011 and ended on November 10; the debate in the Chamber itself began on November 23 and ended on November 30. In the Senate, the Committee debate began on December 7, 2011 and ended on December 14, 2011; the senators approved the text already approved by the House with no further amendment at the first reading on December 15, 2011. The second reading in the House took a single day for examination by the Committee, on February 21, 2012 and two in the Assembly, on 5 and 6 March. The amendment was definitively approved by the Senate on April 17, 2012.

⁵ The amendment was approved at first reading by 464 of the 630 members of the Chamber, with 11 abstentions and no opposing votes. The rest of the members of the Chamber were not present. As this was the first vote, the large majority reached was neither relevant, nor necessary from the legal point of view. The amendment was approved by the Senate at first reading on December 15, 2011 by 255 out of 315 members, with 14 abstentions and no opposing votes. At the second reading (important in the light of art.138 of the Constitution, as a 2/3 majority eliminates the possibility of a referendum) it was approved by 489 members of the Chamber, with 3 opposing votes, and no abstentions. In the second reading by the Senate there were 235 votes in favour, 11 against and 34 abstentions.

This might well be considered a “heterodirected” constitutional revision, insofar as it was requested by supranational institutions: this is because it was “encouraged” by the EU (even more after the Fiscal Compact), and because, as emerged repeatedly during the preparatory works, it was requested in order to “restore market confidence”.

However, none of the above-mentioned European documents clearly requires a constitutional amendment: not even an international commitment on the part of the Government which would result in no modification of the Treaties could limit the power to amend the national Constitution. Moreover, it should be noted that in the Italian legal order, European obligations have immediate constitutional primacy under Article 11 of the Constitution, according to the interpretation provided by the Constitutional Court since decision no. 14/1964.

Thus, until today it was not deemed necessary to adapt the text of the Constitution to European obligations. When constitutional provisions are inconsistent with such obligations, an implicit adaptation of the constitutional text is preferred.

As far as the confidence of the market is concerned, this seems to derive more from the strong signal behind the constitutional amendment rather than the new constitutional rules themselves. It is a signal that the sustainability of public finances represents a goal shared by the whole of Italian society.

Therefore, it can be assumed that necessary unpopular political decisions will be adopted and implemented to this end without strong political or popular opposition.

In other words, the constitutional amendment was not legally essential in order to satisfy European obligations: it was rather the result of a political choice meant to give a strong signal to the financial markets.

The constitutional amendment introduced by Constitutional Law 1/2012 and the introduction of the “balanced budget” principle can be read, in particular, from the point of view of the national legitimacy of unpopular policies required at the international level: these policies, more than the constitutional amendment, have to be considered as “heterodirected”.

III. The former constitutional rules on budget

Secondly, we should briefly recall the former fiscal rules deriving from the Italian Constitution. In the absence of a true “Economic Constitution” (according to the German definition of *Wirtschaftsverfassung*), these rules can be found in several constitutional dispositions, strictly linked to those protecting social rights.

The main article we should refer to on the matter of budget is Art. 81, which is also at the core of the constitutional amendment (although the constitutional revision brings with it some changes to Article 97 of the Constitution – by introducing the requirement that public administrations, in line with European Union directions, ensure “balanced budgets and public debt sustainability” – 117, paragraphs 1 and 2 granting the State exclusive legislative power over the “harmonization of public budgets”, whereas it was previously shared between State and regions, and 119, on matters of regional and local finance, where more stringent constraints on the local authorities have been introduced).

It is worth dwelling briefly on the original version of Article 81 of the Constitution, and in particular its last paragraph, to underline that the “balancing budget” issue was not unknown to the Constituent Assembly⁶.

On one hand, the distinguished constitutionalist Costantino Mortati, one of the fathers of the Italian Constitution, highlighted that leaving the initiative regarding spending laws in the hands of MPs would have been too great a risk. On the other hand, Luigi Einaudi, a pre-eminent economist, later to become the first President of the Italian Republic, proposed two possible solutions to the problem posed by Mortati. The Constituent Assembly could have either denied MPs “the right to make spending proposals, or would have forced MPs to accompany them with an equivalent income proposal able to cover the expenditure, in order to give it an imprint of seriousness”. The second proposal obtained the

⁶ Art.81: 1) The chambers approve the budget and final balance submitted by the government each year. (2) Temporary execution of the budget may not be granted except by law and for periods of no more than four months in total. (3) No new taxes or expenditure may be adopted in the budget law. (4) All other laws implying new or additional expenditure must define the means to cover them.

approval of Ezio Vanoni, a prominent economist, later Minister of finance, who interpreted it as “a guarantee of the tendency towards a balanced budget”.

He strongly pointed out the need for this principle to be always in the minds of political actors, “also from the legal point of view”.

However, the prevailing interpretation of this provision, in the legislation, in the scholarship and in the constitutional case law, has, especially since the sixties, little by little deprived this rule of its legal value, leading to a significant increase in public debt.

Two aspects of this development should be underlined.

First of all, strict coverage of the financial burden, in the case of long-term spending, was deemed necessary only for the first year: this practice allowed a probable and reasonable evaluation for the following years.

Secondly, public borrowing was considered as a possible instrument for covering expenditure.

Two doctrinal positions animate the contemporary Italian debate: on one hand, those for whom a strict interpretation of Art. 81.4 would be sufficient to avoid the expansion of the public debt. On the other, those (the majority) who consider that this provision was not a sufficient obstacle to borrowing, as it was meant only to ensure that ordinary laws would not alter the balance of the budget, but was not binding on the budget law itself.

The Constitutional Court, despite considering public borrowing a legitimate means of covering expenditure, has several times denied since Decisions no. 1/1966 and 22/1968, an interpretation whereby Article 81.4 represented an effective constitutionalisation of the “balanced budget” principle.

The interpretation provided by the Court, on the contrary, stressed how the obligation to indicate, in laws other than those referring to the budget, the means to address new or additional expenditures consists substantially in bringing about an increase in income that could ensure the maintenance of the balance between income and expenses fixed through approval of the budget. This balance should be strictly observed only for expenses relating to the current year, while the same degree of strictness is not required for future periods, for which the “not arbitrary or irrational” (in the words of the Court itself) provision of a higher

income balanced with the expenditure expected in subsequent years and according to the economic and financial planning of the Government, would be enough.

This interpretation has been compounded by the difficult justiciability of any violations of Article 81.4, due to “bottlenecks” in the Italian system of constitutional justice in which it is quite difficult to challenge a spending bill without proper financial coverage in the Constitutional Court.

In fact it is hardly conceivable that such a challenge would take place within the “concrete review” procedure, which can be promoted only by judges when they have to apply a law in deciding a case. As far as the “abstract review” is concerned, parliamentary minorities or State institutions cannot challenge the law. State laws can be challenged only by Regional governments, in the event of the violation of parameters relating to their competences, which do not include Article 81. Conversely, the Government can challenge regional laws for any constitutional violation, including Article 81.4. Thus, it is no coincidence that the few laws declared unconstitutional because they violate the obligation of financial coverage are regional laws.

The Constitutional Court has long been well aware of this problem, thereby admitting, with reference to Article 81 as a constitutional parameter, the legitimacy of the intervention of the Court of Auditors in the exercise of its role of controlling the acts of the Government (Decision no. 226/1976 and 384/1991) and the equalization of the financial statement of the State and the regions (lastly, see Decision no. 213/2008).

At the same time, it also directed a stern warning to the legislator, inviting it to expand access to the Constitutional Court regarding financial issues (Decision no. 406/1989).

Neither the parliamentary instruments of control of coverage (increasingly developed during the Eighties) have proved to be more effective, nor has the Presidential power of veto (a power rarely exercised, although some of the rare cases refer precisely to the violation of the obligation of coverage).

IV. The amendment to Art. 81 and the necessary respect of the “balanced budget” principle

The gradual erosion of the legal meaning of Article 81.4 and the doctrinal and political debate that this practice has generated for decades⁷, explains the favour the proposals coming from Europe in 2011 gained.

As already mentioned earlier, the constitutional bill presented by the Government followed a fast parliamentary procedure: few formal changes were introduced at first reading in the Chamber of Deputies which approved the text of the constitutional revision and it was not amended in successive readings.

Four constitutional provisions were changed.⁸ We shall focus on Article 81, even if it should be noted that it is in Articles 97 and 119 (on the public administrations and territorial authorities) that reference to “economic and financial constraints derived from the European Union” was included, a reference lacking in Article 81.

The choice of the Italian constitutional legislator deviates from the German model and is closer to the French and Spanish models, as it introduced only a few provisions into the Constitution. According to Article 5 of the Constitutional revision law, the detailed legislation has to be enacted by an ordinary law, which must be approved by an absolute majority (in the absence of a source comparable to the organic law it can be labelled as “reinforced law” due to the special majority required).

Although the title of the constitutional bill refers to the “balanced budget”, what has been introduced in practice is “the balance between revenues and expenditures” of the State budget, mitigated however by the possibility of taking into account periods of adversity and growth (paragraph 1). The establishment of the maximum deviation from the parameter of equilibrium is

⁷ Even in the early eighties, in a commission to draw up major constitutional reforms (the Bozzi Commission), it was proposed to assign to the Court of Auditors (Corte dei Conti) the assessment of the actual cost of laws passed in previous years, with the possibility of referring to the Constitutional Court. Other proposals were advanced in 1993 (by the De Mita-Iotti Commission) and 1997 (the D'Alema Commission), all making a reference to the balance or equilibrium of the budget.

⁸ Articles 81, 97, 117 and 119.

entrusted to the “reinforced law”, under Article 5 of the constitutional law.

As has been pointed out, the meaning of this provision is not in itself too explicit, because it only refers to a difference between income and expenditure. Thus, the balance is always reached. In the actual budget, for example, the expenditure is matched by the revenue, with the peculiarity that among these there are a significant amount of resources acquired by public borrowing.

Far more significant in the amendment is the prohibition of public borrowing: it is permitted only upon parliamentary authorization (by absolute majority), with the sole purpose of considering the effects of the economic cycle and the occurrence of exceptional events (paragraph 1). These events will be more carefully defined by the reinforced law as established in Article 5.

However, such provisions must refer to the “net borrowing” balance, allowing the renewal of maturing bonds, not producing, therefore, any reduction of the total debt.

It should be noted, as far as borrowing is concerned, that a stricter provision is to be introduced on regional and local finance in Art. 119 of the Constitution. Even back in 2001, borrowing was permitted only to finance investment expenditure. “The contextual definition of the amortization schedules” is added to the limitation mentioned above and the requirement that the balanced budget be respected by all the local governments within each Region calls for close coordination. The requirement to cover expenditure laws has also been reinforced, so that every law must “provide” the means to cover (paragraph 3), and not simply “indicate” such means (as in the former text). The coverage of expenditure cannot be deferred to future provisions, such as the measures adopted in the budget law package.

In addition, also the budget law, which until now was excluded, is subject to compulsory coverage: thus, if revenues from borrowing are expected, the coverage of costs for the subsequent periods must be indicated.

The mechanism for monitoring compliance with the balanced budget principle is somewhat problematic: having rejected the proposals that would have entrusted the power to appeal to the Constitutional Court to the Court of Auditors, Article 5 provides two different types of control.

First of all, it reiterates, in paragraph 4, the already existing parliamentary control over the budget balance and on the “quality and effectiveness” of public spending, according to the methods prescribed by the parliamentary rules of each Chamber.

Secondly, it introduces in paragraph 1 letter f), a new independent authority (in the form of a Fiscal Council) to be established within the Chambers, which will be entrusted with the “task of analysing and verifying trends in public finance and compliance with budget assessment rules”.

Finally, it is worth noting that among the contents of the reinforced law, under Article 5, paragraph 1, letter g), also the way in which the State, in times of adversity or upon the occurrence of exceptional events, ensures that funding from other levels of government, essential levels of performance and the basic functions related to civil and social rights are included.

V. A “hasty” Constitutional amendment that undermines the Welfare State?

Finally, some considerations can be advanced on the future implementation of the new constitutional rules and their impact on the Italian form of State.

As already mentioned above, the constitutional amendment has enjoyed the widest consensus ever reached in Italy, even obtaining a positive vote from the Northern League (*Lega Nord*), the only party that still opposes the “government of experts” led by Mr Mario Monti. Despite the positive vote, the party leaders have repeatedly pointed out, in a critical way, the implicit transfer of national sovereignty it implies.

Two main positions have emerged among commentators and in legal scholarship.

On the one hand, there are those who fear that the rule is not strict enough and easy to get round (because, in fact, we are not speaking of “perfect equivalence” but of “balance”).

On the other hand, there are those for whom the revision introduces an element of extreme rigidity that threatens to jeopardize the safeguard of fundamental rights and may even produce a recessive effect. In this context, also some criticism highlighting the loss of State sovereignty on economic policies,

now most certainly inspired by neo-liberal principles, has emerged.

One of the most critical aspects underlined by legal scholarship and quoted also in parliamentary debates, is the absence of an adequate monitoring system concerning compliance with the new constitutional rules, due to the lack in the Italian system, as already mentioned above, of the possibility for MPs or for the Court of Auditors to challenge the constitutionality of a statute directly in the Constitutional Court. Moreover, some commentators have eyed with suspicion the introduction of another independent authority.

Finally, the question remains open of the compatibility of the “balanced budget” revision, if taken seriously, with the guarantee of fundamental social rights, which is a fundamental characteristic of the Italian form of State (in other words, the “national constitutional identity”) and that cannot be changed by means of the procedure described in Article 138. These principles represent the “core” of the Constitution itself. They thus fall within the purview of the “constituent power” (i.e. the constitution-making power) rather than within that of the “constituted” power (i.e. the constitution-amending power).

As we have attempted to show over these pages, the revision was enacted as a response to the financial markets, mainly to give national legitimacy to the unpopular policies required at this level. The lack of any public debate in this respect was justified by reference to the extremely technical nature of the matter and the external pressures coming from the markets and the EU institutions, which would have left no room for national decisions.

In this way, a potential hidden change in the “core provisions” of the Italian Constitution has been enacted without the participation of civil society.

At the moment, the ultimate protection of the fundamental values of the Italian Constitution lies in the hands of the Constitutional Court: its case law – up to now – seems impermeable to the effects of the economic crisis, as testified to by the fact that the main explicit reference to the crisis was included in a decision on a State law encroaching on the regional jurisdiction to guarantee a social right (the “social card” Decision n°10/2010).

Nevertheless, one could wonder how long the Court can resist the pressures in favour of the dismantling of the Welfare State it receives day by day from government decrees: in the end the judiciary can slow, but not block, constitutional change.

It is up to the organs of democracy to react: if they are unable to do so at national level, due to the power of the external financial and economic actors, the only solution to the protection of national constitutional values may be found in a political reaction at EU level.

But it would require a further step towards a European Federation.

Is Europe ready for that?

ARTICLES

THE CONSTITUTION YESTERDAY AND TODAY

Valerio Onida *

TABLE OF CONTENTS:

1. Towards the "de-provincialisation" of the debate on the Constitution.	15
2. The "internationalisation" of constitutional law.....	17
3. The Constitution and twentieth-century ideologies.....	25
4 Risks facing the constitutional heritage: the equal enjoyment of rights.....	31
5. The depreciation of democracy.....	35

1. Towards the "de-provincialisation" of the debate on the Constitution.

Sixty years after it came into force, the historical and legal debate on the roots, meaning and perspectives of the republican Constitution should be liberated once and for all from the limitations and sometimes stereotypes into which it has long been constrained. Examples are the affirmation of a genetic link between the Constitution and the Resistance, and the war of liberation from Nazi-Fascism, or the interpretation of the constituent process as the result of the coming together, or compromise between the major political forces making up the Constituent Assembly, and between the various and partially opposing ideologies they stood for. The studies and controversies on the continuity or discontinuity of the institutional order of the Italian State from pre-fascism to fascism, and from fascism to republicanism, and a consideration of the links between the powers established by the Constitution and the current configuration of the Italian political system, with the profound

* Professor emeritus, University of Milan, Italy.

changes that have befallen it over the last few decades are all certainly historically based keys to an understanding of the constitutional events of the Italian State, but they are nevertheless partial and insufficient.

Up to now, in other words, the Constitution has appeared, and has been treated above all, as the expression of a political pact between specific national forces, as an instrument of guaranty or an obstacle to determined political agendas, or else as a basis for negotiation or currency of exchange for future pacts (the "reforms" that make up much of the debate). In any case this has been done according to a wholly "Italian", i.e., an autarchic and somewhat homespun, even contingent, interpretation of the constitutional events.

Perhaps the time has come for a more detached vision, where the value and the scope of the Constitution can, and must, be appreciated beyond, and, in a sense, independently of the characteristics of our changing political system and the specific problems and agendas that it expresses.

Perhaps the clearest expression of this need to "deprovincialise" the debate on the Constitution can be found in the words of an illustrious member of the constituent assembly and protagonist of the constituent phase, one who would also be a key figure in the political, cultural, even spiritual life of our time, Giuseppe Dossetti. Reflecting on the "deeper root" of the Constitution, Dossetti observed:

"Some think that the Constitution is a spiny flower growing almost by chance in a barren land of post-war breakup and partisan resentment about the past. Others believe that it grew from an anti-fascist ideology to all intents and purposes cultivated by certain minorities who had largely lived in exile during the fascist years. Yet others - like a fair number of its current supporters - hark back to the resistance, through which Italy perhaps regained her honour and in some way found herself in tune with a certain kind of international culture."

All these opinions, in Dossetti's words, are "either wrong or insufficient", because in reality "the Italian Constitution was born from and inspired, more so than very few Constitutions, by a great global reality, i.e., the six years of the Second World War": this "enormous event that no man alive today or even simply born

today, can and will be able to set aside or diminish, whatever his opinion of it and from whatever perspective he looks at it”.

And he concluded that: “... the Italian Constitution of 1948 can doubtlessly be said to have been forged from this burning and universal crucible, rather than from the events of Italian fascism and post-fascism. Rather than that of the brusque confrontation of three dated ideologies, it bears the hallmark of a universal and, in a certain sense, trans-temporal spirit”¹.

2. The “internationalisation” of constitutional law.

Contemporary constitutionalism is characterised, as is widely known, by “a universalistic” vocation, and in this also lies its root, which we could define as “religious” or “humanistic”, i.e., tied in with the great spiritual visions, which we should not be afraid to define in fact as religious, worldly and human. Its fundamental statements are rooted in this terrain: all human beings, wherever they live, and however they are organized into societies, are equally endowed with dignity and “inalienable” rights, as well as being burdened with social duties. The basis and the justification of the exercise of authority in political society lie outside it and the interests of those who exercise it, i.e., in the protection and the promotion of this “order”. The choices it can make respecting this order are based on collective consent.

It is true, however, that historically, the principles of constitutionalism developed over a long time in environments and legal systems of a largely national character (not untouched by the idea that every nation, every People, enjoys the right to self-determination and organisation, and therefore the right to have its own political order of State). In this context, the founding principles of international relationships and international law itself were particularly rooted in a number of specific considerations: the independence of all States from others (sovereignty-originality), the contractual character of mutual relations (*pacta sunt servanda*), and above all, the prevalence, in the case of conflict, of their respective use of force (war as the last resort in the solution of controversy). The principles of

¹ G. Dossetti, *Le radici della Costituzione* (conference held at the Abbazia di Monteveglio in the evening of 16th September 1994), in A. Gargano (ed.), *I valori della Costituzione* (1995).

constitutionalism thus developed largely from a prospective of national history, of which the various wars of independence and the respective military victories (or defeats) constituted determining stages. The first “world-wide” war can be said to have been the last war between Nations, or for Nations, and in fact its most significant result was the dissolution of two multinational empires which had existed until that time in Europe.

From this point of view, the Second World War represents a fundamental turning point in history. If World War I was the last and most tragic episode in the European conflict between powers represented by orders based on nationalities and their respective interests, World War II marks the ultimate conflict between democracies, i.e., between political regimes founded on the principles of constitutionalism emerging at the end of the eighteenth century, and authoritarian regimes which, beyond their specific national interests (which were placed on the same level, or at least with equal legitimacy, as the national interests of the democratic States), aimed to create a new order, and explicitly rejected the theoretical and practical foundations of constitutionalism.

These nations turned their backs on their own origins in liberal revolutions and the relative ideals of freedom, equality, and democracy, whereas the regime which came to power in the Soviet revolution did not, in theory, disown these principles, rather it claimed to carry out their perfection, even if in reality, it ended up distorting them.

The outcome of the conflict marks the global level of affirmation, even if only in ideal terms, of the principles of constitutionalism as not being the province of one People or another, or a specific geopolitical area, but as potentially universal. An affirmation that began to come to fruition with the institution, in 1945, of the United Nations Organisation, whose Charter refers to those principles, and especially with the approval by the UN Assembly, on 10 December 1948, of the Universal Declaration of Human Rights. What until then had appeared historically only as principles peculiar to the political culture of some western populations, some of which were, moreover, directly involved in colonial policies in other continents, was transformed and extended so far as to represent, at least in spe, a common human heritage. The slow, and even conflicting, pathway towards the

doctrine and practice of universal human rights has since then represented the true bedrock for the development of constitutionalism, and expresses its universal dimension in practical terms.

We cannot forget how this historical affirmation came into being. The aspiration of the Nazi-Fascist regimes to create a “new order of tyranny” was successfully opposed by what President Roosevelt, in his celebrated speech of the “four freedoms”², addressed to the US Congress on 6 January 1941 (before the United States joined the war), called the “the greater conception - the moral order”. It expressed, in antithesis to “the so-called new order of tyranny”, a vision - i.e. that of the four freedoms - meant to constitute “a definite basis for a kind of world attainable in our own time and generation”.

It is interesting to recall how the speech, famous especially for the short passage on the “four freedoms”, was principally devoted to sustaining the need for the United States to oppose “any attempt to lock us in behind a Chinese wall while the procession of civilisation went past”, i.e. the temptation to adopt isolationist policies, the knowledge that “enduring peace cannot be bought at the cost of other peoples’ freedom”, so it was a need to strengthen the free world in the war against dictatorships. It was necessary, in such a context, to increase arms production to supply to the friendly countries, but also, since men “do not fight by armaments alone”, to strengthen the “unshakable belief in the manner of life” that America was defending”, because the action called for “cannot be based on a disregard of all the things worth fighting for”; without, moreover, ceasing to think of the “social and economic problems which are the root cause of the social revolution which is today a supreme factor in the world”, and calling upon the citizens to put “patriotism ahead pocketbooks”.

This historical document, which deserves to be known and remembered in its entirety as one of the founding documents of contemporary constitutionalism, expressed anything but appeasement or surrender in the face of the adversary of the day. Rather it expressed the full awareness that beyond the war to be won, it was necessary to assert faith in a safer world founded on

² F. D. Roosevelt, *The four freedoms* (speech delivered the 6 January 1941), in www.americanrhetoric.com

the four freedoms - of expression, worship, freedom from want, and fear "everywhere in the world".

This is the birth certificate of the new "international" constitutionalism.

The Italian Constitution came into being in this historical climate, and totally expresses the spirit of the new international constitutionalism. Article 11, repudiating war and accepting the "limitations of sovereignty necessary to guarantee peace and justice among Nations", along with the internationalist clause of article 10, whereby the "Italian legal system complies with the generally recognized norms of international law", represented and represents the affirmation of this characteristic of the Constitution.

This was also the basis of Italy's long journey made with the creation and development of the institutions of the European community and the European Union. Today, we rightly observe the difficulties and uncertainties of the path towards integration, the frequent absence of shared attitudes and common initiatives by the Member States in the domain of international policy, as well as the fears and resistance which emerged upon the failure to ratify the treaty containing the European Constitution. We cannot however underrate the enormous progress made since the end of the Second World War, which once more saw our continent become a theatre of conflict, considering the immense historical significance of the physical disappearance of those frontiers that for centuries had been the locus and symbol of division and contrast, and the fulfilment of the prophetic intuition of the fathers of Europe, who wanted - as Robert Schuman wrote in the celebrated "Declaration" of 9th May 1950 - in setting up a process of integration, to make another war in the same region "not only unthinkable, but materially impossible".

In order to join in the several stages of the integration process, there was no need, unlike in other States, to insert a specific "European clause" into the Italian Constitution to justify constitutionally the acceptance of the internal effectiveness of the Community order, because our "European clause" (and not only that) was already in place in article 11, as the Constitutional Court has recognised since the nineteen-sixties (cf. sentences n. 14/1964, n. 98/1965, n. 183/1973), achieving in 1984 (with sentence n. 170) full acceptance not only of the supremacy of Community law, but also its immediate effectiveness at domestic level, substantially

supralegislative and constitutional, with the sole limit of the supreme principles of the constitutional order. This jurisprudence expresses far more than a simple accommodation of the relationships between the two orders. It substantially admits that European law operates at the same level as the Constitution, providing the opportunity to integrate it using community principles, which in turn incorporate the common principles of the constitutional laws of the Member States in a circular process whereby constitutional systems like ours “breathe” through connections with constitutional law produced at other national and supranational levels.

From many quarters there has been talk of the Constitution being superseded by European law, in particular with regard to the so-called Economic Constitution. In reality it is not a question of superseding, but of the openness of the constitutional fabric to these supranational contributions, which do not contradict, but integrate the Constitution, using the logic that I have called a logic of the internationalisation of constitutionalism.

In the same way, the internationalisation clauses of the Constitution wholly contain the other, and in some way, even more significant, integration of the constitutional fabric consisting in the effects produced by the European Convention on Human Rights³, which translates and guarantees, in the context of a wider Europe, the rights enunciated in the Universal Declaration, as well as in the international Covenants on civil and political rights and on economic and social rights⁴, also originating from the Universal Declaration, and in the other great multilateral agreements, examples being the prevention and the repression of genocide⁵, and torture⁶.

³ European Convention for the protection of Human Rights and Fundamental Freedoms, Rome, 4 November, 1950

⁴ UN International Covenant on civil and political rights, New York, 16 December 1966, entered into force the 23 March 1976; UN International Covenant on social, economic and cultural rights, New York, 16 December 1966, entered into force the 3 January 1976.

⁵ Convention on prevention and repression of the crime of genocide, adopted by the General Assembly of UN, 9 December 1948

⁶ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, entered into force the 26 June 1987

The European Convention on Human Rights (ECHR) is especially significant for us, as it does not limit itself to imposing obligations on the signatory States, but institutes a new jurisdiction of a supranational type, the European Court of Human Rights in Strasbourg. Through this, we have witnessed the remarkable development of the case law of the European Court since additional Protocol n. 11 introduced individual applications concerning the violation of fundamental rights ⁷. This was in 1998 (significantly, the same year that the Convention achieved legislative and, to some extent, supralegislative effectiveness in Great Britain with the Human Rights Act ⁸, so giving the first “Constitutional” State, despite its lack of a written constitution, an express catalogue of rights). Since then, the Convention has seen countless new practical applications thanks to a constantly growing Strasbourg case law (with such an increase in the number of appeals as to risk jeopardising its efficiency) and it is increasingly incisive not only in censuring individual concrete cases of rights violations, but also in indicating, when necessary, “the structural” causes, depending on those characteristics of the domestic order of the Member State which lead to recurrence, and by indicating in increasing detail the legislative or other measures which that State has to adopt to implement the terms of the pronouncement. In this way, Strasbourg case law not only influences domestic practice, but domestic legislation itself, which must change in order to meet the requirement to avoid violations and provide effective remedies able to correct them or repair them, and affects the associated domestic case law.

The ECHR became part of the Italian system in 1955, ratified and enacted with law n. 848, but for many years it seemed that its practical scope was relatively secondary. For questions of fundamental rights, the guarantees deriving from the Constitution, applied by the Constitutional Court seemed to have priority, through the judgment on laws promoted incidentally by the judges in the course of normal judgments. For a long time even the Constitutional Court denied to the norms of the Convention any “rank”, and thus any effectiveness, different from that of the

⁷ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force the 1st November 1998

⁸ Human Rights Act, 1998

enactment⁹ (one decision¹⁰, hinting at a different formulation, remained isolated). And yet the Court did not fail to make frequent reference to the Convention, also in answer to the solicitations of a number of judges, in order to emphasise the validity of the conclusions that it drew from the constitutional norms on questions of rights in view of the convergence of the two orders of guarantees.

Recently however there have been some innovations on this front. Firstly, the constitutional reform of article 111, approved by constitutional law n. 2 of 1999, giving greater impact to an interpretation of the Constitution that offered more guarantees on the matter of criminal trials. This reform reproduced the dispositions of the Convention almost to the letter, thus giving them formal constitutional effectiveness. And even more so, later, the reform brought about by constitutional law n. 3 of 2001, inserting in the new article 117 of the Constitution the necessity for laws (not only at regional level, but also at State level) to respect international obligations, provided a new basis for making the norms of the Convention a real parameter in assessing the constitutionality of the laws.

For a long time, academics had been pointing out the wisdom of relating the norms of the Conventions to the sphere of objective constitutional law, in line with the aforementioned "internationalisation" of constitutional law. This would include European and other Conventions, which stand for universal values at supranational level on matters of fundamental rights. And in reality, it would be neither difficult neither illogical to treat them not merely on a par with every other international treaty, but as "generally recognized norms of international law", immediately effective, according to article 10 of the Constitution, at constitutional level. Despite their origin as treaties, in fact, it cannot be denied that while being meant to give formal legal value to the rights proclaimed in the Universal Declaration, they do not express the mere will of the signatory States, rather the endorsement of ineludible and shared requirements today

⁹ See e.g. decision 22 December 1980, No. 188.

¹⁰ Decision 19 January 1993, No. 10 (par. 2). The Court stated that the norms of the Convention derived from "a source which can be referred to an atypical competence and therefore they cannot be abrogated or modified by an ordinary law".

perceived internationally. These are the norms which make up the new “general” international law, at constitutional level ¹¹.

In two recent judgments (n. 348 and n. 349 of 2007 ¹²) the Constitutional Court endorsed a similar, if not in fact identical, result, taking the simplest path, (opening the door to further problems, because of the reference to all international obligations) i.e., applying the new article 117 of the Constitution. In any case, what counts more is the result. Today therefore the fundamental rights and their minimum content are aligned expressly and univocally, alongside the protection of constitutional norms, with that of the European Convention and the case law of the European Court. Thus, the Constitution of 1948, with its internationalist openness, not only is not contradicted, but is strengthened and enriched, considering that it is always possible to add, when necessary, even higher standards to the guarantee of minimum European standards, if they are not in conflict, inferred from the Constitution itself and applied through domestic case law.

Jurists question and discuss the perspectives and the risks of conflict between different sets of case law in this system for protecting rights, described as multilevel. But, beyond the possible individual problems or divergences, the fundamental point that emerges is precisely the internationalisation of the standard of protection of the rights, and therefore the integration of the national and international constitutional fabric, at least as far as rights are concerned, in line with their original universalistic vocation, but where the voice of the Constitutions and the national case laws do not disappear, because they too are part of the choir.

In today's globalised world, this is an important step ahead. Those called upon to interpret cannot remain bound to sterile “originalist” criteria for the interpretation of the national Constitutions. The language of rights is increasingly becoming a common language. The most detailed and best structured Bill of Rights is perhaps that of the 1996 South African Constitution. It is

¹¹ For some mention in the sense that even conventional norms on fundamental rights can be considered as generally recognized norms of international law, see, in the jurisprudence of the Constitutional Court,, decision 30 July 2008, No. 306 (par. 10) and decision 26 November 2009, No. 311 (par. 6).

¹² Decision 24 October 2007, No. 348 and decision 24 October 2007, No. 349.

no accident that it requires judges, in interpreting it, also to make reference to international law and that of other States.

There is a position strongly supported by some jurists in America which would not meet with approval in Italy or Europe. These jurists hold that in interpreting the American Constitution, it would not be legitimate to refer to the laws and jurisprudence of other countries, forgetting that, if the rights guaranteed are those common to all human beings, which the very Founding Fathers (in the famous incipit to the Declaration of Independence of 1776) asserted as incontestable and "self-evident" truth, as all human beings are considered to be created equal and endowed by their Creator with inalienable rights, one cannot imagine nor justify any legal nationalism from the point of view of the fundamental rights.

The Courts too, when they are called upon to defend human rights, are generally induced to have less care for the contingent requirements of international politics, which even they are not and cannot be insensitive towards. To cite but two examples, thinking of the Italian Constitutional Court, one recalls the firmness with which it fully applied article 27 of the Constitution abolishing the death penalty, declaring the constitutional illegitimacy of norms, even those applying internationally accepted obligations, which allowed extradition towards countries that still allowed the death penalty for the crime ascribed to the person being extradited (first in judgment n. 54 of 1979¹³, and more recently in judgment n. 223 of 1996¹⁴, in which the United States government claimed that there were no grounds); or where it clarified that in the event that criminals are transferred to Italy to serve prison sentences, they will enjoy the same rights as Italian prisoners as far as execution of sentence is concerned (sentence n. 73/2001, Baraldini).

3. The Constitution and twentieth-century ideologies.

What is the relationship between the Italian Constitution and the great ideologies of the twentieth century? The question is all the more apposite in a time like the present, when the

¹³ Decision 21 June 1979, No. 54.

¹⁴ Decision 27 June 1996, No. 223.

ideologies that characterised the last century are widely being given up for dead.

Constitutions too are largely the products of "ideology", in the sense that they correspond to general views of the world and especially political and social organisation. In this sense, it is certainly possible to identify the ideologies that fuelled the history of constitutionalism. On the other hand, the twentieth century saw the temporary assertion in certain political realities of "unconstitutional" ideologies, insofar as the authoritarian regimes were based on theoretical premises and not only practical considerations of rejecting the essential postulates of constitutionalism (in fact they generally rejected even the use of a "Constitution", preferring to entrust their development to the free desire to pursue their declared ends without legal obstacles). The ultimate defeat of these regimes at the end of World War II marked, as recalled above, the affirmation of constitutionalism at international level. More recently, in Europe and elsewhere, some "openly unconstitutional" regimes which survived the war have come to an end, and after the dissolution of the Soviet bloc and the transition of the former European communist states towards liberal-democratic systems, the so-called popular democracy experiment has also seen its day.

In this context, constitutionalism can today be considered as a kind of "good remnant" of the ideologies from which it has developed, cleansed of the contradictions, deviations and excesses which history has produced, so becoming a "remnant" which has been in some sense "de-ideologised".

The contradictions between theory and practice, and the deviation of political regimes resulting from ideological movements towards outcomes contrary to their very premises, or at any rate unacceptable, are not rare in history, where the facts often turn out to be very different from the ideas. The Constitution of the United States cohabited for a hundred years with slavery in some States. After the liberal revolution and the proclamation of the rights of man in France in 1789, the terror followed only a few years later (the revolution that devoured itself). Even the more advanced instances of European constitutionalism in the nineteenth century and between the two Wars cohabited with nationalistic policies and the expansion of colonial domination in Africa and Asia. Under the communist regimes, the demand to

achieve social and economic equality - this too being part of the ideological heritage of constitutionalism - at the price of civil liberties and political pluralism, led to the affirmation of illiberal and not democratic regimes.

It is well known that the Italian Constituent Assembly was a forum for the comparison and dialogue of positions anxious to affirm the theoretical bases for pluralistic democratic constitutionalism on the one hand, and positions more preoccupied with asserting practical requirements on the other, leaving ideological considerations in the background. One recalls first and foremost the speech of Giorgio La Pira, with his criticism both of statist control of a Hegelian stamp, which the authoritarian regimes (all within the State, nothing outside the State) had pursued, and what he called the Constitution of 1789, inspired by proto-liberal individualism, which he judged to be the fulfilment of Rousseau's theory of the social contract. Consequently he affirmed a personalistic and pluralistic conception (with the acknowledgement not only of individual rights, but also of the intermediate communities and their rights) as a theoretical basis for the new constitutional order ¹⁵. The second position is represented by the speech of La Pira's contemporary, Palmiro Togliatti, denouncing the limits and responsibilities of the pre-Fascist political class, affirming that his group aspired to "a Constitution that set aside ideologies", and therefore would not be an "ideological formulation" but a "concrete political formulation". He also stated that the Assembly had also seen the confluence of the "human and social solidarism" of the left and the "solidarism of a different kind of ideological inspiration, but which arrived nonetheless, through the formulation and concrete solution of different aspects of the constitutional problem, at similar results to those to which his party [arrived]". It was a convergence to which, Togliatti added, the conception, sustained by La Pira, "of the dignity of the human person as the foundation for the rights of man and the citizen" could not be considered an obstacle, but actually constituted "another point of convergence" between the left and the "Christian solidaristic current" ¹⁶.

¹⁵ *La Costituzione della Repubblica nei lavori preparatori dell'Assemblea Costituente*, seduta pomeridiana dell'11 marzo 1947.

¹⁶ *La Costituzione della Repubblica nei lavori preparatori dell'Assemblea Costituente*, cit. at 15

In reality, the meeting point, the common ground for the agreement that brought the Constitution into being, in total contrast to the previous authoritarian experience, was nothing more than the acceptance of an ideal formulation that, embracing the premises and the essential postulates of the liberal democratic and social ideologies, avoided some of the consequences of extreme and more "ideological" developments. Consequently, republican Italy found its place within the greater current of contemporary constitutionalism. The prevailing positions were therefore "non-totalising". Alcide De Gasperi, in setting out the Christian Democratic programme in early 1944, argued with the "total fundamentalism of the Marxist parties - upon which, however, they did not base their work in the Constituent Assembly - but also rejected the suggestion of a "Christian State", asserting that "our political movement is, however, aware of its limits", that "the State is the political organisation of society, but not all of society", and that his party did not present itself "as the integralist promoter of a universal palingenesis, but as the bearer of a specific political responsibility, certainly inspired by our ideal agenda, conditioned rather by the shared environment in which it must be put into effect"¹⁷. As for the organisation of powers, what prevailed was no "Jacobin" conception of democracy, wholly focused on the power of the people exercised in Parliament, but a more balanced vision that reflected the historical experience of European constitutionalism, and that grasped, among other things, the importance of guarantees connected with the creation of institutions of constitutional justice. This is perhaps, along with openness to internationalism, the greatest and most incisive development in constitutionalism after the second world war. Its ample dissemination today makes a sharp contrast with the diffidence in which it was held even by some members of the Constituent Assembly, for the sake of attachment to the extreme myth of the sovereignty of the people with no legal limits.

It may be an interesting aside to note that Togliatti's formulation, while being rich in historical awareness, turned out to be less forward looking or less "farsighted" than that of the Christian Democrats such as La Pira, who went so far as to

¹⁷ See VV. AA., *Il programma della Democrazia Cristiana. Atti e Documenti della Democrazia Cristiana 1943-1967* (1968).

appraise aspects of constitutional organisation such as, tellingly, the role of the Constitutional Court, the organisation of the judiciary, or the new rules on the fiduciary relationship between Parliament and Government.

If this is so, perhaps the cliché (while not being so far from the truth) of the Constitution as an encounter between the three ideologies, Liberal, Catholic-Democratic and Marxist, that relies on the dominant political forces in the Assembly and their ideal ancestries, might well be replaced by a consideration of the correspondence between the “strong core” of the ideas forming the basis of the Constitution and that “good remnant” of the aforementioned great eighteenth-to-twentieth-century ideologies.

Also from this point of view, the Constitution of the Republic has a “non-provincial” “spirit”, and is part of a context that goes far beyond the experience of our country. It is not difficult to summarise the contents of the “strong nucleus” of ideas that constitute the common “heritage” of constitutionalism, i.e., the dignity to be recognised and safeguarded in every human being; the idea that the political organisation (the State) is for the person, and not vice-versa, and in Anglo-Saxon terms, respect for the rule of law; the existence of an intangible nucleus (inalienable not only by the State but also by the market) of individual freedoms, and of collective rights (of the social formations) that supplement them; the principle of equality understood as the prohibition of discrimination and as a fundamental canon for the adequacy of the legal treatment to the situation; the not only passive, but active task of the public powers to promote freedom and equality, and so a guaranteed nucleus of social rights; political power based on the consent and the participation of the citizens in the formation of the collective will, within constitutional limits; a “widespread” organisation of the powers to ensure balance and mutual control; a system of guarantees ensuring the rights of all and the effective respect of legal rules; the international and supranational projection of these principles in order to guarantee an international order not based on force but on the respect of rights.

It is very true that the formulation of these statements does not yet imply agreement on their practical scope, as there is obviously much to discuss concerning what human dignity is or which rights are inviolable, or again what relationships need to

exist among the various rights. And yet these are not empty statements, especially considering that they have been the basis for the potentially convergent jurisprudential tendencies of national and supranational Courts, which give historical tangibility to their content.

Jurists and philosophers will continue to discuss, and even argue, about the nature and basis of these principles, namely, whether they are to be considered the expression of a kind of new “natural law”, or whether they are valid only as positive law, and on what basis. But what counts is to recognise the existence of this “common constitutional law”, of this constitutional “common law”. This is where the Constitution comes in, and it is in this light that is necessary to debate how to safeguard, extend and strengthen the effectiveness of this heritage, to make it ever more effective, to overcome its limits and contradictions, to fulfil it in the complex, incoherent and often dramatic context of national and world-wide events.

In a sense, the birth of the Constitution is similar to that, shortly after, of the Universal Declaration of Human Rights approved by the UN General Assembly of 10 December 1948 with the vote of 50 States out of the 58 then members of the organisation, and the 8 abstentions of the States of the Soviet bloc (which unlike our communist left did not approve the text, despite working on its production). The Declaration too was the fruit of an act of confidence in the existence of a common ground - that of the universal human rights - for the various cultures and traditions and the various regimes: that common ground that President Roosevelt had invoked almost eight years before when he proclaimed his intention to construct a world in which the “four freedoms” would be asserted for all, everywhere in the world¹⁸. And it could be said that, like the Italian Constitution, the seed sown then, with the search for, and the acceptance of, a common ground, even in a climate of strong political opposition (the Cold War, that in Italy meant a confrontation between the forces of Government and the opposition of the left) has borne fruit over time. As our Constitution has proved to be an anchor shared by the national community, although its more ambitious aims are still far from being fully realised (i.e. the “programme” of article 3,

¹⁸ F. D. Roosevelt, *The four freedoms*, cit. at 2.

second paragraph ¹⁹), in the same way, the Universal Declaration has represented, and can represent, for the world a common reference for the growth of the culture and the practice of human rights, in spite of the continued and widespread conflicts and practice in sharp contrast with the proclamations. It has been used in the texts of Conventions - regional ones such as the European Convention of 1950 and general ones such as the New York Covenants of 1966 - thus constituting the basis for the construction of the rich case law of Courts of Human Rights, especially Strasbourg, that today regards and involves the 47 States of the Council of Europe, including all the former Soviet bloc.

4. Risks facing the constitutional heritage: the equal enjoyment of rights.

What are the greatest risks threatening the survival and the development of constitutionalism in Italy and the world today? I do not refer to threats coming from organisations and actions attacking the material security of our societies, but the risk of tarnishing, in our societies, and Italy in particular, confidence in the permanent validity of the patrimony of principles and values of which constitutionalism is the expression, together with the loss of conviction of the need to safeguard it and promote its fulfilment.

The first danger, albeit for now more in intellectual debate than in practice and case law, is the spread of theoretical and political positions that explicitly question the fundamental elements of the essential patrimony of constitutionalism.

As for civil liberties, tensions connected to increasing mass migration, the problems arising from today's multicultural and multiethnic societies, the spectre of "culture clash", all create reactions of fear and closure. As an answer to the disappearance or relaxing of "external" borders between States, through the breathtaking increase, thanks to the new technology, in mobility and communications, and the various phenomena of globalisation, there almost seems to be a common construction or reconstruction

¹⁹ "... It is the duty of the Republic to remove the obstacles of economic and social nature which, by limiting in fact the freedom and equality of citizen, prevent full development of human persons and the participation of all the workers in the political, economic and social organization of the Country ...".

of “internal” borders, assertions of identity and particularity, fear and diffidence towards the “different”, along with anxieties about “security” that tend to lead to exceptions to the universal protection of fundamental civil rights, such as the prohibition of torture or the right to due process, and therefore attitudes and measures contrasting with constitutional principles, in the name of the requirement to fight new dangers facing society.

Even religions, which, having found peace after the painful conquest of secularity at least in our western world, seemed to have become stable factors of understanding rather than division and conflict, are again showing their teeth and are being used as arms in a confrontation between cultures. And so much so as to induce some (e.g., France with its law on the veil) to ban religious symbols from public spaces, not out of respect for diversity, but for fear that they might heighten conflict, while inducing others (i.e., Italy with its crucifixes in schools and courts of justice) to use them as new “civil” symbols. And at times, all this leads, also here, to the reassessment of points that we believed solid, such as freedom of worship and equality without religious distinction.

As for the economic and social orders, the controversy over the ideologies of the twentieth century, and in Italy over the political forces that led the country to embrace western and European constitutionalism, also threatens to give rise to regressive interpretations of the premises of its wealth of ideas.

The new global economy does not seem to have any other objective than competitive growth in consumption and personal wealth. Economic inequalities are increasing rather than disappearing. Criticism of the “State as entrepreneur” and the inefficiencies of the public sector becomes criticism of the State per se. In the name of market freedom and economic competition for wealth, words such as “solidarity” or “justice” seem to disappear from the political dictionary (but not from the constitutional lexicon, which puts the “imperative duties” of political, economic and social solidarity together with the inviolable rights²⁰).

We seem to be witnessing the emergence of an originalist and fundamentalist interpretation of liberal principles, that fails to

²⁰ Article 2 of the Italian Constitution: “The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed, and requires the fulfillment of the imperative duties of political, economic and social solidarity”.

recognise the constitutional rank of social rights and seeks a “minimum” State, which leaves the way open to the spontaneous forces, essentially of the economy, i.e. the market, and predicates for politics a role of merely defending the minimum material conditions for cohabitation (the classical functions of “order”), and not the promotion of freedom, equality and justice.

All this touches essential aspects of the constitutionalist heritage. Certain charges that our Constitution is too “social” and not liberal enough are, in reality, vitiated by “a domestic” point of view, and fail to take into consideration that the constitutional principles of the Welfare State or the “social market economy” are clearly not a peculiar characteristic of the Italian Constitution, but are intrinsic and equally essential to contemporary constitutionalism everywhere.

By placing the “liberal freedoms” of expression and worship and “freedom from want” on the same level in the aforementioned speech on the “four freedoms” of 1941, Roosevelt not only lists this third freedom, translated into world terms, as being the need for “economic understandings which will secure to every nation a healthy peacetime life for its inhabitants - everywhere in the world”, but sets among the foundations of a “healthy and strong democracy” objectives such as the “equality of opportunity for youth and for others”, “jobs for those who can work”, “security for those who need it”, “the ending of special privilege for the few”, “the preservation of civil liberties for all”, “the enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living” - drawing the relevant consequences in terms of social and employment policy ²¹.

On this side of the Atlantic, just to cite one example, the current German and French Constitutions expressly classify their respective Republics as “social” ²² (and our definition of a Republic “founded on work” ²³ is no different in meaning). The right to work and rights at work and to social security are expressly and amply recalled in the preamble to the French Constitution of 1946 which “confirms and supplements” the

²¹ F. D. Roosevelt, *The four freedoms*, cit. at 2

²² See article 20, par. 1, of the German Fundamental Law, 1949 and article 1, par. 1, of the French Constitution, 1958

²³ See article 1, par. 1, of the Italian Constitution: “Italy is a Democratic Republic, founded on work”

declaration of 1789, and to which, according to the preamble of the Constitution of 1958, the “French people solemnly proclaim their fidelity”²⁴ (it would be no objection the fact that this is only a preamble, considering that it has long been recognised and used in the case law of the Conseil Constitutionnel as part of the “bloc de constitutionnalité” used as a yardstick for the constitutional legitimacy of laws²⁵). Clauses stating that “property imposes obligations”, “its use must at the same time serve the common good”, and that indemnification in the event of expropriation “must be established by means of a fair balancing of the interests of society as a whole and the interests of the parties” are not found in our Constitution and the case law that applies it, but in the Grundgesetz of the Federal Republic of Germany²⁶.

In more general terms, it is worth remembering that the right of every individual to social security, the attainment of “economic, social and cultural rights indispensable for his dignity and the free development of his personality”, the right to work, the free choice of employment and to “satisfactory working conditions and protection against unemployment”, “to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented if necessary by other means of social protection”, to “a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services”, to education, as well as the right “to participate in scientific advancement and its benefits”, are proclaimed not in some charter of the so-called real socialism, but in the Universal Declaration of Human Rights (articles 22, 23, 25, 26, 27), and are referred to specifically in the New York International Covenant on Economic, Social and Cultural Rights²⁷ signed in 1966 (articles 6-15).

Neither do the European Convention, as yet without an explicit catalogue of social rights, and the relevant jurisprudence of the Strasbourg Court, ignore requests for protection of these rights. “Democratic Society” - to which the European Convention refers in few words as a parameter for commensuration of the sole

²⁴ See Preamble of the French Constitution, 1958.

²⁵ See e.g. Conseil Constitutionnel,, 27 December 1973; 16 January 1982.

²⁶ See Article 14 of the German Fundamental Law 1949.

²⁷ See *supra*, note 12

permissible “state interference” in the sphere of the individual rights²⁸ - is not only a political order characterised by elective mechanisms for the formation of the collective will, but a society that guarantees civil and social rights and the fundamental equality of individuals in the enjoyment of the same.

The historical communist regimes of Soviet origin sacrificed respect for freedom and pluralism, and thus the fundamental human rights, on the altar of an idea of equality (in any case not achieved). But equality is rightfully a full part of the historical patrimony of constitutionalism, and, naturally, not only formal equality before the law, understood as the prohibition of legally unjustifiable discrimination, but also equality in the effective enjoyment of the fundamental rights. To remove it from among the basic principles of the constitutional order would mean betraying the entire history of constitutionalism.

5. The depreciation of democracy.

A second risk now concerns the mechanisms of political consent and the exercise of power. We can observe the increasing complexity of the problems that modern societies have to face, the interweaving and playing off of individual and group interests, decision-making issues and difficulties in governing. In face of these, are emerging again on a large scale, particularly in Italy, distrust of the mechanisms of participatory and deliberative democracy, suspicion of, or aversion to, politics in se, the split or contrast between the “real country” and the “legal country”, which the collective movements and the mass parties of the twentieth century tended or aspired to overcome, presenting themselves as tools for the mediation and transmission of the social demand vis-à-vis the political institutions. In order to “decide”, and to “govern”, it seems there is a willingness to “oversimplify” the mechanisms for making and transmitting consensus and forging the political will.

This, perhaps, is the strongest and most common temptation facing the many who think of constitutional reforms of the order of the State as a remedy to the ills and the problems of

²⁸ See Articles 8, par. 2, 9, par. 2, 10, par. 2, 11, par. 2, European Convention on Human Rights (supra, note 3)

the country. The danger is that this would not limit us to adopting corrective measures to the form of government and the regulation of electoral representation (beyond those already envisaged, as it is not true that the Constitution completely disregards the need to prevent the “degeneration of parliamentarism”, according to the celebrated Perassi agendum to the Constituent Assembly ²⁹), and improvements in the rules governing the operation of the institutions. There is the risk of compromising respect for the balance of powers, in a context where democratic participation be strengthened and not asphyxiated, as the Republican Constitution postulates, laying its foundations. Also in this, the very principles underlying constitutionalism are at risk.

In a country like Italy, summing the historical defects of a social fabric largely lacking in instruments able to maintain a high level of independence from partisan conditioning (for example the world of communication, or the traditional “hold” of political parties on the administration) and those of a widespread “anti-political” culture as a rejection of all that pertains to the preservation and the promotion of the requirements of society as a whole (from the administration of the public goods to the fiscal loyalty of the contributors), the watchword “governability” risks becoming the *passé-partout* for solutions not leading to institutional efficiency, but to the extreme personalisation of power and impoverishment of democracy.

Access to political power becomes, for those who pursue it, an objective reached above all by satisfying the more egoistic individual and group expectations, taking on board uncritically and irresponsibly feeding the humour and the fears that emerge in social environments bereft of idealistic stimuli and even mere rational awareness (the growing “spreading populism”). It becomes an exercise split between proclamations “for show” - which the voter-spectators attend, noisily manifesting more or less “support” for their team, like a “claque” invariably accompanying the performance - and efficacious ability to work the legal and

²⁹ See the Agendum (*ordine del giorno*) presented by the Member of the Constituent Assembly Tommaso Perassi the 4 September 1946. In the agendum Perassi advocated the adoption of the parliamentary system, but “with constitutional arrangements being adequate to safeguard the stability requirements of the Government and to avoid the distortions of parliamentarism”.

institutional maze where the ultimate purpose of the “general wellbeing” may well be lost.

It is not all like this nor only this. But the danger to contend with today is the depreciation of constitutional culture - which means not only acquaintance with and respect of the Constitution and its principles, but above all an idea of politics that can translate into a rule for political action, by electors and elected alike, by private citizens and those in public office, to be put into practice “with discipline and honour”, as well as observing “the Constitution and the laws” (article 54 of the Constitution). Safeguarding society from these dangers is an essential part of the “constitutional patriotism” that is required of us.

THE TROUBLED LIFE OF COMPETITION IN LOCAL PUBLIC SERVICES

Fabio Merusi*

Abstract

After providing a systematic picture of the state of the art in the regulation of local public services pursuant to the laws that came into being in the 2008/2009 period, this paper moves on to illustrate what the management system of local public services ought to be in light of the special implementing regulation. Finally the author points out that various elements lead to the opinion that the regulation of local public services has yet to find its true basis.

TABLE OF CONTENTS

1. Competition in local public services. Competition for the market instead of the relevant competitive market.....	38
2. The <i>in-house</i> companies exception.....	42
3. Control by the Italian Authority on Fair Competition. Constitutional doubts and problems concerning the system.....	43
4. Competition for the market in normal conditions and for joint ventures. The rules of tender.....	46
5. The search for competition in the market without first identifying the relevant market.....	50

1. Competition in local public services. Competition for the market instead of the relevant competitive market.

Much ink has been spilled, and not always favourably, over the series of laws that came into being in the short period 2008/2009 to regulate local public services.

* Professor of Administrative Law – University “Guglielmo Marconi”

It may therefore be appropriate to provide a systematic picture of the state of the art before moving on to illustrate what the management system of local public services ought to be, in the light of the special implementing regulation which, after a lengthy gestation, finally came into being.

It all began when the European Community, following the example of the United Kingdom, decided to introduce the practice of competition in public services into the various Member States. For the European Community, of course, extending competition to all the possible actors within the Community is a means of achieving European unity at the roots by the Members of the Community, now the Union, thanks to the "mix" of all possible competitors, a unity so difficult to achieve at the top.

The public services competition model naturally consists in identifying a relevant market in the public services, in dissociating State ownership and management of services, creating artificial competition implemented by administrative measures, in management, gradually encouraging the emergence of more competing firms until competition between operators becomes natural, while regulation is entrusted to a neutral entity, an independent authority, through administrative measures (so-called "artificial" competition).

The application of these rules to the major national public services has seen both success and failure, and to date has produced the most diverse results, but they were still applied, or are still being applied, to services for which it has been possible to identify a relevant market, first at home and then abroad.

The model came unstuck when it came to *local* public services, for which it was impossible, except in exceptional cases, to identify a relevant market in which to introduce simulated competition and, later, *true* competition¹. There are many reasons for this failure, but, in essence, they are due to the fragmentation of local authorities and their consequent inability to identify a market in the operational area of a service if local.

This phenomenon is particularly apparent in Italy, where the subjective configuration of local powers, at municipal level, has remained unchanged, or has undergone only marginal

¹ See F. Merusi, *Le leggi del mercato. Innovazione comunitaria e autarchia nazionale* (2002), at 76.

changes, since the 1859 Rattazzi Law, which legitimated the local communities as they were, without attempting to rationalise the administrative powers of local communities². This "temporary" solution was consolidated by an 1865 law on administrative unification for the whole of Italy, and has come down to this day with only minor alterations, reflecting the changing Constitutional order over time. After World War II, almost all the other European countries rationalized their local authorities, but, as before, there was barely any attempt to make the provision of services fit in with a market that could be described as relevant from the point of view of introducing a competitive system³.

Faced with this state of affairs, the EU decided not to introduce the simulation of competition into markets that appeared to be of no great relevance and resorted to a lesser form of competition: competition for the market. This involves periodically submitting the management of local services for tender on the assumption that occasional competition for the market would guarantee efficient services.

A system of this kind obviously means that the local authorities themselves, or other public entities which simulate competition for the market through a holding company, cannot allocate the provision of services to subsidiaries in which they have a substantial share or through subsidiaries which essentially constitute a veiled provider along the lines of the old in-house providers.

There are endless problems, and not only in Italy, connected with alleged circumvention of EU legislation, and there have been countless cases before domestic administrative courts as well as the Court of Justice, often involving Italy.

² For an overview of the situation at the time of the Rattazzi law see the reconstruction and documentation of A. Petracchi, *Le origini dell'ordinamento comunale e provinciale italiano*, vol. 3 (1962), and on the situation of the southern municipalities after the unification of Italy, see the authoritative study P. Manfredi, *I comuni meridionali prima e dopo le leggi eversive della feudalità*, vol. 2. (1910-16). On the reasons for the 'confirmation' of 1865, see G. Vesperini, *I poteri locali*, vol. 1 (1999) and the literature cited there.

³ See for example Y. Meny, *Profili di Amministrazione locale. La riforma francese* (1983) and A. Alexander, *L'amministrazione locale in Gran Bretagna. Una riforma alla prova* (1984). For a description of the current state of local autonomy in practically every part of the globe see G. Pavani & L Pegoraro (eds.), *Municipi d'Occidente. Il governo locale in Europa e nelle Americhe* (2006).

The first legal measure, the legislative decree of 2008, an addition to the string of legislative changes whereby the Italian government sought to remedy up to 14 Community infringements, also regulates what the competition for the local public services market ought to be by specifying the kinds of local services to be regularly put to tender and the type of entity to be entrusted with managing the service.

It begins with the exceptions for services of national relevance, or at any rate of a relevance reaching beyond municipality level, i.e., the distribution of natural gas, electricity and rail transport (the latter transferred only to regional control). But thanks to a parliamentary sleight of hand, the exempted services were extended to include community municipal pharmacies, which certainly cannot be said to have any kind of large-scale relevant market. Here, if anything, problems arise relating to the privatization of pharmacies, and not competition for the market concerning the service to be provided⁴.

The normal rules refer to services of economic relevance. The problem that clearly arises is that of distinguishing between financially important services and those of social importance. This is not always easy, and not only in the marginal cases, but also because of the different possible meanings of the concept of public service into which economics can blur when providing socially relevant services. The question of interpretation seems to have been resolved by the Italian Competition Authority which, in a communication referring to the article in question states that "*the public services are defined as those of economic relevance relating to the production of goods and activities designed to achieve social purposes and to promote the economic and social development of local communities with the exception of social services of a non-entrepreneurial nature.*" It follows that according to the Authority, the notion of an economically relevant local public service should, in principle, be reconstructed in terms of the difference between it and other activities related to the normal function of public administration, i.e., administration, and providing services which cannot be handled in such a way as to be economically relevant, including all the activities instrumental to the workings of the

⁴ For associated problems see D. De Pretis (ed.), *La gestione delle farmacie comunali: modelli e problemi giuridici* (2006).

public administration, but which cannot be run on business lines. Of course there will always be cases where it is uncertain whether or not an instrumental activity can actually be run along business lines. From this perspective, in the end it should become relevant whether they are run as enterprises or not, considering their actual nature rather than the way the service is provided.

Under normal circumstances, i.e., in the relatively near future and after the transitional adjustment procedures which may not actually turn out to be as "ephemeral" as one might wish, those assigned a local public service through a public selection process in conformity with all the rules laid down by the EU should be: 1) entrepreneurs or established companies of some kind, and 2) public/private joint venture companies, provided however, that the private partner is selected through a competitive selection process, i.e. shifting the tender onto involving a private sector partner who should take on a specific practical role in the management of the service and who should in any case acquire a stake of at least 40% of the capital.

2. The *in-house* companies exception.

This is how it should normally be in a more or less distant future. But not for everyone. The long shadow of the Rattazzi solution still falls over the Italian municipal authorities. These municipalities are not all homogeneous. For many, "the territorial criterion of reference" - to cite the wording of the Act - not only does not make it possible to identify a relevant market, but it also fails to allow recourse to a management policy envisaging regular competition for a place on the market. For this reason, the law provides for an exception through the use of so-called *in-house* companies, that is, a company wholly owned by the public partner (or by several public bodies joined in a consortium) and dominated by the shareholder as if it were one of its own (i.e. without any concession to autonomy made possible by statutory regulation): "in exceptional situations, because of the particular economic, social, environmental and geographical features of the territory, which do not permit an effective and beneficial use of the market, a fully public-held company owned by the local authority can be called upon to provide the service if it satisfies EU requirements for the so-called *in-house management*, if it at any

rate complies with the principles of the guidelines on the control of companies and especially its activity with the authority or authorities that control it."

As can be seen here, there were two problems to solve: 1) to determine when and why the conditions for exemption might arise, and 2) the legal form that could legitimise the exemption.

An answer has been proposed for the first question. As for the second, an *idolum* in EU case law has provided an answer, probably without asking the reason for such a response.

3. Control by the Italian Authority on Fair Competition. Constitutional doubts and problems concerning the system.

The answer to the first question is found in procedure: it relies on a neutral authority, independent of the central administration, to determine whether the "economic" reasons that a local authority is obliged to set out are valid.

In fact, under Art. 15 and Regulation 4 of the regulation, an entity wishing to avail itself of an *in-house* company to manage a public economic service must give "adequate publicity to its choice, based on a systematic market analysis" and then submit it to the "opinion", in reality the approval, of the Authority on Fair Competition.

The reason for turning to the Authority on Fair Competition is easily comprehensible: no-one wanted to return to the days of the hated government controls, and the Authority has technical expertise while being independent of the government. There is one detail that everyone seems to have forgotten: the reform of Title V of the Constitution repealed Art. 130 requiring controls which provided for legal and technical specifications by a governmental agency which also would take a neutral stance towards the administration: regional monitoring committees. If this abrogation makes any sense from the legal point of view, it is because any control over the acts of local government, legitimacy, and, even more so, merits, should be considered unconstitutional – even when attributed to an equally "neutral" authority with respect to government policy, like the Antitrust Authority. The emphasis placed on municipal and provincial autonomy in the new art. 114 of the Constitution clearly states that the deletion of Art. 130 of the Constitution is meant to provide for the prohibition

of new *ex lege* controls, hence the doubts concerning the constitutionality of this provision.

But whatever the doubts about the constitutionality of this legislation, there remain issues including the choice of the Italian Authority on Fair Competition. The role of the Antitrust Authority is to guarantee competition and to dissuade from abuse. In the so-called competition for the market in public procurement and public services, there is naturally no competition, and the appearance of one must be created, a one-off, by means of administrative procedure: the call for tender. Artificial competition brought about by means of administrative acts.

But creating artificial administrative competition measures is defined as "regulation" and so far it has been considered appropriate to distinguish between regulatory and supervisory authorities so that competition exists and does not degenerate into an attack on itself. Briefly, it is claimed that the antitrust authorities intervene *ex post* and the supervisory bodies *ex ante*, with the Competition Authority defending the market and the regulatory authorities creating it. There is usually a problem of the powers of regulatory authorities "overflowing" into those of the Antitrust authority: just as the regulatory authorities manage to create effective and natural competition in a market, they end up competing with the Antitrust authorities in protecting the competition that already exists. The case of the relations between the Antitrust Authority and the Authority for the Regulation of Communications (AGCOM) is, at least in the Italian system, paradigmatic.

Here, the opposite happens: the Antitrust Authority is attributed a regulatory function which will naturally remain such and will never take on the function of an authority protecting competition. In fact, competition for the market will never result in competition in the market, to be defended, once created, by antitrust authorities.

And there is another asystematic peculiarity: at least for the moment, this consists in a national jurisdiction extra to the general EU competence which has recently seen the "unification" of the jurisdiction of domestic antitrust authorities and the European Commission by means of a "single jurisdiction" spread over several agencies which are also "part of the community". After being joined together into a single community administrative

system, can the antitrust authorities still be used in special national regulation?

But beyond the doubts concerning constitutionality, and perplexities on altering the antitrust system there is the "waiver" benefiting so-called *in-house* companies, which, having been provided for in this way, raises a number of questions.

The *in-house* company is not an institution envisaged by EU law, as the law on the "exception" allowed for local authorities would have us believe.

The *in-house* company is an invention of the Court of Justice which, in several successive rulings on the subject, not only for Italian cases, has pursued a dual purpose: 1) to submit to EU legislation, characterized by the typifying (and therefore unifying) effect of administrative law, "substantial" administration assessed as such using identification parameters, as had been done with the analogous institution, also a Community invention, for the other administrations, of the public law agency, and 2) to exclude from the regulation of public services the phenomenon of "administrative self-production, i.e. administrations which use the company's means to provide services for themselves, not for the end users.

Neither of these cases has anything to do with the exemption proposed by the law; here the idea is one of a service, which in itself could be described as being of an economic nature, and therefore amenable to competition for the market, cannot be run as a business due to local economic reasons. But if this is the case, there is no reason to run it as a joint-stock company, since the quoted company is, by definition, an organisational instrument to manage a business.

If the service cannot be organised as a business and as such is not subject to competition for the market, the service management organization model can only be direct delivery or the attenuated form of company management known as the *in-house* provider.

Paradoxically, this was demonstrated by the provision introduced when the Legislative Decree was converted, stating that services below a certain threshold to be defined by government regulation do not require the opinion/approval of the Italian Authority on Fair Competition. The provision established a threshold of €200,000 for the economic value of a service below

which the prior approval of the Authority is not required and, consequently, it is possible to freely set up an *in-house* company. But what is the point of setting up a service company with an economic value of less than 200,000 euros? The organisation here appears to be clearly disproportionate to the function it is meant to perform. The use of the form of the joint-stock company was envisaged to get round the domestic norm imposed by the EU on the acquisition of goods and services and the domestic law on the employment of State workers through competitive examinations required by the Italian Constitution (Article 97).

But after the case law and the national parliament (as confirmed by law and regulation) have clarified that the administrative rules on purchasing goods and services and on the employment of State employees⁵ also apply to *in-house* companies and companies with majority State ownership, being "substantive administrations," what is the point of setting up companies to carry out activities by their very nature devoid of entrepreneurial "attraction"?

Adding then the obligation to respect, on the part of the *in-house* companies and holding companies dominated by public shareholders, the internal agreements on financial stability, the only possible conclusion is that the law and the regulation, in codifying the hypothesis of the *in-house* company, envisaged its disappearance, prohibiting the pursuit of those ends which had been so felicitous in the Italian and other systems.

4. Competition for the market in normal conditions and for joint ventures. The rules of tender.

But let us return to normality: competition for the market - to a tender to select the private service provider which will be a qualified minority shareholder (at least 40%), with "specific" functions that should be "... in accordance with the principles of the Treaty establishing the European Community and the general principles relating to public contracts and, in particular, the

⁵ Albeit with some mitigation and an exception for quoted companies, the fruit of the strenuous resistance of local administrations involved in the question ("In house companies and mixed public/private companies providing local public services, apply provisions of Legislative Decree 163 and subsequent amendments, of 12 April 2006, for the procurement of goods and services").

principles of economy, effectiveness, impartiality, transparency, adequate publicity, non-discrimination, equal treatment, mutual recognition and proportionality".

Principles that Art. 3 of the Regulation has tried to adapt to the complex reality of local public services, but with some difficulty arising from the *de facto* and legal ambiguity that are still present even after the legislation.

First, there is the problem of sources. The Constitutional Court has legitimized the intervention of parliament in the name of competition which, after being mentioned in Title V of the Constitution, in the Court's view "horizontally" legitimates any intervention by the State legislator to the detriment of the regional legislators (see Corte Cost. November 3, 2010, No. 326). This is tantamount to saying that in economic matters, after the Community competition option, Title V was reformed to eliminate any regional legislative powers on economic matters in the broadest sense. A kind of euthanasia for the 'Republic of Autonomy' formally proclaimed in Art. 114. One of the many adjustments that the Court was forced to make to clean up the mess created by the reform of Title V of the Constitution, an area which now constitutes a large part of the activity of that same Court.

At best, regional parliaments may retain a residual power over the type and *standards* of service being provided. The regional legislature, in all truth, has in some cases intervened to add some alteration to what the Community Treaties, the EU directives and the legislature had determined by taking away some of the original power from local authorities (for example, in Lombardy, on which the Constitutional Court also expressed an opinion in Judgment 2009/307).

Then there are the authorities regulating the sector which may affect directly, or through interference, the regulation of local public services, drawing them into an important national market, leaving only decisions on the territory for the provision of the service under the control of local authorities⁶.

Finally, if anything is left, it is the grantor which must establish the "law of the tender", including the *standards* for

⁶ For a more complete description, see F. Merusi & M. Passaro, *Le autorità indipendenti* (2011).

providing the service in the call for tender⁷.

To ensure competition for the market, i.e. the tender that the regulation improperly calls the "competitive structure of the relevant markets", the Regulation requires tenders to comply with 1) the dissociation between the network and management, without giving any advantage, in fact or in law, for the availability, for any reason, of the network, then 2) the link between the requirements of the competitors and the service to be provided in order to avoid the economically unfavourable participation of mere "business hunters" as often happened in public tenders, and 3) an impartial definition of the object of the tender in order to prevent the service being artificially tailored to a few competitors favoured by the grantor, and at the same time favouring any economies of scale and scope available from multiple providers of similar services.

This is a theory that could give rise to agreements restricting competition with regard to applications for participation and, as such, must also be evaluated, thanks to the Regulations, by the grantor agencies, which are thus invited to relax their autonomy and to extend their assessments to the whole universe of bids to provide a service, with the necessary effects on the preparation of the call to tender.

It seems clear that if two or more large utility companies are associated in any form, they could counteract or reduce the possible positive effects of competition for the market. Thus, also competition for the market is a form of competition, and as such it should be approached by the grantor for which it is envisaged.

But the truly thorny question concerning competition for the market is time. How often does the tender need to be held for the service to be delivered efficiently and for any initial efficiency not to decline over time?⁸

The Regulation (Article 3) requires a link to be established between the investment required to manage the service and its

⁷ As well as drawing up the rules for providing the service through the stipulation of a service contract with the grantor. On this see A. Mozzatti, *Contributo allo studio del contratto di servizio. La contrattualizzazione dei rapporti tra le amministrazioni e i gestori di servizi pubblici* (2010).

⁸ A time for competition for the market to add to the examples of the relevance of "time" examined recently by L. Cuocolo, *Tempo e potere nel diritto costituzionale* (2009).

amortization in order to calculate the duration of the service, if and when investment is necessary, of course. And this is what happens in the case of almost all services.

But to call a new tender it is not enough to calculate the amortization of the investment. It should be borne in mind that the company leaving the service has to "transfer" operations to the new operator, which, to avoid the risk of litigation hanging like a sword of Damocles over the costs of the service, means determining beforehand, in the call for tender, at the very least, the criteria for calculating the value of what is passed on to the new assignee. The same, *mutatis mutandis*, must be said for private sector share when the public service has been granted by tender to identify the minority shareholder of the public body. Again, if the criteria and procedures for the liquidation of the share are not defined, not only would litigation be inevitable, but it may prove difficult to find a successor at the end of the established period.

But when there is a private shareholder, at least two other problems arise regarding the call for tender: 1) to define the specific responsibilities to be allocated to the private partner in the management of the service (and not as in the original version of the legislative decree in the outright management so as to *totally* remove the political component of the majority shareholder) and make it effective by stating that the assignment of responsibilities is a condition leading to the forfeit of the assignment should they not be honoured, for any reason, during the provision of the service, and 2) to ensure that a tender based on the price of the shares to be purchased by private bodies interested in becoming partners in the joint enterprise does not jeopardise the quality and cost of the service to be provided, which must be suitably defined in the call for tender.

These are largely obvious criteria of what local authority calls for tender should anyway provide for, applying the general principles relating to public tenders set out in law, but setting them out in a government regulation means transforming the obvious, inferred from general principles which can only be ascertained through case law, into a means of legitimating calls for tender, for whose omission prospective partners or prospective grantees could take action. It would also be a way of ensuring that local authorities do not deviate from the "correct way" through calculated omissions. It would be a form of regulatory

government protection to replace the one repealed by the reform of Title V of the Constitution.

It could of course be argued that the original law already provided for a regulation on municipalisation, albeit issued after more than half a century, and on the point of death, to try to adapt Giolitti's 'municipal' firms to later entrepreneurial needs, but it would be just as easy to reply that at that time the relationship between the State and the local authorities was not on an equal footing as required by the new Title V of the Constitution⁹. But perhaps this goes to show once more that Article. 114 of the Constitution is a showcase norm with no practical implications, and is considered as such not only by the legislator, but also by the Constitutional Court.

5. The search for competition in the market without first identifying the relevant market.

But where the rule seems to have been left in mid-stream is not the question of competition for the market, but competition in the market.

It may well be that a local public service, initially considered to be a monopoly, i.e. provided and able to be provided by a single entity, finds that it has a substantial market and may thus be subject to competition. Among local public services, the phenomenon of city tours in competition with traditional means of transport such as buses and trams is a common experience, not to mention alternative airport links rather than normal public services.

It is widely known how the European Community addresses the problem of transition from competition for the market to competition in the market, i.e., universal service. As competition between firms anyway favours the provision of services at the lowest cost, the social cost of certain services established on a case by case basis is covered by public finance, directly or through a procedure of apportionment of the burden across the competition. The application of this principle is also set

⁹ For past events regarding the localisation of public services, see F. Merusi, *Cent'anni di municipalizzazione dal monopolio alla ricerca della concorrenza*, Dir. Amm. 37 (2004).

out in Art. 2 of the Regulation, the so-called "liberalisation measures": "... providing for any economic compensation to the firms providing the services, taking into account income from charges within the limitations of the funds set aside for this purpose."

A local public service may evolve towards the identification of a significant market. But in this case, it is no longer an issue of competition for the market, but of the regulation of competition in the market which has been identified as relevant.

And it is in this light that Article. 2 of the Regulation envisages a complex procedure to determine whether the conditions exist for competition with local public services in the market and, consequently, for eliminating the exclusive monopoly clause favouring the local authority. This would be with the intervention, in this case perfectly congruent, but apparently passive, of the Italian Authority on Fair Competition, which has only to account to Parliament in the annual report.

But even here the text of the regulation, following the suggestions in the opinion prepared by the *Consiglio di Stato*¹⁰, raises some questions.

In the surveys that individual local authorities ought to carry out after the entry into force of the Regulation, and thereafter at regular intervals, there is no mention of the precondition of establishing the existence of a relevant market.

In the majority of municipalities, an expensive economic analysis on the possibility of liberalising services is useless because, in terms of size, it is immediately clear that a relevant market does not exist.

And, secondly, is it certain that the addition of the monopoly clause is still legitimate?

The exclusivity clause in the provision of public services is a dubious hypothesis of the original reservation enforceable under Art. 43 of the Constitution. But is Art. 43 of the Constitution still valid or was it not perhaps repealed, as some authorities have

¹⁰ The norm was suggested by the Consiglio di Stato with its opinion of 24 May, 2010 based on what had been set out previously in Art 113, para. 11 of the legislative decree of 18th August 2000, nr. 267 and the EU principles on public services of an economic nature. The issue of the relevant market does not however seem to have come to the attention of those drawing up the opinion.

already claimed after the incorporation of Italian law in EU law¹¹?

But even if Art. 43 of the Constitution were still effective, is the law on the municipalisation of public services still in place? This law which made it possible to include the exclusivity clause, that is, the original reservation, when a local authority set up a public service. Or, if it is still in force, is it not now in conflict with community competition law?

Perhaps there is still a monopoly, because no relevant market can be identified.

Elements which lead to the opinion that the regulation of local public services has yet to find its true basis¹².

Post scriptum

The subject covered in this article had lapsed as a result of the referendum which abrogated Art. 23bis of Law 25 of June 2008, Nr. 112 and subsequent amendments, causing to lapse with it the regulation which had implemented it, to which the comments contained in this text referred. However, the norm on local public services (except the integrated water service... despite the judgment of the Constitutional Court, 26 January, 2011, nr 24, which, when approving the referendum, had stated that the reason for holding it, as far as the water question was concerned, was irrelevant) was immediately “resurrected” by the legislative decree of 13 August, 2011, Nr. 138, which became law on 14th September, 2011 as Nr. 148, which proposed again, and practically to the letter, the norm contained within the regulation. The only difference is that what in the text referred to regulatory norms implementing a general disposition of the law, now refers to statutory provisions which directly govern local public services of economic relevance.

¹¹ On the debate in question of the consequence of the “Community Constitutionalisation” of a competitive market, see N. Irti (ed.) *Il dibattito sull'ordine giuridico del mercato* (1999), where the idea of a “breakdown of the Italian Constitution” emerges, also with reference to art. 43.

¹² For some ideas based on criteria of economic sociology on the reform envisaged even before its approval, see G. Bargerò - G. Fornengo, *Mercato, concorrenza e governance nei servizi pubblici locali*, *Economia Pubblica* 5 (2008), and more in general on the reform of the public services R. Pedersini, *La riforma dei servizi pubblici: oltre le istituzioni in Stato e mercato* (2009), at 95.

GLOBAL LAW AND THE LAW ON THE GLOBE.
LAYERS, LEGALITIES AND THE RULE OF LAW PRINCIPLE.

Gianluigi Palombella *

TABLE OF CONTENTS:

1. Introduction.....	53
2. Legalities and layers, fragments and wholes.....	56
3. The law as a whole and the law for the globe.....	62
4 On the legal character of global legality and its external environment.....	65
5. Defining and enhancing the Rule of law.....	71
6. Legal realities, Global tolerance?.....	78
7. The onus of communication and the substance of the Rule of law.....	84
8. Responsibility and the inherent tension between justice and the good.....	89

1. Introduction.

The emergent ‘global law’ and global governance are often evoked as a multiversum in the absence of a controlling principle, or alternatively as a complex set of normativity to be encompassed by a holistic constitutional architecture¹. In what follows, I shall not pursue a further guiding “meta-principle” but shall refer to the Rule of law: this ideal, cherished in our most solemn legal documents, can be elaborated upon and promises to shed some light on the essential role of legality in the extended beyond the state space. Before dealing with this issue, a recognition of the current transformations in the global setting shall be due, and a narrative that should understand

*. Professor of Philosophy of Law, University of Parma

¹ Truly, the variety of theoretical patterns is even richer. For their elaboration and the issue of their failure to provide a controlling meta-principle, one with overarching epistemic function over the globe, see N. Walker, *Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders*, 6 Int. J. Const. L. 373 (2008).

them in terms of legality's structures and of their interactions. Thus, I invite to carefully follow some subsequent steps: I shall account for what is to be meant with 'global law', the nature and questionability of its own 'legality' and its difference and connections with non-global forms of legality and legal orders.

Thereafter I shall point to rescue a sounder definition of the rule of law- on which the paper turns more than once (and in a special section IV), one that can be made relevant precisely to the relations among legalities on the globe. Subsequently, further examples of interactions among normative legal orderings- through real world cases- are offered, and eventually the general function of the principle of the Rule of law shall be accounted for as the contribution that comes from law to preservation of the right (and of legal non-domination premises) in those global intercourses. This work aims at showing, first, what the legal configuration of plural orders on the globe consists of. While it shall endorse the narrative of an emerging and distinctive global law of mainly administrative and regulatory nature, it shall consider it as a layer of law on the globe, one that does not replace either international law or other regional legal orders; second, the role the Rule of law principle can play in civilizing the confrontation among legal orders' imperatives, preventing their relations from both monistic interpretations of the global universe on one side and dogmatic closure of self referential ("self-contained") systems on the other.

One can readily assume that the Rule of law is not a system-relative, or jurisdiction-related notion, i.e. a 'parochial' shield. As I submitted elsewhere², it means more than compliance with rules, certainty and predictability³. I will return on it and offer a more precise definition (*infra* at para. IV) as an ideal asking for legal structures to counter the possibility that the whole extent of available law be reduced to a sheer instrument in the hands of those in power

² To this regard it is a background chapter to the present paper G. Palombella, *The Rule of law as an Institutional Ideal*, in L. Morlino & G. Palombella (ed.), *Rule of law and Democracy. Internal and External Issues* (2010). See also, G. Palombella, *The Rule of law and Its Core*, in G. Palombella & N. Walker (ed.), *Relocating the Rule of law* (2009).

³ For such a view, see instead A. Scalia, *The Rule of law as a law of rules*, 56 U. Chi. L. Rev. 1175 (1989). Naturally, I am not assuming anything against the importance of compliance with rules, domestically and of international law (and nothing against welcoming that most States "almost all of the time" do comply with rules of international law). See also L. Henkin, *How Nations Behave: Law and Foreign Policy* (1979).

(a rule by law)⁴. This definitional standard should be born in mind in the development of the issue at stake in this work. Its principle can be shared externally, outside the limits of domestic self-legitimation. I shall maintain as well that its place in a global setting is the relationships in the complex transformative multiversum of legalities. If taken consistently, it allows them to mutual confrontation, causing claims to be heard, differences to be considered, without supporting the image of the world relations as devoid of legal counterpoise.

Making that point, however, is based on a peculiar description of orders' plurality: it is consequential to a recognition of the 'global law' as a distinctive layer of order among others, incapable of replacing or 'englobing', due to its nature, contents, commitments, and 'limits', the normative universe which many other levels of legal ordering embody. I shall look at the 'global law' especially from the empirical and theoretical observation angle refined from the 'global administrative law' approach. As a matter of legal theory, the autonomy of the global normative space needs to be examined, and it must be assessed whether or not its status as law and as a legal order is plausible. Even answering in the positive though, as I shall submit, what can be seen as necessarily 'global', does not necessarily enjoy a kind of hierarchic unconditional primacy over the array of legal orders on the globe.

As a matter of fact, diverse orders, multiple normativities keep separate and disconnected even in the face of substantive problems which- mainly due to globalisation- are instead mutually interconnected. Thus, the theoretical recognition of plurality, autonomy and distinctiveness covers only one side of the issue. The other side discloses the matter of interconnections, and has to do with how to handle with them, while a project of global, legal or 'substantive' overall control seems out of reach.

In the complex interplay among different orders, and along with the slow, case by case construction of judicial confrontation, I shall unfold the role that the normative assumption of the Rule of law is to play, one that is crucial to legal viability of global governance: it concerns the framing of a (non substantively pre-determined) scheme of coexistence and the incremental weaving of further rules of recognition. Out of the inevitable interaction

⁴See *infra* par. 5.

and interdependence, this ideal, regarding the quality of legal matrix, works as well as a template of the (desirable) tension among countervailing needs and expectations and points to preventing one sidedness and unilateral conceptions of the good from being shielded “globally” by a merely instrumental code of legality.

In the general reasoning, and essential to the understanding of the view that I propose here, some further concepts shall be taken to matter, like accountability and responsibility, non domination, the “right” and the avoidance of injustice.

2. Legalities and layers, fragments and wholes.

Metaphors can be illuminating. The metaphor of international law as a progressive formation, in vertical cross section, of “geological” layers, has revealed that the flat view from the surface would miss, and waste, the actual complexity. Joseph Weiler ⁵ has looked into how layers developed, and conventional law, community law, regulatory law, have consecutively enriched the significance and spectrum of international law. The metaphor holds together parts that would be otherwise divergent and meant to embody different logics, nature, fundamental rules. The suggestion is that we cannot make sense of the same thing unless through the layers of which it still consists, that is, which its “consistence” is made of.

Other views have a different dynamic concern: mainly they see one of the layers above as explaining the others, to reveal the real fulcrum, the governing principle. The *clavis universalis* is rather elusive though: is the “human dimension” ⁶, the development of a *super partes* law, or is the holding of the Masters of the Treaties, the conventional nature, still ultimate, and explaining, for instance, as its generative root, the imagined autonomy of international, transnational or supranational institutions? or is rather the further engine of regulatory and administrative rule making, one that is spreading through disseminating entities with an unparalleled self authorizing jurisgenerative power?

⁵ J. H. H. Weiler, *The Geology of International Law. Governance, Democracy and Legitimacy* (2004).

⁶ A. Cassese, *The Human Dimension of international law* (2008).

It has been said that the progressive transformation of old concepts towards the meta-rule of “humanity” clarifies the trends and the hierarchy of “contents”: redefines sovereignty⁷, or trade law maybe⁸. On the other side, from the other “regulative” layer, even stronger claims can be implied. It interconnects, horizontally and vertically, traditional and new entities developing rule making and administration in all fields of peoples’ and individuals’ life (from human rights to commercial standards, from sport agencies to forest conservation, from environment to agriculture, from cultural heritage to energy, trade, security). For the very fact of progressively tuning its own viability among diverse imperatives and concerns, it purports to shed the only light through which things are visible. And by considering its processes as inexplicable through the lens of the ‘conventional’ layer, the scholars of regulatory international governance see how the law they are working on, rather than the traditional *inter gentes*, is instead the ‘global’ law. This is a paradigm shift, for one general reason at least, that what was a layer of the same whole becomes the whole of the same layers.

But what a ‘global’ law can be like⁹ is rather controversial and uncertain.

Global regulatory law for some can be still included within a revised international law sphere, whence it has taken mostly its start. But the point is that it alters the distinction between “domestic and international law”, the legitimacy of the latter, and gradually undermines sovereign equality among states¹⁰. For global regulatory law should be meant here the norm-production mainly deriving from sources of diverse nature, beyond the legal realm of States. Different entities generate clusters of norms related to the regulation of specialised fields, define their own rules of production, internal powers and competences, and avail of dispute settlement bodies, so that they build up governance regimes. Specialized regimes’ imperatives appear often to

⁷ A. Peters, *Humanity as the A and Ω of Sovereignty*, 20 Eur. J. Int’l L. 513 (2009). See also the early opening by R. Teitel, *Humanity’s Law*, 35 Corn. Int’l L. J. 355 (2002).

⁸ See E. Petersmann, *Human Rights, International Economic Law and Constitutional Justice*, 19 Eur. J. Int’l L. 4 (2009).

⁹ The expression is used now often, and has been lastly invoked as a comprehensive label in the title of the book by S. Cassese, *Il diritto globale* (2009).

¹⁰ See B. Kingsbury and N. Krisch, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 Eur. J. Int’l L. 13 (2006).

eventually detach from the root of international law, or hardly to be explainable by its legal chain. Even the law of UN hosted institutions (UNCHR, FAO, ILO, WHO, WIPO, etc.) or of further entities generated by global authorities of public nature, like the Codex Alimentarius Commission (by FAO), express substantively autonomous governance. And albeit born through traditional treaty-making, the most outstanding, the World Trade Organisation, is taken to exemplify “the pervasive shift of authority from domestic governments to global regulatory bodies”. Such a “shift of authority” also includes “transnational networks of domestic regulatory officials, private standard setting bodies, and hybrid public-private entities”¹¹. The relevance of other “informal” entities of supranational nature like the Basel Committee (on Banking Supervision) or of the IAIS (the International Association of Insurance Supervisors) is undoubted. There are not only public entities: ISO or ICANN reach global actual effectiveness despite lacking formal public authorization processes behind their birth. ISO, by standards affecting any kind of productions, also undermines the ultimate effectiveness of national authorities on the same issues, and achieves worldwide respect, having been adopted in WTO TBT (Technical Barriers to Trade Agreement). Due to its general acceptance and viability it has lost de facto its voluntary character¹².

Given the more and more refined account of the different types of regulatory authorities producing “non treaty law”, traditional state and interstate understanding “are inadequate to ensure that these diverse global regulatory decision makers are accountable and responsive to all of those who are affected by their decisions”¹³. In fact, most functional regimes address more often private actors rather than simply states¹⁴: as with the international

¹¹ R. B. Stewart and M. Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, 7 Int’l L. J. 1 (2009).

¹² An exhaustive analysis of ISO and of its legitimacy pillars, beyond traditional concepts of authority, is in E. Shamir-Borer, *Legitimacy without authority: Explaining the Pre-Eminence of the ISO in Global Standardisation governance, A Global Administrative Approach* (2009).

¹³ As R. B. Stewart and M. Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law* cit. at 11 add: “At the same time, we believe that the divisions and differences in regimes, interests and values are too wide and deep to support, at this point a constitutionalist paradigm for global governance”.

¹⁴ See the GAL manifesto, B. Kingsbury, N. Krisch and R.B. Stewart, *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15 (2005). See also

climate regime, regulations take effect “behind the national borders, within the national societies”, and the ultimate addressees in various fields of global regulatory institutions are consumers, companies, and societal actors¹⁵.

The compensating effort - *vis à vis* self-referentiality of global regimes - has been to focus on and to harden measures of accountability¹⁶. And the s.c. Global Administrative Law project (GAL) has elaborated on a model of normative requirements based on transparency, participation, reasoned decision and review. These should affect “the accountability of global administrative bodies”¹⁷, and their albeit limited existence can already be exemplified in various cases¹⁸.

On the one hand, such a global law works on the premise of the existence of sub-global legal orders that can grant compliance and implementation; on the other hand it can neither replace them nor possess the authority of determining their validity (in this sense, it is not the case of the Kelsenian unity of a universal legality, where States’ legal orders are seen as dependent on the higher international order’s authorisation). It would be impossible to show that the trade rules of WTO, for instance, define the conditions of validity/existence of the multiplicity of orders that instead it takes for granted. The regulative global law at issue here simply performs a peculiar jurisgenerative practice that refers to fragments (-fields) of human action, extends beyond territorial borders, and locates nowhere in particular.

S. Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 33 N.Y.U. J. Int’l L. & Pol. 663 (2005)

¹⁵ M. Zuern, *Global governance and Legitimacy Problems*, in D. Held & M. Koenig-Archibugi (ed.), *Global Governance and Public Accountability* (2005).

¹⁶ See also S. Cassese, *Shrimp, Turtles and Procedures: Global Standards for National Administrative Procedure*, 68 L. & Cont. Prob. 109 (2005).

¹⁷ B. Kingsbury, *International Law as Inter-Public Law*, in H. Richardson & M. Williams (ed.), *Moral Universalism and Pluralism* (2009) “in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make”.

¹⁸ In the exemplary Shrimp-Turtles case, the WTO Appellate Body found USA banning decision arbitrary for failing to provide India with notice in advance and opportunity to contestation, that was due since USA Turtles policies were affecting a public other than its own. B. Kingsbury, *The Concept of “Law” in Global Administrative Law*, 20 Eur. J. Int’l L. 37 (2009), also S. Cassese, *Shrimp, Turtles and Procedures: Global Standards for National Administrative Procedure*, cit. at 16.

At the same time, the about two thousands global regimes, but also transnational legal rules developed among private actors, produce a state of uncertainty due especially to the lack of a single frame of common reference and to the fact that each field-related single regime purports to achieve its objectives potentially engendering regulative conflicts. Obviously, concerns are raised precisely because of the supervened epistemic insufficiency of our grids, in the face of circumstances of so called “fragmentation”¹⁹; and the latter, be it pathology or physiology, means not just the lack, but properly the (ontological) loss of a reassuring unified legal world. So it tells us more about our cognitive premises or pre-understandings than about the world itself.

As an indicator of the uneasy environment, the increasing number of international tribunals is so often mentioned, whose proliferation is neither curbed nor hierarchically controlled by the International Court of Justice. As famously confirmed from the ICTY (Appeals Chamber, in *Prosecutor v. Tadic*), international law lacks a centralized system “operating an orderly division of labour among a number of tribunals” so that “every tribunal is a self contained system (unless otherwise provided)”²⁰.

However, at stake is mainly a metamorphosis of law in the emergence of a global normative space: the ICTY statement reflects it but in an unsatisfactory way, because of the frustrating effects and irrationality of self-contained tribunals as part of a space where different clusters of specialized regulation define functional areas and subject matters (energy, human rights, climate change, security,

¹⁹ A as a preliminary study report had already stressed: G. Hafner, *Risks ensuing from the fragmentation of international law*, in Official Records of the General Assembly, 566 session, Supplement n. 10, 321 (UN Doc A/55/10) and G. Hafner, *Pros and Cons ensuing from Fragmentation of International Law*, 25 Michigan J. of Int’l L. 849 (2004).

²⁰ ICTY (International Criminal Tribunal for the former Yugoslavia), *Prosecutor v. Tadic*, Case No. IT-94-1-I, Appeals Judgment, 34-75, para. 11. (The merits concerned disagreeing with the ICJ about the relevant threshold of responsibility of states for the acts of private individuals, under a test of effective or overall control (ICJ *Nicaragua v Us* (Merits) 1986 ICJ Rep 14, 65.). Then the ICJ contrary ruling on *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91 (Feb. 26) rejected the applicability of a broader “overall control” test to assess State responsibility (Serbia) and denied to such matters the ICTY jurisdiction, which is concerning individual criminal responsibility instead.

trade, agriculture, etc.) that are nonetheless highly interconnected: ironically they address the complexity of interconnected issues by a divide et impera, through artificial separation of technical treatment. In fact, diverse kinds of law end up overlapping or blurring their mutual borders when impinging on the 'real' world: a domestic policy regulation letting pharmaceutical production flourish outside the established system of patents (in India for facing HIV, for ex.), overlaps with and conflicts against World Trade Organization rules and TRIPS Agreements (on "Trade-related Aspects of Intellectual Property Rights"); the latter, in turn, by defending the trade interests of States and powerful industrial companies in the patent system, do hardly concur with the goals of the World Health Organisation: developing countries especially must raise the life expectancy of the people, and of course, wider availability of medical treatment unrestrained by patents would facilitate the task²¹. In this and a myriad of similar cases, one can take different "internal points of view" (as judges respectively do), that of the WTO, the Constitutional Indian order, the World Health regime, bearing different accent on trade, health and human rights, and involving different participants and addressees. But none would be fully and exclusively adequate. It cannot be denied that different formats of law are pretending their share in the resolution of a single, concrete affair. And one can hardly ignore the conflicts between diverse priorities and the overlapping on the same object of more than one legal discipline: some pluralist, medieval, puzzle, where different regimes appear like fragments, 'pieces' in a sense orphans of a whole. The real thing—think it as a whole— lies somehow beyond each of the concurring/competing perspectives.

It is at this point that our mindsets come to the fore. Our highest idea of unity, on which the perception of fractions is premised, is placed mainly in the general conception of law as associated with a "system". If we focus on the global regulatory layer, it is made by regulations, that is substantive norms, issued by institutions looking at functional tasks, ie specialized regimes, whose reach is fully circumscribed and that are often assisted by internal (quasi) judicial organs. Although they do not stand alone and seem to work on the premise of the international order, still they are

²¹ Cfr. N. Torbisco, *Beyond Unity and Coherence: The Challenge of Legal Pluralism in a Post-National World*, <http://www.law.yale.edu/documents/pdf/SELA>

largely irreducible to it and exceed its unification attempts. In this sense they are fragments, far from the “wholes” that ‘traditional’ legal orders are held to encompass.

3. The law as a whole and the law on the globe.

Legal systems have been explicitly or implicitly considered to be a premise for law itself, a kind of transcendental condition for it, i.e. a condition of conceivability. The capacity of law to build itself as a unity and as an object of knowledge is often premised on the conception of law itself as an epistemically and ontologically “whole” object²². As a matter of fact, it has been, however, mainly construed on the premise of the modern State.

The connection between legal system and States is all but an irreversible conceptual one. Even with the Hartian union of primary and secondary rules, nothing prevents the acceptance of the rule of recognition to be made by officials that are not State officials²³. But in the general understanding, it is somehow presupposed, implicitly or explicitly, that they are.

Now, if the bond between law and the State protects, rather than a formal consistency, the self limiting domain of a polity’s social practices, it is so because the State is not just any “public” entity

²² The construction of the epistemic unity or the self-creation, etc. as a separated object have been reflected by different speculations and theories. On the more general question recall Kelsen’s Grundnorm. See H. Kelsen, *The Pure Theory of Law* (1934) or Hart’s rule of recognition in H. L. A. Hart, *The Concept of Law* (1994) and see J. Raz, *The Concept of a Legal System* (1980); M. Van de Kerchove and F. Ost, *The Legal System between Order and Disorder* (1994).

²³ R. Cotterrell, *Law Culture and Society. Legal Ideas in the Mirror of Social Theory* (2007). J. Waldron, *No Barking: Legal Pluralism and the Contrast between Hart’s Jurisprudence and Fuller’s*, <http://law.anu.edu.au/JFCALR/Waldron.pdf> reminds us of the thesis of Cotterrell, and recalls hartian openness to customary law, but also recognizes that it was accompanied with the idea that the autonomy of customary law was harboured in the same central recognition of it as part of the valid law for the wider legal system. As Waldron writes, resuming Hart “his interest in custom as a form of law does not really extend beyond situations where custom is fully integrated into a state-dominated legal system—integrated in the sense that there are clear principles for its subordination as well as for its recognition. Even though the legal status of custom is not necessarily created by the sovereign’s (tacit) command, still legal customs are subject to the system’s overarching rule of recognition, and that rule will determine what the relation is between custom and other forms of law such as statute and precedent”.

whatsoever, but the fullest image/archetype of any existent "public" and-- what is highly defining its very nature--, the only public entity entitled to all encompassing reach: the one that can by definition embody "general ends"²⁴. The entirety of ends, one might say, overlaps with the law as "entire", as a system. Law- as- a- system is therefore deeply associated with a "general ends" capability: which requires it to ultimately shelter any sorts of common objectives "deserving" care, protection, regulation, control, and the like. This couple, to which territory is premised, factually entails at the same time the pre-understanding of a responsibility to cover the full circle of publicness and public problems, i.e. a responsibility for the "whole", and coherence as a "general" result. Its format works the dimension of time, both reflecting some premised "verfassung", the past and the "tradition", and projecting or ruling its 'common' future. Its institutional legality bears on the notion of custom, constitution, legislation²⁵.

The breaking in of global governance spells out a format of law detached from that ground, also due to its rootless standing, and its reference to partial, field- related regulations. It hardly can draw the full circle of political projects over the future: at least the old way to conceive of the time dimension tails off increasingly while the space expands itself. WTO or ISO rules are rather global as to their reach, but limited as to their content, task, function (trade). Indeed, global governance reference to an unlimited space goes with the incapability of each acting regulatory institutions to resume the internal self-understanding of a polity, its future-related commitments or its ideals, preferences and needs. Indeed they do not live with a polity, although they affect polities from outside. But this is not yet the whole story.

The obsolescence of the whole in the global law is linked to the obsolescence of the connection between law and responsibility. The geometric fractures of which it consists, have been addressed by a legitimacy-authority building attempt intended to construct conditions of procedural accountability, and mainly based on the latter. Procedures by decisions makers in institutions-regimes, like

²⁴ It is to be avoided the misunderstanding, however, that for the State to embrace "general ends" means to satisfy the requirement that "law must be general". This is possibly linkable, but clearly a different concept.

²⁵ See for example, and for this last point, M. Van de Kerchove and F. Ost, *The Legal System between Order and Disorder* cit. at 22, 147-76.

WTO or the UN Security Council, are not always transparent, and fail to connect with the affected publics. Therefore, they must be made more and more accountable, work through pre-fixed rules of fairness and transparency. Accountability is thus an important asset of some civilizing progress in global governance. This is something different though from the idea of responsibility that was linked to the pre-understanding of law as a matter related to the State. So, the actual setting, as to the emergence of a global law, has some bearing on the relational shift between responsibility and accountability.

Put it briefly, “responsible” (as with a “responsible person”) here projects a sensible self involving consideration of as many relevant factors (be they facts, interests, intentions, consequences, and the like) as possible or necessary regardless of accomplishment of single discrete obligations or objectives. It would exceed²⁶ the view of a required task (which more or less neatly circumscribes the field of relevance, and is called upon to leave aside any further concern), one that is instead entailed by accountability. Responsibility of this kind has a whole-related sensitivity and concern; it turns to be implied in the pre-conception of a simple objective *raison d’être* of the State: it hints at the abstract ultimate “capacity” or all-encompassing capability of a legal order as a State related concept. It does not replace, and it is not replaced by, either ‘accountability mechanisms’, meant to operate “after the fact”²⁷ or by other procedural accountability requirements in relation to global governance: the latter are those suggested to compensate for the lack of true democratic control, and operate on various grounds, of which the legal one is seen as minor²⁸. In some way, global

²⁶ As to the general meanings of responsibility, among others, M. Villey, *Esquisse Historique sur le mot ‘responsable’*, 22 *Archives de Philosophie de Droit*, 45 (1977). Suited to the notion here exposed, one can recall as a significant example, Hans Jonas’s insight in “political responsibility” (meant as the responsibility of the State felt through the role of the Statesman and in analogy with parental responsibility), which in his words bears an essential relation with *totality, continuity and future*, because it encompasses the “total being” of its object, with no possible interruption in time, and beyond its immediate present. See H. Jonas, *The Imperative of Responsibility* (1984).

²⁷ R. W. Grant and R. O. Kehoane, *Accountability and Abuses of Power in World Politics*, 99 *Am. Pol. Sc. Rev.* 29 (2005).

²⁸ In R. W. Grant and R. O. Kehoane, *Accountability and Abuses of Power in World Politics*, cit. at 27, however, accountability divides in two strands: in the participation model, the performance of power wielders is evaluated by those who

regulatory entities, structures and procedures can be progressively integrated with legal counterweights and hopefully be made accountable. Yet global law obviously cannot help downplaying the reassuring modern enterprise of law as one all-encompassing human activities. It weakens increasingly the old holistic frame of 'public interest', and the political control of complex issues. Administration, somehow the intermediate legal form between particular and general, has thereby transformed itself from the instrumental arm, the bureaucratic or technical apparatus, as it was within the State, into a self standing form of sectoral or self referential global regulations.

In conclusion, segmented law, of itself, is unsuited to shoulder "responsibility" for the "whole". The "whole" looks, all the more now, clearly a metaphysical concept, too far to be conceived, and its very width, depth and complexity are here out of sight. On the other hand, such a situation, the intuition of which is also enhanced by the accountability/responsibility divergence, is a case for re-considering the autonomy of and the relation between legal orders.

4. On the legal character of global legality and its external environment.

In such a state of affairs many compensatory overall designs have been elaborated, most with 'constitutional' aspirations, but at first glance circumstances call into question before anything else the very idea of a Rule of law: more basic a question which appears to concern directly legality in itself. Beyond the general notion of the Rule of law (that I have also spelled elsewhere)²⁹, we certainly need to further focus on its import within the new setting of global governance: as I submit, in this realm it concerns the relations among diverse legalities that actually populate on different layers, and with different extension, the "multiversum" of our "globe". Before taking issue with the Rule of law itself, though, I shall firstly try to assess the legal nature of global legality, drawing a profile of it as a discrete member of the 'association' of legalities that dwell on the globe. Such preliminary assessment shall display the frame and pave the way to the question of the Rule of law.

are affected by their actions. In the delegation model, by contrast, performance is evaluated by those entrusting them with powers.

²⁹See G. Palombella, *The Rule of law as an Institutional Ideal*, cit. at 2.

Admittedly, often our views have to represent such legalities regardless of the different patterns and thickness, nature, legitimacy, and of institutional and social features. Notably, ILC 2006 Report worked out a de-fragmentation apparatus based on the topoi of legal reasoning³⁰, a question of rules, deliberately leaving out the “beyond” issue concerning the structures of the institutions, the allocation of authorities, and the novelty of self-authorized entities in the global space. We fail to see a unique format, one matrix covering, in the last instance, the diverse generators of normativity (that range from sub-national, State, the transnational and “merchants” law, conventional or customary *inter-gentes* law to “humanity” *jus gentium*, regional supranational orders, global administrative law, and the like). And finally, we are far from the pre-understanding of law as ultimately coherent.

A universalized coherence would be premised on a kind of internal point of view to the globe itself as an entirety, that, put in Hartian terms (aside from the insuperable “situatedness” of our angles and the abstractness of a view from “nowhere”) is unavailable for the time being: for a “practiced” common rule of recognition cannot be empirically described as existing³¹.

If we acknowledge that regardless of upholding universal standards of morality, the ultimate conditions of validity in our systems are those spelled out by social sources³², we should accordingly assume that different legal orders depend on different domains of social practices. This holds true for each of the layers of the globe recalled, from State, or regional law to international law, or global (administrative-regulatory) law.

The latter represents a telling Sonderweg indeed, whose interpretation is still in progress, and that shall be instructive to

³⁰ The ICL Study Group Report in 2006 found it substantively manageable under the framework of the Vienna Convention of the Law of Treaties (esp. the role of its art. 31).

³¹ This does not detract from the progressive coherence seeking efforts and trends of the single different layers of orders taken separately.

³² On this, and also on the separability thesis, there is well known and vast legal theory literature. One shall recall however that for Hart this does not exclude a role in questions of validity- for principles: the latter may also be identified by virtue of their “pedigree,” much as in the case of “norms” if those principles are created or adopted by a recognized authoritative source, see H. L. A. Hart, *The Concept of Law*, cit. at 22, 266. Moreover, a strong contribution on this point has come from strands of “inclusive” legal positivism.

follow, by the appraisal of its pretenses and claims of normativity. Not by chance, its scholars have had to consolidate firstly its normativity as "legal", by re-framing a concept of law, that in fact has been proposed as specifically tailored to accommodate it, given its mismatch with international law and national law³³.

Of course, should global (administrative-regulative) law be felt to belong in some other pre-existing "system" one would not ask what wider and better-suited conception of law could be envisaged: it would simply undergo the test of one given system's criteria of validity. The question of whether GAL is law and under which concept of law, can emerge because it is believed to unfit the parameters of validity of the known legal orders. Now, as far as this premise holds true, if it is law, then it shall also be a legality of its own, that neither international (and supranational) law nor national law encompasses.

Yet, the two questions are different in nature: what is the notion of law like has an essentialist purpose, that extends to all legalities (in the sense of legal orders: in the Hartian scheme, the one that GAL proponents follow, in the non "primitive" mode, law requires further secondary rules, of which the rule of recognition is the practiced criterion of validity- vis à vis any candidate norm-, to be "accepted" from an internal point of view, at least by officials.) This holds true regardless of the variability of criteria of recognition, one that exposes the differences among systems of law.

Accordingly, the second issue as to which those criteria actually are, is different, and shall depend on the practice within the specific order observed, thereby drawing the boundary of membership. Thus, if we engage in the first question (the concept of law), still we do not touch the second.

As it is theorised, GAL is law because law essentially presupposes a) a rule of recognition and ordinary rules, b) that the rule of recognition admits a varied typology of very diverse source entities, states or not states (including those producing specialised rule making, and of an administrative nature), provided that, however, they comply with the principles of publicness, as further elaborated, and referred to the nature of entities, not to the involved publics. According to the argument suggested by Benedict Kingsbury, their legal nature reflects the inherent "public" character

³³See B. Kingsbury, *The Concept of "Law" in Global Administrative Law*, cit. at 18, 26.

of law, one which embodies the general legality principle, rationality, proportionality, the Rule of law and respect for basic human rights³⁴. Moreover, “what it means to be a ‘public’ entity would routinely be evaluated by reference to the relevant entity’s legal and political arrangements, which may derive from national law, inter-state agreement, self-constitution, or delegation by other entities”³⁵. The reasoning partakes both of a principle-based re-cognition of law as such and of a source based delimitation of it.

One might observe that such a definition already frames the nature of the sources, and embeds criteria that beyond the ‘notion’ of law, could prompt lineages and the pattern of a rule of recognition³⁶ to be practiced globally: and if only some further step or the regulative and administrative nature of candidate norms were spelled out, that would easily fit as a test of validity, within the peculiar (albeit open) realm encompassed by GAL, of which it rationalises the practiced standards. Thus, somehow, it has to oscillate, so to speak, between legality and validity³⁷.

The reason is that GAL has been identified and studied from the start as more than a loose set of rules³⁸. The dual, descriptive and normative, stances of the discourse, are inherent in the actual way of being of GAL itself, thereby turning it into a legal order of incremental nature, within a predefined scheme. The further specification of a unitary rule of recognition might be considered an endeavour that is certainly in progress: but its lineages under a public chain are partially spelled out already and partially deferred to the practices of the classified sources under the requirements of publicness. This is developed out of the need to make sense of this matrix of law under the constraint of tackling a visible puzzle: that is, on one side, its premised lack of belonging (to any other single system), on the other its consequent need to qualify otherwise as

³⁴ *Ibidem*, 23.

³⁵ *Ibidem*, 56

³⁶ As Hart writes, the “rule of recognition,” unlike other rules and norms (which are “ valid ” from the moment they are enacted and even “ before any occasion for their practice has arisen ”), is a “ form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts”. See H. L. A. Hart, *The Concept of Law*, cit. at 22, 256.

³⁷ The statements relating to sources say already about their typologies, and these are drawn on existing sources, that are implied and can be listed in further detail or incrementally identified by what appears to be a kind of “cooptation”.

³⁸ See this expression for example in H. L. A. Hart, *The Concept of Law*, cit. at 22, 233.

“law”. In a positivist and Hartian attitude, the general characters of law are a theoretical ‘essentialist’ predicament. If the question about ‘what is law’ is addressed in order to fix whether something in particular is law, it can be answered in the positive only if that something has already self defined its internal conditions of validity by a specified social practice, i.e. is- or refers to- a legal order.

Naturally, the incremental definition of GAL’s rule of recognition cannot determine the conditions of validity pertaining exclusively to other legal orders: upon them it can make no claims. What counts as law in international law, in a State legal order, or in the EU, is determined through their own secondary rules³⁹. Accordingly, they cannot pretend to define some global legality as a whole, since this would be, *ceteris paribus*, as imaginary as the other way round unless the respective practices take that very role in displacing one another.

Otherwise, it would imply a monist conception of the global order, where no relation/ interaction is possible among legalities, all of them being hierarchically contained as part of one single system, under its rule of recognition. This matters definitely because as we know, the rules and regulations generated by global regimes are typically meant to impinge on the domains controlled by other legal orders: GAL is itself and works as an interconnection among actors and layers, international institutions and transnational networks, domestic and global, with vertical and horizontal kinds of transitivity⁴⁰.

This said, the subsequent question has to do with the intersections and coordination among legalities. The scholars that have focused on the law that actually develops precisely on the specifically global layer of law, and that they consider overflowing the coordinates of sources and systemic pedigree of international

³⁹ At it is obvious, what counts for GAL as criteria of recognition might well be different from what counts for some candidate norms to be conceived of as legal norm, say, in the UK legal order.

⁴⁰ B. Kingsbury, *The Concept of “Law” in Global Administrative Law*, cit. at 18, 25: “For instance, national courts may find themselves reviewing the acts of international, transnational and especially national bodies that are in effect administering decentralized global governance systems, and in some cases the national courts themselves form part not only of the review but of the practical administration of a global governance regime”.

law, see that legality as vertically penetrating States' order⁴¹. But the point remains that different systems persist separately, and the confrontations among them have, normatively, a double dimension: within the confined realm of the rules of recognition of the GAL legality, all the involved entities, and those actors, mainly judges, domestic or supranational, and institutionalized bodies with decisional entitlements, should work theoretically within its criteria of validity: at least conflict of rules techniques and others, like principle of hierarchy, harmonization, systematic interpretation, etc. apply. From this point of view, the normative claims are all to be considered "internal", and the different regimes or the States' orders, are all seen from the perspective of the operationalization of GAL. The practice of the rule, as a social source, i.e. a factual datum, shall be ultimately controlling.

But there is a second dimension, that shall always affect the viability of the first: on this dimension GAL is just one order among the many, it is not the eminent legality functioning as the yardstick to assess the validity within the remaining legal orders. Needless to say, validity is always an internal issue, it cannot be predicated of a legal order as a whole, but simply of a rule on the basis of one legal order requirements. Thus, when different orders confront each other, it cannot be a matter of their "validity", one that can be solved with common shared practice of a (system relative) rule of recognition.

This impinges on the first dimension because connections among them, i.e. the interaction of different orders, requires more and less than the "practice" of a superior rule. It requires less, because a superior rule would simply undermine the autonomy of any other legal orders; it requires more, because an alleged universal rule of recognition is by definition only appropriate to deal with matters of internal validity, and those autonomous orders can only look at it from an external point of view, i.e. as a factual datum. And understandably, the latter has neither normative import on them, nor can be "accepted" internally without relinquishing autonomy.

It is thus the normative question that must be raised. What is the "why" all actors should behave so to fairly interact in a

⁴¹ S. Cassese, *Il diritto globale* cit. at 9. thanks also to material interaction, and institutional penetration: for example by way of taking in their operating members, officials belonging in diverse States' corresponding administrative fields. On the horizontal plane, diverse legal regimes have in common the progressive development of principles of administrative law.

heterarchical order of autonomous partners? and how can they construe their relations without fading under one overarching system of the globe?

As a matter of fact, kind of interactions are factually inevitable, and many indicia show the role of law as an independent tool. But, to this regard, it is helpful to contrast this setting with the analogies in the medieval pattern⁴²: with the latter, legal scholars, arbitrators, and “*jurisperiti*”, in a multileveled set of legalities operated in the view of the “case” at stake, without further implications as to the weaving of a frame of interactions among orders: at least in the sense that a final unity was to be searched at the bottom in the “*convenientia rerum*”⁴³ and at the top in fidelity to an overarching transcendent order shaped by theological concepts. The contemporary globe is orphan to such a final unity, while would not be satisfied with leaving pluralism of legalities as an anarchical setting, at the mercy of the material forces of globalization. Accordingly, the work of judges and jurists appears to contribute something different. As institutionally held to lack (or at least, to reason without) political bias, their task is seen to increase in framing a texture that⁴⁴ enhances accountability and endeavors to compensate for dis-order. The value of this work is high, not just because courts and other jurisdictional bodies treat conflicts, but because they weave the lines on which States and other supranational actors start making sense of some normative mutual commitments, and try and reason on the principled ways in which they can be articulated⁴⁵.

⁴² One of the most authoritative scholars of the medieval universe, describes it as ordered through law where no focus was on the political (modern) conception of law as sheer (political) *instrumentum regni*. See P. Grossi, *L'ordine giuridico medievale* (2000).

⁴³ *Id est*, in the relations among things in themselves under standards of doctrinal legal institutes and formulas tracing back to Roman Law and common law. On connections with the substratum of *aequitas* see P. Grossi, *L'ordine giuridico medievale* cit at 42 and. E. Cortese, *La norma giuridica. Spunti teorici nel diritto comune classico* (1962). On the centrality of *jurisperiti* see P. Grossi, *L'ordine giuridico medievale* cit. at 42, 54.

⁴⁴ S. Cassese, *Il diritto globale* cit. at 9, 26. Cassese also enhances the Shrimp-Turtle case. See S. Cassese, *Shrimp, Turtles and Procedures: Global Standards for National Administrative Procedure*, cit. at 16

⁴⁵ See also G. Palombella, *The Rule of law beyond the State*, 7 *Int'l J. Const. L.* 432 2009, and also G. Palombella, *Global Threads: Weaving the Rule of law and the Balance*

Now, even behind such a work, there must be a supporting choice, one that however suggested by real world constraints, nonetheless is needed to build normative bonds among legal orders, otherwise not provided by a premised world legal system, bonds that can only be traced back to the normative commitments that legal orders autonomously take.

5. Enhancing the Rule of law.

One such commitment that I purport to enhance is the Rule of law. At one level of meaning the Rule of law, in the sense promising certainty through generalised compliance with existing rules, may be intended to protect the linkage between constituents and the law, ethos and legal order. One can say that this conception reflects conservatively the State based law matrix. One of its versions in the “Burkean” mode, speaks of the Courts as reflecting the whole experience of a nation ⁴⁶.

This kind of task is accomplished also externally, as one of the functions of interfacial constitutional rules defining legal force and status that domestic law can assign to conventional or customary international law, to Treaties and general principles. It falls, in brief, within the “Rule of law in this jurisdiction” as solemnly the Supreme Court (in the US) calls it.

Equally, in global governance, beyond the State, the appeal to the Rule of law has, first of all, an ‘internal’ function, that is, it is apparently worked out more as related to the ‘quality’ of each governance entity, to certainty of rule-following in the diverse clusters (in different regimes of norms, from WTO to ECHR, ICLOS, etc.) than to channel inter-legalities concerns. It is serving the teleological ambition to enhance accountability. Abiding by the rule of law, in this sense, helps making such power-exercising bodies and institutions, more transparent or accountable. This can be justified. It can be said that accountability means the way through which law production process can be controlled, made visible, and eventually kept in tune with the interest of its addressees: and the Rule of law, conceived of in terms of a set of

of Legal Software, in P. Carrozza, F. Fontanelli & G. Martinico (ed.), *Shaping the Rule of law through Dialogue* (2009).

⁴⁶ Oliver Wendell Holmes, in *Missouri v. Holland*, 252 U.S. 416, 433 (1920). and see R. Post, *The Challenge of Globalization to American Public Law Scholarship* (2001).

definitional requirements for the law (like those envisaged by Fuller, or by Raz, for example), has also been thought of as implying a legitimating relation to its addressees⁴⁷. In a different vein, the Rule of law is counted among the criteria that a sound conception of legality should embody, if global governance entities and functional regimes must embed the quality of “publicness”, as recalled above. And publicness ties authorities to “accountability” as well ⁴⁸.

We equally can recognise that the Rule of law is a recurrent ideal belonging as well, at least theoretically, in most of the layers that we take here into account as populating the world. It is in most of them an internal principle, constantly cherished in regional, international and supranational documents as well. But the import and ideal of the Rule of law need a sounder definition, also given the question of its use outside the State.

There can be a second level of meaning beyond the reference to single legal orders, be they national or supranational ones, and I shall focus on that in the next section. What the infinite interactions between autonomous orders do, among other things, is evidently opening the field beyond the strict normative tasks inherent in each single domain, in other words making systems and “fragments” to fairly relate to and ‘magnetize’ each other. If the Rule of law commitment plays a role beyond each confined platform within which it is elaborated, and thus in the global context, it does more than structuring the quality of public rule-making entities; in the metaphor, it not only bears directly on the fragments, but also affects the legal quality of a potential (and indeed inescapable) interaction.

⁴⁷ See Lon Fuller’s “internal morality of law,” as one made up of eight features, so that rules have to be general, public, non-retroactive, comprehensible, non-contradictory, possible to perform, relatively stable, administered in ways congruent with the rules as announced. L. Fuller, *The Morality of Law* (1964). See also the elaboration by J. Raz, *The Rule of law and Its Virtue*, in J. Raz (ed.), *The Authority of Law* (1979), D. Dyzenhaus’s, *Accountability and the Concept of (Global) Administrative Law*, 7 Int’l L. J. Working Paper (2008) insists on the legitimating connection to the addressees fostered by the Fullerian idea of law’s requisites as granting ‘accountability’.

⁴⁸ This happens in the guises alternative to those participatory channels otherwise available in constitutional democracies, by implying review, transparency, reason-giving, participation requirements, legal accountability and liability B. Kingsbury, *The Concept of “Law” in Global Administrative Law*, cit. at 18, 34.

In this sense, it overflows the question of each regime's accountability⁴⁹, but, yet, it operates on weakening self-referentiality and kinds of normative monism. Both in the global specialized regimes and in the even wider global space of orders, our image of law as linked to the States' general ends, is naturally missing. This I have described above as the shift from "wholes" to "fragments". In a loose and "aspirational" sense, it can be said that taking care of the legal quality of the interactions themselves is premise to the fostering of a background and "regulative" idea of responsibility⁵⁰. It might be so in some indirect way on which I shall return later.

Returning to the notion of Rule of law, for sure it cannot do the work of generating a more or less fictitious and all-encompassing substantive project or a general authority: this is a matter of constitutional empowerment, authority creation/ authorization, legitimation, that has less to do with the appeal to the ideal of the Rule of law as such. Nonetheless, the Rule of law can do a different but still valuable job, one that refers to the question of the equilibrium among legalities at different latitudes, and without essentialist presuppositions, perfectionist faiths, might normatively sustain a process reaching beyond the separated realms and their internal accountability.

In the view that I shall resume here, the Rule of law is originally concerned with the quality and structure of law in a defined environment. First of all, as an ideal, its import, once taken consistently, without a double standard, can be naturally externalised. It is a kind of ideal that does not only control each legal order's quality of law, but has implications in the legal intercourses among legal orders. Now, what this ideal looks like can be answered as a matter of historical and institutional reconstruction.

In the modern history, rule of law's structures boiled down to institutionalise forms of legal counterpoise of power. They contributed to this achievement by the separation of powers, an independent judiciary, legal protection of other principles (and rights) even vis à vis legislation (and the democratic or sovereign principle itself), and by fixing pre-given rules for the exercise of legitimate power in a non-arbitrary way. The last aspect, though,

⁴⁹ I am not submitting here that matching accountability requirements should have no consequences on mutual confrontations or on the nature of a public entity.

⁵⁰ On this concept see *supra* par. 3 and *infra* par. 7.

wouldn't tell the whole story, and if taken alone would be misleading. As the pre-constitutional (XX and XIX) European *Rechtsstaat* (or *Stato di diritto*) proved, power's formal steps can be non-arbitrary, rule-based, hierarchically rigorous, and still an ultimate source, legislation (let alone the whim of the Executive) can monopolize the social available normativity in a legally dominating way. This is why the pre-constitutional model of *Stato di diritto/Rechtsstaat* -albeit 'non arbitrary'- is still far from the English Rule of law rationale⁵¹. Contrariwise, a dual structure of law was factually developed in the English tradition (where common law and judge made law developed): such a dual structure is a reason why the power, from the legal point of view, is neither " unlimited " nor " unbridled "

Seen through its historical trajectories, rooted in the medieval England , the point of the Rule of law is to prevent the law from turning itself into a manageable servant to political monopoly and instrumentalism, a sheer tool of domination. It requires that, besides the laws that bend to the will of governments, 'another' positive law should be available, which is located somehow outside the purview of the (legitimate) government, be it granted by the long standing tradition of the common law or by the creation of a 'constitutional' higher law protection, and so forth.

The Rule of law endows legal order with a peculiar 'duality' that positively protects, since ancient roots, the right (*jurisdictio*) from being overwhelmed by rulers pursuing the ends of government (*gubernaculum*). In all these the ruler's law is constrained by something that is truly law but not his to rule. Such a duality⁵² is appealed to when in the face of the law of the most powerful, the sovereign's *gubernaculum*s, some other legal guarantees, liberties and rights, principles and safeguards are provided elsewhere in the fabric of the existing valid law that are

⁵¹ Theoretical and historical treatment of the issue more at length in G. Palombella, *The Rule of Law as an Institutional Ideal*, cit. at 2.

⁵² It is something clearly missing in Continental Europe (until 20th century's spread of constitutions) from the European *Rechtsstaat* (in its pre-constitutional form), which was, nonetheless, an example of non-arbitrariness as its *form* of rule. At a closer look, though, it lacked any overarching constraint that rendered anything beyond its power: its sovereign ideas of the good could be pursued even cancelling safeguards of liberty and individuals' rights, and that could be unilaterally legislated as *legal*.

hardly overwritten by ordinary legislation. Accordingly, it refers to respect for law in the two sides. It can hold in diverse historical experiences, and diverse domains, be it the judge made law, the common law, the constitutional law principles or, in our centuries extra-state setting, the international *jus cogens*, the ‘*erga omnes*’ rules, the human rights charter of the European Convention on Human Rights, the humanitarian preemptory status of the common art. 3 of 1949 Geneva Conventions, and the like. The latter, again, are held to be out of the ‘legal’ reach of those who, from time to time, within or without the limits of a territorial power, or of a field related global authority (the global functional regimes), intend to play a monopolizing law- productive role. Of course, one of the main mirrors of totalitarian attitudes and orders (not Rule of law-based orders) is the elevation of the goals of the most powerful to the dignity of the unique interest of a community, the transformation of some ethical majoritarian (or forcefully imposed) aspiration into the only “legally” permissible contents, by overwriting individual justice concerns and de-legalizing any other law capable of granting legal standing and protection to the weakest and least powerful.

Once this definition is given (according to which absent such a duality the Rule of law is itself missing), then, on the extended setting beyond the State, the Rule of law has still to do with this duality of law as a scheme aimed at the equilibrium between existing normativities; if upheld, it purports to avoid the absorption of all available law under the purview of one dominating source, thus keeping alive the tension between -as it was said once upon a time- *gubernaculum* and *jurisdictio*. Paying attention to the profile of the Rule of law, as a matter of interactions, means to pay due respect to the legal arguments and legal circumstances that are held by different legal orders coming to terms in a definite case at stake; it means to accept that a cross cutting and shareable legal reasoning takes place without assuming that hierarchical, argumentative stops shall prevent it from being disclosed.

The equilibrium between the parties involved- be they the European Union and the Security Council, the European Convention on Human Rights and Russia or Italy, the WTO and the European Court of Justice- traces back to the original root, as a constant *fil rouge*, from the medieval English traditions to our contemporary constitutions, and has been and can be realised in diverse incarnations, in different times and institutional settings,

placing the “ideal” as the benchmark concerning the quality of legality⁵³.

In the global context, the new globe-encompassing regulative layer of law is firstly a transmission belt of an instrumental efficiency, simply because it is the law issued to pursue their own imperatives by authorities born for the regulation of a specialized realm; and the increasing importance finally assigned to accountability devices is itself meant to avoid that such an exercise of power be either inconsistent with the field or issue related imperatives of each regime (delegated or self created competence limits) or mindless of some basic “moral” constraints or other requisites borrowed from the elsewhere developed administrative law principles (procedural fairness and basic human rights). The unilateral (i.e. following only functional internal objectives) character of the regulations issued by authorities with mainly administrative roles (nonetheless exercising full power over the fate of individuals and peoples) is structural to each regime, it is not contingent. And regimes of norms, mainly defined through primary rules, established treaties, ‘covered agreements’ are considered as defining also the basis on which controversies can be assessed: they make their own rules the one parameter for arbitrating interests of different parties, up to the point that arbitral tribunals are contested if they make ‘external’ references, such as, for example, to international law customary rules⁵⁴.

The Rule of law indeed should work so to enlarge the common ground that constitutes the basis for a full fledged legal reasoning, by sticking to the principle that the available law should not be completely monopolized or produced by one of the parties, and that for examples, otherwise recurrent principles of ‘civilised nations’, general human rights protection, cannot be ignored simply because placed outside the regime that is relevant to the controversy.

⁵³ This definition of an institutional scheme of the kind here suggested does follow a different path from both the thick and the thin conceptions of the Rule of law on which P. Craig, *Formal and Substantive Conceptions of the Rule of law: An Analytical Framework* (1997).

⁵⁴ In cases *Sempra Energy*, *Enron*, *CMS*, ad hoc Committees had to scrutiny arbitral awards based on the relevance of state of necessity as a general principle of international law, to be considered as outside the applicable law of the regime. See A. Singh, *Necessity in Investor State Arbitration: the Sempra Annulment decision*, <http://www.ejiltalk.org/necessity-in-investor-state-arbitration-the-sempra-annulment-decision>; and P. Nair and C. Ludwig, *ICSID Annulment awards: the fourth generation?*, 5 Gl. Arb. Rev. 5 (2010).

The Rule of law, in this sense, not only bears on an internal level, but by institutionally imbuing our notion of a qualified legality, affects our understanding of a legal code, and determines how are we to conceive of the juridical character of the Globe, as made of multiple legalities. The implications bring the subsequent fostering of mutual recognition (and competition) among legalities as peers, and should countervail unifying “ethical” constructions of a material order of the global good i.e. via a simply a priori legal hierarchy.

This shall lead us to manage the issue, mentioned in the above section, that from within each legal order normativity, only a purely external stance can be taken towards any other. It is the question of bridging the gap between the self referred claims of internal legal validity made by opposing interlocutors. It amounts to the choice for the assumption that a normative order is *prima facie* a bearer of a respectable legality, that is tantamount to recognizing that someone else’s order is not a manageable instrument, and is out of the whim of external players. However, this is a potentially productive standpoint. Yet, we need to focus a bit more on this through a closer observation of legal realities.

6. Legal realities, Global tolerance?⁵⁵

“Self observing” specialised regimes do normally interfere inter se as much as with State or regional legal orders. As Koskenniemi recalled, institutional and procedural questions are lurking in cases like Mox Plant- nuclear facility at Sellafield, UK, which involved three different institutional procedures, the Arbitral Tribunal at UN Convention on the Law of the Sea, the procedure under the Convention on Protection of the Marine Environment of the North-East Asiatic Atlantic, and under the European Community and Euratom Treaties within the European Court of Justice⁵⁶.

One of the compensating strategies, as often suggested in the foregoing, has been focussing on the judicial side: judicial work could advance, so to speak, some additional software, one of a

⁵⁵ I am taking the word from elsewhere, echoing the pattern expounded by Joseph Weiler with reference to the European Communities’ “constitutional tolerance”.

⁵⁶ M. Koskenniemi, Introduction, § 13, p. 11 of “Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of IL”, ILC, 58 sess, 2006 (A/61/10, para. 251). [<http://untreaty.un.org/ilc/reports/2006/2006report.htm>].

distinctive kind though: shaped “through cases” but providing for gap bridging criteria and connective texture, not found in the “primary” rules that it is for judges to apply or enforce, often borrowed from general principles of law, or background international law general rules, or even from the most advanced legal tools of national orders⁵⁷. Even Courts indirect “communicative” strategies (circumstances-relative, comity, reciprocity, equivalent protection, margin of appreciation, scope of manoeuvre, subsidiarity, proportionality, and more) might either reflect or produce interfacial rules, purport to develop some shared working idioms helping coexistence and connections in the absence of the “grand box”. And whereas the “system” might be out of sight, some criteria of mutual reference might increase their relevance and role, up to becoming the closest thing to a post- “Babel”⁵⁸ legal understanding. But as remarked in the sect. above, the question was why should judges on a legal plane do so?

When, as in the *Swordfish* case⁵⁹, a supranational entity (the EU) and a national State (Chile) defend their claims, they happen to find their own case as one potentially relevant, or “belonging”, in more than one regulatory regime (or system), each endowed with fundamental “political” objectives, functional imperatives, scientific expertise, principles, rules, and finally, Tribunals: to this extent, the International Convention on the Law of the Sea, and the World Trade Organisation emerge as they are, separate in the space, each with an attracting and unifying force, and both can announce the Rule of law according to their own realm. But their parallel validity

⁵⁷ A thorough examination of the threads of global public law general principles, as well as the discussion of their theoretical basis and promises, has been recently provided by G. della Cananea, *Al di là dei confini statuali. Principi generali del diritto pubblico globale* (2010).

⁵⁸ The metaphor has become a *topos* and is recalled as a rather favourable opportunity both in R. Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 *Int'l & Comp. L. Quart.* 791 (2006) and in S. Cassese, *I Tribunali di Babele* (2009).

⁵⁹ The case: at WTO: Chile- WTO Doc. WT/DS193; at the ITLOS, *Chile v. Eur. Com.* (available at www.un.org/Depts/los/ITLOS/Order1_2001Eng.pdf). For a presentation of the case, recently S. Cassese, *I Tribunali di Babele*, cit. at 58, 31. Cf. also T. Treves, *Fragmentation of International Law: the Judicial Perspective* (2008) and M. Orellana, *The European Union and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea*, available at <http://www.asil.org/insights/insigh60.htm>; M. Orellana, *The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO*, 71 *N. J. Int'l L.* 55 (2002).

has to face a crucial challenge, when from the point of view of the parties involved (Chile, or the EU, in *Swordfish*, or say, Mexico and US, between NAFTA and WTO in *Soft Drinks*⁶⁰), as a matter of Euclidean geometry, the (parallel) non intersection property fails the evidence. The transcendental answer cannot be traced back to a large system, there is no *Grundnorm*, and should it exist, in the Kelsenian mode, it would hardly attach to such an environment.

The alternative route has no clear results, but the first viable tool, in a legal environment, is the choice for the Rule of law, provided that it is taken as more than a system-relative, or jurisdiction related concept. But this is still part of the problem.

As a well known example, the European Court of First Instance appealed to the rule of international law in order to state that the Security Council resolutions (in particular those listing AlQuaeda suspects, and deciding the freezing of their funds, without providing them information, right to defence, and review, and infringing their right to property) are binding not only on UN member states (UN Charter, art.103) but also on the European Community⁶¹, which should be held responsible for compliance. Thus, harmonization between states, Community, and United Nations system is thereby achieved, so that scholars who look at the decision with a view to a more unitary or even “monist” account of international legality believe that the court “is to be congratulated ... for accepting the primacy of the UN system without any general restrictive caveats”⁶². However, it has been likewise and again the appeal to the Rule of law to provide a basis for ECJ to reverse the first decision. What is significant is the connection between the quest

⁶⁰ Cf. Panel Report, *Mexico-Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005).

⁶¹ Cf. *Kadi*. Case T-315/01, *Kadi v. Council and Commission*, 21 September 2005, [2005] ECR II-3649 § 205. In November 2005 *Kadi* brought an appeal against the decision of CFI (decided by ECJ, *Joined Cases C-402/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council & Commission*, 2005 E.C.R. II-3649, Judgment of 3 September 2008).

⁶² The author adds: “ – with one exception only”: the exception refers to *jus cogens* norms. Then: “The Community can live quite well under the regime suggested by the Court, a regime which unambiguously acknowledges the primacy of those parts of the UN legal order which are binding on the Member States of the world organization ” (Ch. Tomuschat, *Case Law: Case T-306/01 (Yusuf Al Barakaat)*, and *Case T-315/01 (Kadi)*, judgments of the Court of First Instance of 21 September 2005, 43 *Common Market Law. Review.*, 543 (2006).

for legality as compliance and the system-relative nature of the Rule of law. The ECJ decision did reason by introducing a new level of discussion: even if there were an hierarchy under international Rule of law, the primacy over Community law “would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part”⁶³. This means, first of all, that the primacy of the international order is never content independent. It coexists with the autonomy of legal orders, each pursuing their own review of their own decisions, even those depending, as in this case, on resolutions issued in the international order.

Of course this relative autonomy holds true even within the EU, where supremacy and direct effect have been established, along the years when the construction of the common order and the subsequent vertical relationships were in progress, and possibly each time a step forward is required to find a stable ground. Even more notably because the ECJ normally adopts of itself an internal monist attitude towards the Member States. Thus, the Italian Constitutional Court wrote in *Frontini v. Ministero delle Finanze*⁶⁴, that the limitations on sovereignty, even within the European Communities, have to be connected with the pursuit of legitimate and valued objectives, and, notably, it must be done so coherently with “fundamental principles” of the member states constitutional orders.

In general, it holds with the famous “Solange ” interplay between legal orders, according to which the German Constitutional Court did subordinate domestic compliance so long as an adequate substantive and procedural system of fundamental rights protection was working in the European legal order⁶⁵. Eventually, a similar attitude concerns other confrontations between legal orders, for example as to “direct effect” of WTO norms within the EU: “It is established case law (from Portugal to FIAMM)” that the WTO norms according to the ECJ are not “parameters” for reviewing the legality of normative acts adopted by Community institutions. In

⁶³ ECJ, *Kadi* at §§ 316 - 317, that also adds that “ the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the Rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement. ”

⁶⁴ Corte Costituzionale, 27 dec. 1973, n.183..

⁶⁵ The two “Solange” decisions are BVerfGE, May 29, 1974, 37, 27; BVerfGE, Oct. 22, 1986, 73, 339 - 388.

other words, WTO norms do not have “direct effect”, i.e. cannot be invoked “by private parties and Member States in proceedings before the EU judges, unless an act of implementation has been adopted”⁶⁶. Reasons for this to be so have been given more than one. In Portugal all started with enhancing a still relevant matter of horizontal symmetry, i.e. that direct effect is not granted by other Members, thereby the condition of “reciprocity” and the functional advantages from homogeneous behaviour are missing. Thus, internally, the margins left for legitimate negotiation, would be cancelled: “Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community’s trading partners”⁶⁷.

Generally, in these and other cases judges are called upon to “vertically define the relationships between diverse legal orders and horizontally integrate diverse specialised regulatory bodies”⁶⁸. Admittedly, on the one hand, some kind of fuller integration might strengthen the coherence of global (administrative) law, as a peculiar legality in itself. But this should not be thought of as an unconditioned attitude or presupposition of ‘monism’. Further relations among that level of legality and States’ legal orders, or others like the EU, and between them and international law, are better drawn along lines of (what I would call) a respectful recognition of autonomy, responding to a logic of confrontation in which transparency, openness and “giving reasons” are required. As I shall comment later, such a general frame would foster a civilised equilibrium, better reflecting the underlying principle of the Rule of law, as I have developed it so far.

Despite judges weaving growing threads of legal reasoning, still they are operating between recognition and the internal point of view. They assess mutual relations from within their own order. Precisely this recurrent judicial attitude toward the “internal”

⁶⁶ A. Tancredi, *The absence of direct effect of WTO law in the EU legal system: a matter of institutional balancing?*, paper at NYU Hauser Global Forum 26 January 2010.

⁶⁷ Judgment of the ECJ 23 November. 1999, Case C-149/96, Portuguese Republic v Council of the European Union, par. 46.

⁶⁸ S. Cassese, *Il diritto globale*, cit. at 9, 138. The Italian Constitutional Court Judge, Cassese, suggests instead that the best direction would be different from the route taken by the ECJ, i.e. it would be that of recognising fuller integration among the relevant orders.

questions of validity, which otherwise is considered to be backward looking, has to play a role as important as the forward looking attitude in “opening” and linking “external” legalities.

In many ways, for the sake of categorizations, that should be called a dualist stance. Diverse strategies of interaction are ways of addressing the fact of plurality. But if we line up the possible ‘relations’ along an axis of “engagement”, we can here stipulatively simplify⁶⁹ that a strict pluralist view might signal the overlapping on the same field of two or more different “systems” controlling it: systems that in a pluralist understanding see the things from their own perspective, and irrespective of one another. Monism might also end up with simply asking for the supremacy of one legal order over the other (conceived as internal part), while dualism as an equilibrium point, entails the recognition of the “others” within the domain that they regulate (e.g. global trade or international human rights law) and normally provides for interfacial norms as to their domestic validity, internal applicability, direct effect, elaborated by courts or included in constitutional or legislative texts. Relations towards external legalities emerge as a matter of legal principle⁷⁰.

⁶⁹ I am not going to assess here the viability of different conceptions of pluralism, I am suggesting an heuristic scheme along which the Rule of law consequence on the “communicative” level can be understood.

⁷⁰ I have mentioned the role of different interfacial rules, *vis à vis* the relevant transformations and the increment of *super partes* norms of relevance to the general international community (in my “The Rule of law, democracy and international law. Learning from the US experience”, *supra* at note 26. No doubt many difficulties can be recognized for ex. as to the status of general international law “codified” through treaties in the absence of incorporation: a crucial matter in dualist systems that do not allow for some supra legislative force either general principles or at least some conventional international law (see instead Art. 25 German Const.; art. 10 and 117 Italian Const. and see also C. Cost. dec. n. 348 and n. 349 2007: according to the Italian Const. Court, art. 117 of the Italian Const. determines for International treaties (or the “adaptation rules” for them) “una maggior forza di resistenza rispetto a leggi ordinarie successive”. Thus they are ranked higher than ordinary legislation, albeit under the Constitution). Remarkable before 1998, the article by R. Higgins, “The Relationship between International and Regional Human Rights Norms and Domestic Law”, in 18 *Common Law Bulletin* (1992), 1268 . On dualism, monism and multilevel constitutionalism (esp. in the EU), I suggest, in an unlimited literature, only some: for ex. I. Pernice, *Multilevel constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, 36 *Common Mkt. L. Rev.* (1999), E. Scoditti, *Articolare le Costituzioni. L’Europa come ordinamento giuridico integrato*, in VV. AA. (ed.), *Materiali per una storia della cultura*

7. The onus of communication and the substantive import of the Rule of law.

A “communicative” attitude should be, theoretically, at odds with exclusion, arbitrariness, and dominance. As Habermas wrote, when committed to ‘comprehension’, the “interpreter cannot understand the semantic content of a text if he is not in a position to present to himself the reasons that the author might have been able to adduce in defence of his utterances under suitable conditions”. But these reasons cannot be taken to be “sound” unless the interpreter takes a “negative or positive position on them”⁷¹. By suspending accordingly the ‘application’ and the acceptance into our context of someone else’s claims of validity and rightness, we simply abstain from crediting our interlocutor with an a-priori superiority, be it based on authority, power, faith, or tradition.

Turned toward the relation among competing legal orders, *mutatis mutandis*, this shall concern for example the justification and limits of some primacy of supranational law, beyond some *prima facie* general viability. However, and conversely, it shall mean as well the unacceptability of, say, domestic impermeable closure, out of unjustifiable attitudes or generally untenable reasons. It also resembles, schematically, some of the stances taken (externally) for example by judges in European context: one can think of the mentioned “Solange” dialogue, between Germany and the ECJ; but also of the change, albeit slow, triggered in the Security Council procedural safeguards concerning its “listing” of individuals allegedly suspected of terrorism: an advancement started by resistance in diverse fora, that the above recalled decision of the ECJ finally confirmed. Communication implies on the other hand more than simple dissent: it imports some degree of clarity in framing a coherent countervailing stance, taking account of both legalities concerned, and of their mutually referred claims. It is based on the premise that parties can both learn from each other, only if the ‘interpreter’ is allowed to make his own claim and his own argument (provided that he has got one capable of meeting the constraints of legal reasoning on the external fora). Learning is

giuridica (2004), E. Cannizzaro, *Il pluralismo dell’ordinamento giuridico europeo e la questione della sovranità*, 31 Quad. Fior. St. Pens. Giur. Mod. 245 (2002).

⁷¹ J. Habermas, *A Theory of Communicative Action* (1987). It is useful to recall that Habermas is thus developing his criticism of Hans Georg Gadamer hermeneutics.

an essential benefit of communication, and if it applies to both parties it grants fairness.

Complex interplays require considered and multiple-steps intercourses. Ongoing step-by-step assessments between Parliaments, legislation and ECtHR have developed in some cases and can be considered⁷². Trenchant solutions are not always the best option by the Courts⁷³.

However, confrontation among legal orders is in a sense a fruit of a general allegiance to the Rule of law. It is relatively open a practice, to which the Rule of law provides a “negative” condition of equality, while it is unable to predetermine the merits. Nonetheless, the ‘external’ or global function of the Rule of law does not work only as communication’s empowerment, with no import whatsoever

⁷² See the article by the ECHR judge, Lech Garlicki, *Cooperation of courts: The role of supranational jurisdictions in Europe*, 6 Int’l J. Const. L. 509 (2008).

⁷³ See the recent *Lautsi* case at the European Court of Human Rights (ECHR, Lautsi v. Italy, no. 30814/06 (Sect. 2) (fr) – (3.11.09). and *Grand Chamber*, 18.3.2011). The Grand Chamber fully reversed the previous decision of the Court concerning the display of a crucifix in public schools. The ECtHR had upheld the right to be free “from” religion (and freedom of education), the Grand Chamber rejected the assumption that such a right’s infringement was occurring. One can say that the problems underlying the case are of even deeper import than the sheer display of the Crucifix can suggest, and both decisions seem to be unsatisfactory, as a matter of reasoning, even to the winning parties. This uneasiness might depend on the very fact that not always a zero-sum game, the unconditional yes/no solution, is the best option. It should be noted, however, that regardless of the answers in the merits, the religious symbol’s display in the public school amounts to a sheer practice in Italy, supported only by a couple of Decrees of the King in the 20s of last century (art.118 of the R.D. n.965, 1924 e art. 19 R. D. n. 1297, 1928) while no contemporary legal frame- be it through legislation or a relevant Constitutional Court’s decision- has been provided in order to elaborate and confirm the point as to the freedom of, and from, religion, a version of domestic elaboration, whether of the publicness of religious sphere or of secularization, in the totally changed social and religious environment of a century later. Regardless of the Grand Chamber verdict being right or wrong, a mature liberal democracy can dialogue with a Court of Human Rights by structuring in its legal order relevant frame provisions, an even sui generic pattern, yet capable of interpreting with reflective equilibrium the elements of its choices, in between traditions, constitution, fidelity to the EHR Convention, that is, proposing a reasoned model of reconciliation of competing needs and rights, instead of leaving this space, so far, empty. The King’s decrees are a sub-legislative source, and like in a surrealist chain, despite their substantial hold on the issue, the Italian Constitutional Court, which is “only” the judge of laws, had to dismiss the question (referred to the Court by an administrative Tribunal, Tar Veneto, Ord. n. 56/ 2004: and see C. Cost. Ord. n. 389, 2004).

as to what the standards themselves shall be about: certainly, on one side (i), in a loose communicative model like the one developed by Habermas himself, constraints, implied by the mutual recognition of peers, the rationality and universalisability of the argumentation, are channeling the process, affecting the viability of respective claims. But on the other side (ii), the standards of such a legal discursive elaboration, that is well known to juridical experience, are themselves provided by the parties, in so far as they are generated from within the Rule of law as an ideal already cherished domestically, i.e. as the interpretive claim from the angle of the legalities involved. The meta-legality (i.e. global) level of the Rule of law does ask for the projection on the global confrontation fora of ‘internally’ generated conceptions of the Rule of law, whose not simply parochial nature has to be defended externally.

In fact, a notion of the Rule of law is to be presupposed in a number of ways. First, it is to be assumed as the fabric itself of the confrontational stage, because the willingness to argue on a legal, not purely power based plane, is by definition implied within (i) above, as a qualitatively different path, alternative to the logic of sheer negotiation and bargaining⁷⁴; second, that is premise to the conceivability and the very possibility of claiming a conception of the general Rule of law notion: no such conception can be claimed ‘globally’ unless it is a legal and cultural benchmark within the horizon of one of the parties, i.e. unless it figures somehow in its normative universe; third, a conception can be proposed by a commitment to consistency, that is, by abandoning any dual standard in the internal/external interplay⁷⁵. The confrontational legal stage is one where the Rule of law needs to be brought by someone. This is because-- like human rights or democracy – it can easily be missing; because it is itself an ideal, one which hints at something other than the sheer respect for rules whatever, other than the existence of any law whatsoever. As I have often reminded here, more than that, it is the normative ideal that in our western civilization has slowly constructed and protected the duality of positive law, that is, the tension between the two sides of *jurisdictio*

⁷⁴ See J. Elster, *Deliberation and Constitution-Making*, in J. Elster (ed.), *Deliberative Democracy* (1998).

⁷⁵ I insisted on the question of internal/external consistency in G. Palombella, *The Rule of law, democracy and international law. Learning from US experience*, 20 *Ratio Juris*, 456 (2007).

and gubernaculum, the right(s) and the good, their balance, and their liberty and non domination import⁷⁶. Needless to say, while compliance with rules is very far from being the whole story, the existence of the Rule of law requires social and institutional constructions, and cannot descend from heaven.

Accordingly, where there is no Rule of law and no commitment to it, it shall not resurface. The dialogue between two legal orders uncommitted, say, to internal democracy, and sharing aberrant uses of instrumentalist law, shall hardly be a confrontation about the role of fundamental rights, democracy and the Rule of law. Contrariwise, for instance, the commitment of the international legal order to human rights or the provisions of the European Convention on Human Rights are a historical and institutional achievement whose normative force affords substantive contents to the global arena. The legal universe obtains thereby a different quality on the international plane, as a matter of tension *vis à vis* the Master-of-Treaties conventional way, the legal force of states' will, the ideas of the good that might be propounded through it. In the interplay between State legal order and external legalities, be they ECHR or the WTO, opposite contentions might arise which are to be measured among the rest on a Rule of law better argument: the resulting elaborations potentially contribute in incrementally forging a sharable thread of common reference⁷⁷.

One can also get beyond, framing further "rules of engagement", suggested as including the international legality, subsidiarity, procedural legitimacy and "outcome legitimacy": this hypothesis⁷⁸ or similar further criteria can be certainly laid down, but cannot be expected in a sheer top down foundationalist way, which is largely out of reach, but yet through different processes, bearing on the available actors that shall perform on the global scene (the new and old concurring legalities, with different publics, social embeddedness, legitimacy, addressees, etc, as described supra; the s. c. trans-judicial dialogue, in the slow resort of courts, tribunals, and

⁷⁶ See supra par 5. and G. Palombella, *Rule of law as an institutional ideal*, cit. at 2.

⁷⁷ I have provided further analyses in G. Palombella, *Global threads: Weaving the Rule of law and the balance of legal software*, cit. at 45 and in G. Palombella, *The Rule of law beyond the State: failures, promises and theory*, cit. at 45..

⁷⁸ M. Kumm, *Constitutional Democracy Encounters International Law: Terms of Engagement*, in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (2007).

other types of judging authorities in the global sphere, to techniques of confrontation).

To this last regard, it is to be noticed at any rate that the often celebrated judicial communication, evidently, is not simply good will, and it seems to be, on the long run, a global crossroad. If global governance develops control through its field-functional separations, if its original sin is ignoring relatedness, then judicial communication is also a compensatory process. It has to cope with an inescapable reality: regimes are “already” related and sometimes even managed so to take account of some relevant relations⁷⁹.

When this can happen, the question, I believe, can be posed precisely in terms of giving ‘voice’ to different self referred elaborations of the ‘good’ in order to make them compatible with the respect of the ‘right’ among all; giving voice to the distinctive depth, social embeddedness, publics, and functional imperatives, the ‘orders’ relate to, and accordingly, granting justified harmonization and prevalence as well as contrasting a straightforward colonization or “homogeneisation” (regardless of the direction it takes: be it of some imperial domestic law over international law, of Security Council over the EU, of the WTO over the ICLOS, or State non-compliance, and so forth). A commitment to the Rule of law non domination import, works toward this direction. While it is mirrored

⁷⁹ M. Koskenniemi, *Global Legal Pluralism: Multiple Regimes and multiple modes of thought*, at <http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d%5B1%5D.pdf> has written, for example: “A better place to start would, therefore, not be their separatedness but their connectedness, not their homogeneity but heterogeneity. Every regime like every State is always already connected with everything around it. We know this from practice. Environmental law may be best supported by market mechanisms through introducing pollution permissions. For the market to fulfil its promise, again, a huge amount of regulation is needed, not merely on conditions of exchange or the terms of ownership or banking. A market with no provision for social or environmental conditions will fail. Human rights may be best advanced by giving up strict human rights criteria and, for example, insisting on early accession of Turkey in the European Union. Critical lawyers have long rehearsed arguments about the porosity of the limit between public and private, political and legal, the national and the international. Extended to a world of multiple regimes and multiple modes of thought such arguments would highlight the contingency of the limits of individual regimes, their dependence on other regimes, and the politics of regime-definition. Here there is room for much ingenuity. A regime of trade may always be re-described as a regime for human rights protection while any human rights regime is always also a regime for allocating resources.”.

internally as the balance between two legal sides of the fabric of law (jurisdiction and *gubernaculum*, the right and the good), externally it emerges not only through the latter, but also by valuing the distinct contribution from different legal orders. The concurrence or intersection between these two overlapping levels shall allow for the pursuit of the Rule of law on the global scene.

This is all the more important, since in the real world of global governance one can find the dominance of power and exclusion as the substantive state of affairs. Rule of law contrasts the abusive elevation of the particular to the universal, and operates towards providing a formal right to make sound arguments legally equal. This has to do with dialogue as much as dissent⁸⁰. Of course, one must know that the Rule of law cannot prevent material power from violation of, say, fundamental rights, but it can prevent this from being thought of as “legal”.

8. Responsibility and the inherent tension between justice and the good.

The last and related point that I wish to make comes now at hand. It has to do with the constructive weaving which might help addressing, without metaphysical *hybris*, the lack of a global law as an overarching and unified architecture. It appears to be a consequence of the RoL on this meta-level, to indirectly activate a process that mimics, in the background, the possibility of the (inevitably obsolescent) “responsibility” dimension I sketched earlier (§ II). By allowing for a juridical interlinking on a content dependent basis among “legalities” with heterogeneous reach, extension, nature, and depth, the RoL can objectively trigger a re-circulation of needs, ends and claims that surge elsewhere. Being allowed to a forum should shape tools for ideally harboring as wide legal claims and ends as possible, i.e. pointing to the “regulative” idea of reflecting the “whole” (as if it could really “exist”). Moreover, as said, the legal treatment of such interconnectedness, as far as it is concerned, shifts the actors’ medium of confrontation from a power-

⁸⁰ Behind some normative support for “pluralism” one can find the support for dissent. Efforts were done in trying to build channels of convergence without hiding power conflict or dissent. See for ex. S. M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 *Georgetown L. J.* 2243 (1993).

based one, in the realm of autonomous contracting, bargaining and negotiations, to one based on public arguments and universalisable legal reasoning, that is, not only a constraining, but also a non- self referential channel. From a legal point of view this can be thought of as working also indirectly, and admittedly through deploying and showing the civilizing role of hypocrisy⁸¹.

All the more so because the idea of general ends and responsibility for the whole on a legal plane, is hard to be credibly advanced as a substantive pretension that can be made in itself, it doesn't apply to any of the participants, and cannot reasonably be the claim of anyone in particular, although a *prima facie* common- to- all concern must be credited as an essential *raison d'être* of, say, supranational institutions and even of global regimes⁸². Although the latter is not in question of itself, in a Rule of law vein it is to be avoided precisely the elevation of one to the role of representing the whole beyond- legal- scrutiny. Thus the Rule of law perspective recognizes to legalities their discrete role in composing the general puzzle, contributing in the overall scene. The responsibility for the whole is, firstly, a prospective horizon: against its background are to be considered of value the multiple processes of confrontation in an unlimited run. It is a potential inherent in the objectivity of these dynamics in their entirety. Secondly, as recalled above, it is a quality of the process itself, as a matter of framing arguments in a required universalisable guise.

Thus, one does not have to credit the Olympic rationality ⁸³ of a full scale global control of law's general ends, that would easily risk to legitimate one-sidedness. It is instead the case of paving the way to an incremental (step by step) reasoned conjunction of operating rationalities and normativities, which often are bound to interact and overlap.

⁸¹ J. Elster, *Deliberation and Constitution-Making*, cit. at 74, 97.

⁸² It is in fact not a matter of dissolving the institutional division of labour on the globe. But even global regimes work on a fragment of real life, by focusing on functional imperatives and discrete areas like trade, security, environment and climate, energy, and so forth. The question has indeed to do with the recognisability and justifiability of the goals that are to prevail, of the means preferred, of the respect for the voice of those affected, of the balance with countervailing interests, rights, needs, of the overall results, all of which can benefit from letting others and other normative orders involved to have a say.

⁸³ H. A. Simon, *Reason in Human Affairs* (1983).

By operating in the relation between them, the Rule of law works, as in the foregoing, on non domination and balance. Thus it deals more with “equilibrium” along the coordinates of the right and the good, than by upholding a clear cut definition of the content of justice and of well being. One is brought to the corresponding scheme as reflected in the words of John Rawls as much as in those of Immanuel Kant, for example: the two notions can be distinguished, and the idea of right has a priority function over the contending conceptions of the good⁸⁴. The “right” concerns the status of our social coexistence according to freedom, i.e. as free and equal individuals. In principle it should be preserved in any cases, against any conception of the common good that would undermine it. The “transcendental” view of rational law is deemed (with Kant) as granting such conditions, regardless of particular realms of action and ethical convictions. All the more so, in the global environment, where legal imperatives, generated at different levels, each appeal, ultimately, to an internal conception of the good, say, to domestic social welfare, to democratic self determination, to a religious faith, to the regulative necessities of free trade or to the protection of environment: each of them carrying a full load of ethical and political choices as to our well being. Needless to say, each of them potentially or actually interferes with one another (the appeal to democracy might prevent from respecting human rights or humanitarian laws, managing global environmental priorities does interfere with some people’s welfare, for example). Should the law be turned to serving the (one) ultimately unique “good”, this would certainly throw us into a one dimensional universe, where such a full monopolisation would have overcome any legal standing, albeit not any concern, for the “right”⁸⁵. The Rule of law point is here to prevent the silencing of the opposite sources of validity and meaning.

The most impressive shortcoming of globalisation is the impossibility of preventing interference: the latter, even unintended, can be arbitrary, and the first concern therefore to start with has to

⁸⁴ See J. Rawls, *A Theory of Justice*. (1971); and the further specification in J. Rawls, *Political Liberalism* (1993), at 209. For I. Kant, *Critique of Practical Reason*, (1788) and I. Kant, *On the Common Saying: “That may be correct in theory, but it is of no use in practice”* (1793).

⁸⁵ Apparently, this is also a political problem. One can say that it is the contribution from the Rule of law to prevent such political shortcomings.

relate to avoiding injustice from one-sidedness and domination. To this extent, as much as one can say ⁸⁶, that we are not envisaging any “perfect justice”, we are, in the background, aware that there are comprehensive state of affairs related to people lives and ‘social realizations’ , “wholes” beyond fragments; that our operating standard can be a civilized accountability, while our regulative ideal should hopefully be responsibility. This paper should not have a further conclusion than that: it has mainly tried to describe and interpret some deep albeit general directions taken by a complex reality, and has given more than one suggestions in normative terms. Whether we shall build on those interpretations shall depend, again, on the evolution of a fast running global world.

⁸⁶ With A. Sen, *The Idea of Justice* (2009). Tellingly, and beyond the scope of this paper, Sen not only elaborates from injustice but develops the quality of ‘responsibility’ as inherent not to the pursuit of some specific ‘just’ result, but to the concern for avoiding injustice, in the overall state of affairs, in the “outcomes in their comprehensive form” considered by measuring “social realizations”. This belongs in Sen’s critique of utilitarian ethics, even updated to taking account of utilities, welfare and sum ranking.

THE QUALITY OF REGULATION.
THE MYTH AND REALITY OF GOOD REGULATION TOOLS*

Nicoletta Rangone**

Abstract

The objective of this paper is to introduce the main tools used to manage the flow and the stock of regulation with special attention to those based on economic analysis, their advantages and weak points, the consequences of their use in public sector organization, procedures and, in general, in the relationship between regulators and their targets. Discussion is also devoted to conditions for improving their efficacy, since the tools need to be used selectively, and require an agenda-setting phase as well as periodic retrospective analysis of existing rules as used in the whole regulation life cycle. Therefore, it is crucial to understand what these good regulation tools are really intended for, and to avoid their over or under-evaluation, both of which could be influential in reforms made partially or in name only. At the same time, their limits could incentivize the search for innovative solutions, such as a special attention to the real needs and behaviour of people in the design of new regulation, as well as in its measurement and reform.

TABLE OF CONTENTS

1. Introduction.....	93
2. The growing interest in good regulation.....	95
3. What does good regulation mean, and why are bad regulations so common?.....	97
4. Which regulation is concerned with good regulation tools?...	99
5. The life cycle of regulation and tools to improve flow and stock of regulation.....	100

* This paper is a revised version of my contribution to the volume M. De Benedetto, M. Martelli and N. Rangone, *La qualità delle regole*, Il Mulino, 2011.

** Associate Professor, Politecnico of Milan.

6. Simplification of burdensome paperwork requirements.....	104
7. Impact assessment analysis.....	108
8. The recognition of good quality regulation as an autonomous public interest and its consequences.....	113
9. Conditions to improve the efficacy of good regulation tools	115
10. Conclusions.....	118

1. Introduction

The growing interest in good regulation has focused attention on the tools intended to reach this aim, considered as strategic step forward in growth and competitiveness of market economy countries. Nonetheless, it cannot be forgotten that good quality regulation is an essential element of the rule of law. Firstly, because it allows for widespread participation in public procedural decision-making. Secondly, it imposes a duty to give reasons for preferred policy options. And lastly, it helps end-users' comprehensibility and allows public targets to be met without unjustified costs for regulates and regulators. For these reasons, good quality regulation should be the object of constant attention from regulators and policy makers, and should not take on importance in economic crises alone.

There are different kinds of good quality regulation tools (as summarized in paragraph 5), which concern both the content of regulation (it must be necessary, proportional and consistent) and its form (a rule should be well written and accessible to end users). These two aspects concern the stock and the flow of regulation.

Before going into the merits of these tools, it should be stressed that their utility should not be over-emphasised. The first thing to be said is that tools used to improve the quality of regulation evolve over time and partially differ from one country to another. For instance, the exclusive attention to formal drafting and to "evaluation legislative" in the administrative law countries has been accompanied in recent times by an assessment of the impact of new regulations; moreover, in countries characterized by a great tradition in economic analysis these assessments have recently included a specific risk and competition assessment. Secondly, no individual tool can bring about the final objective of

good quality regulation on its own. Finally, they are not capable of solving the structural problems presented by a multiplicity of regulatory systems (i.e., the proliferation of regulatory structures, fragmentation and overlapping of responsibilities).

With such caveats in mind, it is crucial to understand what these good regulation tools are really intended for. In general, they are not decision-making methods, nor are they intended to substitute political choice with the results of algorithms or formulas. On the contrary, they can be used to raise the right questions to regulators: is the new regulation necessary? Is it proportional to its aim? Is it going to generate unintended consequences? Is it clear, consistent, comprehensible and accessible to users? Is the existing regulation still justified and needed for the future? Among the available good regulation tools, those based on economic analysis (such as Impact Assessment-IA and the Standard Cost Model-SCM) provide evidence of advantages and disadvantages of existing or new regulation while also allowing evidence-based decisions (paragraph 6 and 7). At the same time, the experiences and awareness of their limitations and incorrect uses can lead to these tools being used in response to a legal obligation in name only. As a consequence of these under-evaluations, time consuming and costly methods are used to no advantage.

The paper is organized as follows, paragraphs 1-3 provide some evidence about the convergence on the need for and the meaning of good regulation, including the recent importance given to citizens and consumers as end-users of regulation. Paragraphs 4 and 5 evidence that only rules (considered in this context as a subset of the regulation) can be measured by good regulation tools based on economic analysis and the importance of the maintenance of such rules in all their life-cycle. Paragraphs 6 and 7 analyse in depth two good regulation tools based on economic analysis, which are widely used around the world and whose introduction have had the most relevant consequences on rulemaking procedures and rules which were eventually adopted. Paragraph 8 suggests that good quality regulation should be viewed as a new public interest which (together with other components) allows specific public interest met by regulations to be attained. Paragraphs 9 and 10 suggest other conditions to improve the efficacy of good quality regulation tools based on

economic analysis and that they may evolve to better achieve its objectives (to improve residuality, proportionality, consistency and accessibility of regulation) giving more attention to the needs and behaviour of real people. Some of the possible directions for these changes are developed in the concluding paragraph.

2. The growing interest in good regulation

In general, the intention of the tools to improve the flow and the stock of regulation is to achieve high quality, with the ultimate objective of improving competitiveness, consumer welfare and so called *securité juridique*. Indeed, regulatory uncertainty, which usually concerns the unpredictability of an organization's regulatory environment (connected to the uncertainty about the basic direction of the regulation, the measures needed to put it into action, the implementation process itself, and the interdependence between regulations), is increased by extremely complex and conflicting regulations or by regulations which are outmoded or ineffective.

The interest in good regulation is not new. This is an essential element of the rule of law [U. Karpen, *Law Drafting and the Legislative training course for law drafters*, L. Mader and C. Moll (ed.), *The Learning Legislator*, Nomos, 2006, 9] and is the "basis for liberty and prosperity" [Statute of International Association of Legislation]. As early as 1748, de Montesquieu declared that "les lois inutiles affaiblissent les lois nécessaires" [*De l'esprit des lois*, quoted by the French Conseil d'Etat in 2006, reaffirming his position against "la complexité croissante des normes qui menace l'état du droit"]. Indeed, a place governed through few but effective laws was considered in 1516 to be no more than an imaginary island country: Utopia, by Thomas Moore.

In the 1990s, good quality regulation was confirmed as one of the main objectives in E.U. countries due to the choice for a market economy, which led to liberalisation and simplification policies, even if different results were achieved. In the new century, this convergence has been reaffirmed thanks to a common vision of European and international institutions concerning the crucial role played by the regulatory framework in competitiveness, growth and employment performance of countries. For instance, according to the World Economic Forum,

the first pillar of competitiveness is the “legal and administrative framework within which individuals, firms, and governments interact to generate wealth” [*The Global Competitiveness Report 2011-2012*]. The same position can be found in the European Union, the World Bank, and OECD documents [European Commission, *White Paper on European Governance*, COM(2001) 428 fin.; Mandelkern Group on Better Regulation *final report* 2001; World Bank, *Easy of doing business* reports; OECD, *Reference Checklist for Regulatory Decision-Making* 1995, OECD, *Guiding Principles for Regulatory Quality and Performance* 2005, draft OECD, *Recommendation on Regulatory Policy and Governance* 2011].

Further, in the current economic crisis, the link between good quality regulation and competitiveness explains the reason for the renewed commitment to regulatory reform in most OECD countries, both at national and local level. For example, the impressive widespread adoption of the Standard Cost Model has been due to its success at freeing up those resources of citizens and firms which are devoted to the administrative burden, and which were being monetized using a quite simple method.

So, although we have seen that it is not new, calls for regulatory reform have often been an answer in times of economic distress. The Great Depression in the U.S. “led to an enormous expansion in the scope of public utility and common carrier regulation, and the “stagflation” (...) of the 1970s set the stage for the deregulation movement” [R.A. Posner, *Economic Analysis of Law*, Aspen Publishers, 2003, 380]. Similarly, Europe turned to better regulation policies in 2000 to remedy its sluggish economy [B.J. Wiener, *Better Regulation in Europe*, Duke Law School, Research Paper n. 130, 2006, 9-10]. At present, the European Commission points out that “the crisis has highlighted the need to address incomplete, ineffective, and underperforming regulatory measures and, in many cases, to do so urgently” [*Smart Regulation in the European Union*, COM(2010) 543 final]. In the U.S. too one of the current presidential priorities is to design regulations in a way that promotes the continuing recovery.

Whereas traditionally the main objective in regulatory reform was to improve the environment for firms, today equal importance is given to all the end users of regulation: citizens, employees, consumers, and businesses. In other words, the link between good quality regulation and competitiveness does not

mean that the main focus of regulatory reforms is only on business, as in the ever relevant warning of Francesco Carnelutti: “il diritto o è per la persona o non è” [*Certezza, autonomia, libertà, diritto*, «Il diritto dell’economia», 1956, 1185].

At European level, this evolution has led, for instance, to a revision of consultation procedures to improve citizen participation not only in the adoption, but even in the implementation and revision of rules (i.e., at all stages of the regulatory life cycle) [European Commission, *Smart Regulation in the European Union*, COM(2010)543 def.]. Recently, the implementation of the Smart Regulation agenda has been presented as one of the strategies for sustainable and inclusive growth (Europe 2020, COM(2010) 2020). At national level, all countries engaged in the reduction of administrative burdens for business through the SCM are now extending those activities to citizens [European Public Administration Network, *Learning Team Administrative Burdens for Citizens. Report on National Approaches*, 2009].

A comparable sensitivity to all end users seems to have emerged in the U.S., exemplified by the tendency (or at least the desire) to use Regulatory Impact Analysis “as a pragmatic tool for cataloguing, assessing, reassessing, and publicizing the human consequences of regulation”, and by the focus on how people really behave in order to improve the efficacy of regulations and by new emphasis on transparency and open government [C.R. Sunstein, *Humanizing Cost-Benefit Analysis*, *Administrative Law Review* Conference, February 17, 2010]. This is connected to an innovative, new approach to regulation, which “must protect public health, welfare, safety, and (...) environment while promoting economic growth, innovation, competitiveness, and job creation” [Executive Order 13563, January 18, 2011].

3. What does good regulation mean, and why are bad regulations so common?

The above-mentioned substantial convergence on the need for good regulation, also characterizes the meaning of good regulation tools to perform better regulation.

Therefore, there are many definitions of good (or better) regulation [R. Baldwin, M. Cave and M. Lodge, *Understanding*

Regulation. Theory, Strategy and Practice, Oxford University Press, 2011, 25 ss.]. For instance, the OECD stressed that “better regulation means to adopt regulations that meet concrete quality standards, avoids unnecessary regulatory burdens and effectively meet clear objectives” [*Overcoming Barriers to Administrative Simplification Strategies: Guidance for Policy Makers*, 2009, 44]. The European Commission affirmed that better regulation involves a “more effective, efficient and transparent” regulatory system [communication, *Better Regulation for Growth and Jobs in the European Union*, COM(2005)97 def.]. Moreover, the regulatory system “must ensure that regulations are accessible, consistent, written in plain language, and easy to understand”, as stressed by the U.S. executive order adopted in January 2011.

The numerous definitions of good regulation can be summarized as follows: the regulation must be necessary (i.e., targeted), proportional (imposing only burdens proportionate to its aim), consistent, well written and accessible to end users. In short, good regulation allows public targets to be met without unjustified costs for enterprises and citizens and it concerns both the content of regulation and its form [Italian Council of State, 2004].

There are many advantages which spring from improving regulation, such as the reduction of red tape, i.e. the unnecessary regulatory burden [OECD, *From red tape to smart tape*, 2003]: *i*) innovation can be encouraged through efficiency gains, *ii*) entrepreneurship can be favoured by fewer administrative burdens, releasing resources otherwise devoted to red tape, and *iii*) governments can gain constituency by reducing administrative costs to businesses and citizens without consuming large resources [OECD, *Overcoming Barriers to Administrative Simplification Strategies. Guidance for Policy Makers*, 2009, 7]. Even if the first advantage remains unproven, these arguments might be of interest to all regulators, not least because they will make an undeniable impact. Therefore, if good regulation has a crucial role in growth and employment performance, why are poor regulations so universal?

In general, regulators tend not to consider (or even know) the costs of regulations. Indeed, they use regulation as an easy answer to problems (behaviour which increases regulatory inflation) [T. Ascarelli, *Certezza del diritto e autonomia delle parti nella*

realtà giuridica, «Il diritto dell'economia», 1956, 1238]. At the same time, administrative formalities benefit many parties, such as consultants (who sell services to help businesses and citizens to fulfil regulations) and incumbent firms (who want to reduce market entry). Moreover, the most common cause of poor regulation is the growth of government and the lack of coordination across multiple centres of regulatory production [G. Corso, *Perché la "complicazione"?*, «Nuove autonomie», n. 3-4, 325; R. Rose (ed.), *Challenge to Governance. Studies in Overloaded Politics*, Sage publications, 1980, 17 ss.], which leads to excessive and overlapping demands on end users [OECD, *Reviews of Regulatory Reform: Italy*, 2009, 288].

These problems are exceedingly difficult to address in a sustainable way and they require much more than marginal changes to a few procedures. However, a committed use of good regulation tools could help to tease out interests, impose the right incentives and help to limit unintended consequences of rules and outmoded regulations. It obviously cannot solve the structural problems, such as those concerning the proliferation of regulatory structures and the fragmentation of responsibilities.

4. Which regulation is concerned with good regulation tools?

Before conducting an in-depth analysis of some good regulation tools and their implications from an organizational and procedural point of view, it is important to define those regulations considered relevant to good regulation tools.

There is no generally accepted definition of regulation applicable to the very different regulatory systems around the world, and scholars have formulated different theories, which will not be dealt with in this paper. In fact, a broad definition of regulation seems the most coherent with the objective of good regulation tools, which is to improve the quality of all requirements set by public powers. To this end, the OECD definition is useful, which considers regulation to be "the diverse set of instruments by which governments set requirements on enterprises and citizens". Accordingly, "regulations include laws, formal and informal orders, and subordinate rules issued by all levels of government, and rules issued by non-governmental or

self-regulatory bodies to whom governments have delegated regulatory powers” [OECD, *Report on Regulatory Reform*, 1997].

Regulations which are general (because they are addressed to an undetermined number of subjects) must then be divided into rules and principles. In fact, a more specific analysis must distinguish between those regulations and the rules which might modify the end-users’ activity, production or organization. In other words, the core element of rules is the content which directly affects the end users (differently from principles, such as free competition, which must be applied by rules) [R. Dworkin, *Taking rights seriously*, Harvard University Press, 1977]. A rule is, for instance, the provision of competition “for” the markets in local public services (meaning competitive bidding). This concept of a rule is close to that of regulation as “the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes which may involve a mechanism of standard-setting, information gathering and behaviour modification” [J. Black, *Critical Reflection on regulation*, Center for Analysis of Risk and Regulation. LSE, 2002, 20].

Only rules can be measured through Impact Assessment (such rules are the so-called policy options whose impacts are compared through IA) and the Standard Cost Model method (which measures the costs of the time needed to comply with a rule which imposes an information obligation, such as collection of relevant data and reporting to the designated authority). This approach has concrete consequences. For instance, Italian Impact Assessment reports often confuse the alternative policy options with the sources of laws (such as legislative decree or governmental regulations) so that they conclude that there are no alternatives to laws if a European directive is to be implemented.

5. The life cycle of regulation and tools to improve flow and stock of regulation

The core elements which, together, make up good regulation (necessity, proportionality, consistency, and plain language drafting) seem to be universally recognised in OECD countries, thanks to EU liberalisation and better regulation policies (adopted respectively since 1990 and 2002) as well as the OECD

recommendation to regulators and its reports on regulatory reforms at national level.

Moreover, OECD countries agree on the need to perform a reduction of the regulation stock and to improve the flow of regulation at the same time. In fact, the vast majority of those governments have experimented for almost a decade with regulatory policy mixes that include simplification, reduction of administrative burdens, and impact assessment.

This is related to an approach to regulation as a cycle, in which “principles of good regulation are applied in initial decisions on new regulations and in continuing reviews throughout the life of the regulation” [OECD, *The OECD Report on Regulatory Reform: Synthesis*, 1997, 29-30].

This approach is one of the lessons of implementation research (begun in 1970 with the famous study by Pressman and Wildavsky: “Implementation. How Great Expectations in Washington are Dashed in Oakland”) which eliminated the line of demarcation between adoption-implementation of public policies. At present, it is generally recognised that regulation must be managed throughout its whole life cycle: from the design of a piece of legislation, to implementation, enforcement, evaluation and revision. The attention to the regulation life cycle (derived from the public policy life cycle) marks the switch from better regulation to smart regulation at European level: smart regulation policy attaches great importance not only to the flow of new regulation, but even to the maintenance of the stock [European Commission, *Smart regulation in Europe*, 2010]. At the same time, in the U.S., the E.O. *Improving Regulation and Regulatory Review* (2011) specified the previous orders requiring each federal agency to submit to the Office of Information and Regulatory Affairs a plan concerning the periodic review of its existing significant regulations “to determine whether any such regulations should be modified, streamlined, expanded, or repealed”.

Although subject to change over time, the core elements for better regulation to improve design of new regulations (the flow) are currently the following:

- *Impact assessment* analysis (or Regulatory Impact Assessment) provides evidence for decision-makers on the advantages and disadvantages of feasible policy options by assessing their potential economic, social and environmental

impacts, including a specific assessment of administrative burdens and of competition (this topic will be dealt with in paragraph 7). This analysis has also to provide a broad outline of monitoring and possible *ex post* evaluation (for instance, the project of regulation can identify how and when costs will be checked and by whom).

- *Plain language drafting* (or the *legistique formelle*) ensures clear, consistent and accessible regulation. For instance, it imposes the use of unambiguous language and of explicit rather than implicit abrogation (e.g. “all the rules inconsistent with the new regulation are repealed”); or that any rules adopted by reference should be specified.

Impact assessment and drafting are specific tools which address the two aspects of good regulation: the formal and the substantive ones.

The target to simplify and modernize existing regulations (the stock) could be attained through:

- *Monitoring* activity, which provides information about whether rules are achieving their objectives and compliance is attained, and *ex post evaluation* (also called *ex post* impact assessment analysis), which examines the real impact of a rule. In fact, the impact of regulations should only be estimated in advance and the final effect depends on how a rule will be implemented, enforced, interpreted and sanctioned. These analyses can lead to a *revision* of regulation which is no longer necessary or proportional.

- *Administrative burden reduction* measured through the Standard Cost Model which is intended to quantify the cost of the time needed to accomplish an information obligation by the end-users of a specific regulation (this method will be addressed again in paragraph 6).

- The *Guillotine system* to reduce regulation aims at taking an inventory of the whole regulatory stock and eliminating unneeded regulations and simplifying remaining regulations (introduced in Italy in 2005 for repealing State legislation). It implies a variously sophisticated analysis of the stock through review criteria, such as: legality; necessity; efficiency; market-friendliness; and administrative cost recovery. In the first step of the Guillotine system the government counts all regulations affecting end users which are no longer justified or needed for the

future (each rule is reviewed against simple filters in a checklist format: Is it legal? Is it needed? Is it business/consumer friendly?). Then all regulations that are not needed are eliminated. Finally, all remaining regulations must be organized into codes and simplified. In fact, the Guillotine is almost never the end of reform (because the reduction of regulation is not an objective in itself) and theoretically prepares the ground for the normal use of good regulation tools in the regulation life cycle. On the other hand, there is the *sunset clause*, which introduces a future expiration date for a regulation in the text of the regulation itself [UK Department for Business, Innovation and Skills, *Sunsettings Regulations: Guidance*, 2011].

- *Codification* is usually considered as intending to repeal regulations and replacing them with a single new act, the code, which may unify existing acts (so called *à droit constant*, as in the France tradition) or introduce simplifications and other substantive changes. Common law states have put in motion a different process to codify, which is intended to unite up to date laws and regulations in a single act, without replacing the original texts (for instance, the U.S. Code and the UK consolidation statutes) [B.G. Mattarella, *La trappola delle leggi. Molte, oscure, complicate*, Il Mulino, 2011, p. 151 ss.].

- *Administrative simplification* is a very common tool to reduce red tape which imposes unjustified burdens on citizens, businesses and public administrations. It can be realized through “horizontal” measures (such as one-stop shops, or the replacement of authorizations with simple notifications to the public administration), or a procedure-by-procedure simplification (for instance, streamlining or reducing the necessary steps or imposing a time limit on the provision of an answer). The analytical second approach (suggested by the European directive on services in the internal market) is the one with the greatest chance of success. Administrative simplification could be one of the feasible policy options suggested in the impact assessment process, or the reform adopted after an administrative burden measurement through the SCM. The coexistence of simplification which has been approved after a costly and time consuming assessment alongside proposals which have been formulated without any in-depth analysis suggests the need for a ‘reform agenda’ to ensure that the

regulation submitted to the first or the second method are chosen consciously (as stressed in paragraph 9).

Paragraphs 6 and 7 return to the tools designed to improve the flow and stock based on economic analysis, ones which are widely used around the world, and whose introduction could have the most relevant consequences for the organization of regulators and their decision making procedures.

6. Simplification of burdensome paperwork requirements

One of the core elements which makes up good regulation is proportionality: public targets must be met without unjustified costs for end users. This is the reason why good regulation involves cutting red tape originating from excessive regulation [OECD 2009]. Therefore, burdensome paperwork requirements which impose large costs on the private and public sectors, have unintended adverse effects, and reduce compliance [OIRA, *Disclosure and Simplification as Regulatory Tools*, June 18, 2010].

In the US, the Paperwork Reduction Act 1980 requires federal agencies to justify a request for information, certifying that it is necessary for the proper performance of agency functions, it avoids unnecessary duplication, it uses plain, coherent, and unambiguous terminology, the respondents are informed of the reason why the information is being collected, its use, its burden estimation (and the request has been developed by an office which has planned and allocated resources for the efficient and effective management and use of the information to be collected). In line with these provisions, in 2010 an Office of Information and Regulatory Affairs guideline asked agencies “to reduce such requirements by eliminating unnecessary, ambiguous, excessive, and redundant questions; by permitting electronic filing (including electronic signatures); by allowing “prepopulation” of forms, where appropriate and feasible by sharing information across offices or agencies; and by promoting administrative simplification by coordinating and reducing requirements from multiple offices and agencies” [*Disclosure and Simplification as Regulatory Tools*, June 18, 2010].

The above mentioned simplifications are suggested by the Standard Cost Model (SCM) mechanism as tools to reduce administrative burdens (the information obligations that would

not be collected by business or citizens without legal requirements) which have been previously monetized multiplying the time needed to reply to an information obligation by the hourly cost of people performing administrative activities.

Initially developed in the Netherlands, the SCM is at present the most widely applied methodology for measuring administrative costs in OECD countries. At European and national levels multiyear administrative burden measurement and reduction programmes to reduce costs and burdens by at least 25% by 2012 have been established [2007 Spring European Council]. The EU-SCM method was introduced, in 2006, then tested through the “Pilot project on Administrative burdens” and the “Action Programme”, and is now included in appendix X of the 2009 *Impact Assessment Guidelines*. The European Commission has completed a “Fast Track Action” of measurements (outsourced to an external consultant) of 42 EC regulations concerning 13 priority areas (company law, pharmaceutical legislation, working environment/employment relations, tax law-VAT, statistics, agriculture and agricultural subsidies, food safety, transport, fisheries, financial services, environment, cohesion policy, public procurement). Since 2009, the EC has extended the measurement to numerous other European regulations and is now adopting measures to simplify regulations (COM(2009) 544 final).

In Italy, the administrative burden measurement and reduction programme (the so called *taglia-oneri*) was introduced by the law 133/2008, aiming at reducing the same above mentioned percentage of administrative costs coming from Italian regulation (adopted at national, regional or local level), which the European Commission estimated burdened Italian enterprises by an amount equalling 4.6% of Gross Domestic Product [OECD, *Modernising the Public Administration. A Study on Italy*, 2010]. Many Italian Regions are currently testing this method, which is now mandatory for Regions and independent regulators (law 106/2011).

Except for in a few exceptional national and European cases, measurement is based on the following steps.

The “mapping” activity must identify the information obligation (IO), which could be, for instance, applications for authorization or subsidies, notification of activities, cooperating with audits/inspections, statutory labelling for the sake of third

parties, or providing statutory information for third parties [SCM Networks, *International Standard Cost Model Manual*, 2005]. This activity consists in the identification of the rules, inside the regulations concerned, which impose an information obligation and its classification by origin (international, European, national, regional or local level). Then the required actions to fulfil the IO must be identified (such as familiarization with the IO; collection of relevant data; internal/external meetings; storage of the information obligation with a view to subsequent production in connection with an inspection; reporting/submitting information to the relevant authority) [SCM Networks, *International Standard Cost Model Manual*]. The analysis of relevant regulation may also help to identify the frequency of required actions (for instance, if the registration has to be produced and sent every four months, the annual frequency is three).

Then, the analysis must assess the performance of a “normally efficient entity”, which means the time (and the subsequent cost) needed by a “normally efficient business” in order to carry out all the administrative activities associated with the considered IOs. In fact, according to International SCM Manual, the goal is for the businesses to handle their administrative tasks “neither better nor worse than may be reasonably expected”. This relevant data could be gathered by telephone and face-to-face interviews, consultation with experts, use of existing data or a mix of these techniques (as suggested by the international experience).

The estimation of the total administrative burden is performed through a basic formula for calculating administrative burden for each IO: $\text{Price} = \text{Tariff} \times \text{Time}$. $Q = \text{Number of business} \times \text{Frequency}$. $\text{Tot P} \times Q$.

According to this basic formula (adopted by all the countries engaged in administrative cost measurement) the price represents the cost which the firms incur in performing the administrative activities. Specifically, it represents the hourly rate of the person who deals with the IO (internal cost), which corresponds to the wage costs plus overheads for administrative activities done internally (such as expenses for premises, telephone, electricity, IT equipment). When external advisors deal with outsourced tasks for the businesses (external costs), the cost corresponds to the hourly cost for external service providers.

These hourly prices must be multiplied by the time required to carry out the administrative activity, measured in hours. Then, the number of regulates affected must be multiplied by the frequency within which each administrative activity must be completed each year.

As a tool it targets *ex post* simplification and is a specific impact that must be analysed in *ex ante* impact assessments (as in EU and in Italy).

The weak points of the SCM are directly linked to its limited scope and the pragmatic methodological approach of the analysis.

It is an incomplete instrument, because it ignores other categories of compliance costs and the benefit of the regulation measured (therefore, the subsequent simplification activity should take into account the risk of reducing public guarantees). Moreover, SCM (as well as IA) does not identify the cumulative impact of regulation. Indeed, the method is based on some assumptions: a representative sample is used to collect information about all businesses involved in the IO, data are collected on a selected normally efficient business, and it assumes the full compliance to regulation. Further, the method only produces partial information when regulations come from different levels of government (as is the normal situation in Italy). Finally, the stakeholders may not receive real benefits from the reforms when administrative obligations are accomplished through intermediaries and employer organizations (as is often the case): they will gain from the reduction of administrative burdens without necessarily reversing those gains to end users.

These considerations do not override the objective advantages of the SCM method, principally connected to its flexibility and simple application, which consequently generate limited procedural costs. It can therefore be used to measure the whole of the existing regulation (as has already been implemented in some countries) and allows for international comparison and benchmarking. Moreover, there is no doubt that the reason for its widespread use is its ability to deliver results (in terms of money saved) which policy makers can easily communicate to the public.

The above mentioned limits might and have already stimulated evolution and variants of the traditional method. For instance, Denmark is experimenting with an SCM application

which does not start from existing rules, but from an end user investigation of real needs and expectations regarding simplification [MindLab, *The Burden-Hunter Technique. A User-centric Approach to Cutting Red Tape*, Beskæftigelses Ministeriet, Skatteministeriet, Økonomi- og Erhvervsministeriet, Copenhagen, 2008]. The current Dutch measurement concerns administrative costs and the compliance cost of regulation. France simultaneously analyses costs of information obligation, the costs of “administrative delays” (i.e. expenses and loss of income generated while companies must wait for the mandatory decision by the competent administration, and the internal costs to the regulators from managing each rule. Another variant could lead to the monitoring of the flow of information coming from the regulated to regulators, in a way that permits detection of effective compliance including over-compliance due to error (as tested, for instance, in the Italian region of Lombardy and in some Italian governmental administrative burden measurement to integrate data obtained through the traditional SCM). At European level the “traditional” approach (based on the evaluation of individual initiatives through a single tools) is to be completed by a so called fitness check of policy sectors, which is intended to identify “excessive burdens, overlaps, gaps, inconsistencies and/or obsolete measures” and, doing so, the cumulative impact of legislation (Commission Work Programme 2010: *Time to act*, COM(2010)135; pilot exercises started in 2010 in four areas: environment, transport, employment and social policy, and industrial policy).

7. Impact assessment analysis

Impact assessment analysis is a systematic and comparative appraisal of how proposed rules will affect stakeholders, regulators, economic sectors, the environment, and the public administration (for instance, other departments) or regional and local governments.

Essentially, IA is a process which moves from the general strategy underlying the logic of intervention (the definition of the problem), to the identification of relevant options, and finally to the in-depth analysis of options that are not only “relevant” in the sense that they can achieve specific objectives, but also feasible.

The US was a pioneer in the 1970s, when several executive orders introduced a “regulatory impact analysis programme” (i.e. a “programme that uses systematic analyses of the economic effects, often including benefits and costs, that are expected to result from proposed regulations for the purpose of informing policy makers”). The term economists use for such analyses in their more developed form and that is also used for project and programme evaluation is “Cost-Benefit analysis” [J.F. Morral III, *An assessment of the US regulatory impact analysis program*, in OECD, *Regulatory impact analysis. Best practices in OECD Countries*, 1997, p. 71 ss.]. In this context, the use of economic analysis for major rules adopted by federal executive agencies found fertile ground: the evaluation of federal projects dates to the 1930s (when the Flood Control Act stipulated that the economic benefits of federal flood control projects had to exceed the costs) and the impact analysis could be considered as complementary to the reason-giving requirement of the Administrative Procedure Act. Regulatory impact analysis is limited to the executive agencies under Presidential control, and the IA watchdog is an executive office of the President (the Office of Management and Budget). Therefore, the Regulatory Impact Analysis is not mandatory for Congress and only in 2011 have independent regulatory agencies been invited to consider the costs and benefits of regulations “to the extent permitted by law” (E.O. 13579 of July 2011). Due to the emphasis on Cost-Benefit Analysis, Impact Assessment has been mostly efficiency-oriented; even if special attention to equity is now emerging, as well as to distributional impact and other advantages in such areas as the environment, or public health and safety [see E.O. January 18, 2011, *Improving Regulation and Regulatory Review*]. Moreover, on January 30, 2009 the presidential memorandum on *Regulatory Review*, asked the Director of the OMB to address the role of three factors which are not always fully included in cost-benefit analysis: the interests of future generations; distributional considerations; and fairness. In the UK, the *Impact Assessment* (adopted in 1998 as an evolution of the previous Cost Compliance Assessment) concerns all governmental and parliamentary regulation and assesses the impacts on business, the third sector and society through different economic analysis instruments.

At European level, the business impact assessment system (1986) evolved into the current impact assessment method (2002), which concerns binding and non-binding proposals [C. O'Connor Close and D.J. Mancini, *Comparison of US and European Commission guidelines on Regulatory Impact Assessment/Analysis*, in *Industrial Policy and Economic Reforms Papers*, n. 3, 2007]. The E.C. 2009 Guidelines mandate the assessment of economic, social and environmental impacts (through the CBA, cost effectiveness or multicriteria analysis), and imposes specific analysis to evaluate the impact on competition and administrative burdens. Although general exceptions have not been made, the concept of "proportionate level of analysis" for any IA has been conceived. It relates to the appropriate level of detail of analysis which is necessary for the different steps of IA, and is connected to potential impact, political significance and the steps in the process of policy development [European Commission, *Impact Assessment Guidelines*, SEC(2009) 92, 12].

In Italy, after ten years of experimentation (starting in 1999), Impact Assessment is now binding for governmental regulation (2008), although it is mostly done in a ritual and formalistic way, as an *ex post* justification of previously adopted decisions. These disappointing results are supported by two procedural choices which frustrate the method. On one hand, IA must be used for all less relevant governmental regulation though, paradoxically, major rules could be exempt. On the other hand, the comparison between feasible options is not based on empirical evidence resulting from economic analysis which is only binding for one proposal (the so-called preferred option). Moreover, the supervisor of IAs (a department of the Presidency of the Council of Ministers) has never (until now) stopped the rulemaking procedure by denying inclusion in the agenda of the Council of Ministers [as is permitted by governmental regulation n. 170/2008]. In 2003, a mandatory IA was imposed on independent authorities (such as the Authority for electricity and gas, the Electronic Communications Authority, the Bank of Italy, the stock exchange supervisor - Consob) which after years of quasi-generalized indifference, have now discovered the usefulness of this tool. It is to be hoped that Parliament itself will fulfil its role as supervisor of these IAs.

Through the various transplants and transfer processes, IA has mutated. However, IA is based on the following fundamental steps:

The definition of the *problem* (for example: numerous eye diseases affecting workers using PCs more than a certain number of hours a day), which will become the logic of intervention is the most important determinant of the quality of IA.

Another fundamental step is the *identification of the objectives underlying the policy options* (for example, the mentioned diseases must diminish at a certain rate), which must be designed by drawing on the SMART template. Therefore, the given objectives must be: specific (precise and concrete enough not to be open to drastically different interpretations); measurable (verifiable in terms of results achieved by the intervention); accepted (by the enforcing authority and by the end users); realistic; time-dependent (it is important to set a time limit).

Then, the baseline (the *do-nothing option*) must be measured, by documenting the overall qualitative-quantitative dimension. In fact, IA is a comparative exercise, starting with the comparison of policy options and the option of not altering the status quo, showing how incremental deviations from the status quo will achieve results. Moreover, this step can keep pressures to not intervene through new regulation when it is not clear what is wrong with the current situation or what its specific undesirable effects are.

The alternative options to the status quo must be formulated, while aiming to select those which are both feasible and consistent. They might be the more intrusive options (such as command and control regulations) or ones more respectful of markets (deregulation, through a complete or partial elimination of the regulation in force in a sector) and individual choice (self-regulation by bodies to whom governments have delegated regulatory powers; education and training campaigns; information; economic and market-based instruments). Such alternative options might include administrative simplification (such as: one-stop shops; streamlining or reducing the necessary steps of administrative procedures; the “silence is consent” rule; the replacement of authorizations with simple notifications of the commencement of the activity; a larger use of IT tools).

The *feasible options must then be measured*, by documenting the overall qualitative-quantitative dimension through one or more of the major techniques of economic analysis: the cost-benefit analysis; the multi-criteria; the cost-effectiveness analysis; the compliance cost assessment; the risk analysis.

The impact of feasible options must be compared in order to *identify* (if possible) a “*preferred*” option because the benefits outweigh the disadvantages.

Then, the project of regulation could always *organize the monitoring and* (if necessary) *the ex post evaluation activities*, aimed at providing information implementation and effectiveness of the rules.

IA has some weak points, which can be summarized as follows. Experts can influence policy makers through a distorted use of technical instruments (like consultation and cost-benefit analysis) [A. La Spina and G. Majone, *Lo Stato regolatore*, Il Mulino, 2000, 102]. The benefits of regulation (which cannot always be monetized or which emerge over a longer term than cost) might end up being underestimated [D.A. Faber, *Rethinking the Role of Cost-benefit Analysis*, «The University of Chicago Law Review», vol. 76, n. 3, 2009, 1362 ss.]. When based on CBA, it assumes that human behaviour is rational, which does not always correspond to how people really behave (see par. 9). Moreover, IA detects the consequences of a single regulation but has a limited capacity to evaluate the interdependence of very different regulatory strategies and institutions [R. Baldwin, *Better Regulation: Tension aboard the Enterprise*, S. Weatherill (ed.) *Better Regulation*, Hart Publishing, 2007, 34-35]. However, these aspects will not necessarily impede the usefulness of this tool: benefits can be assessed by a qualitative analysis, which must always complete the quantification; real people could be assessed through the empirical evidence of behavioural law and economics studies (and by consultation), and agenda setting might help to coordinate efforts and prevent cumulative burdens.

On the other hand, IA presents important advantages. In fact, it allows for evidence-based decisions and detects in advance all the intended and unintended consequences of rules. It provides information on how public choice was made and why, imposes a justification of rules and doing so ultimately generates a form of internal accountability (of the IA analyst to the final decision-

maker), and of external accountability (decision-maker to the IA supervisor, judges, and the end-users of regulation).

8. The recognition of good quality regulation as an autonomous public interest and its consequences

Good quality regulation tools are functional and crucial to attaining the sectorial interests met by regulations: an obscurely and ambiguously written rule is not implemented, a rule which is impossible to implement (because of economic, social, cultural, organizational conditions are mess) is no more than a slogan; a rule which has unintended consequences could create bigger risks than those it was intended to address, and so on. This analysis leads us to consider a «well written» regulation, accountable for its positive and negative impacts on society to be «a value in itself», whatever its political content [APEC-OECD, *First workshop of the APEC OECD co-operative initiative on regulatory reform*, 19–20 September 2001, Beijing, China, 15]. The recognition of the importance of better regulation policies and the diffusion of good regulation tools across countries (even if they partially differ in implementation and in real benefit gained by end users) seem to confirm that many countries recognise the quality of regulation as a public interest autonomous from sectorial interests met by regulations. This new public interest (together with other components) allows for specific public interests to be met.

The recognition of an autonomous interest in good quality regulation has many concrete consequences.

Both aspects of good quality regulation (the formal and the substantive ones) *require the use of specific tools*, which inform the decision maker about empirical evidence regarding the impact of rules and which increase the plain language of rules. Therefore, it is important for economic analysis to be used only for those regulations with the largest potential impact; although it is difficult to find objective criteria to identify them (e.g. US federal agencies must use Regulatory Impact Analysis for projects which may have an annual effect on the economy of one hundred million dollars or more). Moreover, a specific assessment of the risk which a proposed regulation is intended to manage is a useful technical application of the principle of proportionality, and is required in countries with more advanced experience in economic analysis.

Because the recognition of an autonomous interest in good quality regulation requires the use of specific tools it *increases the participation in the decision process* and can subsequently change the relationship between regulators and the regulated even in civil law countries, where the stakeholders' participation is frequently rare and informal. In fact, the above-mentioned tools of good regulation based on economic analysis are based on consultations. However, the many challenges of consultation with interested parties (reduction of asymmetric information; enrichment of the empirical basis for decision-making; increasing opportunities for citizen participation and democratization of the input provided by experts; reduction of the risk of unintended consequences) demand the respecting of some minimum standards. At European level, institutions must respect the general principles set out by the European Commission [communication *Towards a reinforced culture of consultation and dialogue*, COM(2002)704]: participation, openness, accountability, effectiveness, coherence. These principles are translated into specific rules (which are at this time under review), such as a reasonable time limit for participation (at least 8 weeks for reception of responses to written public consultations and 20 working days notice for meetings), adequate publicity about the starting process and all the relevant elements. In the US, where participation in rulemaking dates back to 1946, the 2011 OMB's *Open Government Directive* requires federal agencies to describe how they will improve transparency and integrate public participation into its activities (one application is the "new OIRA dashboard", a website which allows visitors to find and sort rules by a large number of agencies, by length of review, by stage of rulemaking, and by economic significance).

The recognition of an autonomous interest in good quality regulation has an impact on public sector organisation too. In fact, the use of economic analysis in the regulatory process requires a *multidisciplinary approach to regulation*, where lawyers do not have a monopoly on regulations and are complemented by economists, social scientists, statisticians, experts on economic analysis of law, and possibly psychologists. Moreover, the use of economic analysis in the regulatory process needs adequate institutional design, which includes a *supervision step*, such as external bodies like independent watchdogs (oversight) to check the quality of the analysis done in the framework of IA (e.g. the OIRA in the US or

the Better Regulation Executive in the UK), of SCM (the ACTAL-*Adviescollege Toetsing Administratieve Lasten* in the Netherlands and the *NRCC-Normenkontrollrat* in Germany), or the collection of information by American federal agencies (the OIRA in the US). Indeed, it is important to coordinate efforts across different regulators acting at European and national level (governmental, independent, at central, regional as well as local level).

Moreover, the autonomous interest in good quality imposes (or increases) the *duty to justify regulations*. Indeed, the decision-maker has the duty to give reasons for the need for a new regulation and on the specific rule chosen to meet these necessities. When a specific tool to improve good regulation is used, they must also enrich the justification of regulation through the empirical results of measurement. However, it is important to stress that economic analysis does not impose any final choice on regulators. In fact, IA (as well as SCM) prepares evidence for political decision-makers and must be considered an “aid to political decision-making, not a substitute for it” [European Commission, *Impact Assessment Guidelines*, 2009, 4]. As a consequence, the decision-maker could adopt a rule where benefits do not outweigh disadvantages (if, for instance, they intend to eliminate a discrepancy between the fundamental goal of the state and the existing regulation), but this choice must be justified.

9. Conditions to improve the efficacy of good regulation tools

The above-mentioned participation in decision-making, a multidisciplinary approach and adequate institutional design are some of the main conditions to improve the efficacy of good regulation tools.

The principle of *proportionality* in the use of the tools to improve good quality regulation must help to avoid “ossification” of the rulemaking procedure as a consequence of a too frequent use of economic analysis in all regulatory processes (consider that impact assessment typically lasts several weeks, between eight and twelve). At the same time the depth of the economic analysis (as well as the consultation process) must be proportional to the issues at stake and the resources available. For instance, IA may

cover administrative burdens only, or more complex types of costs and benefits, including environmental benefits or distributional effects. In summary, the efficacy of these tools depends even on its selective use. Only major rules might be concerned: if all the flow and the stock of regulation are assessed, the analysis risks being superficial and its costs unjustified.

The efficacy of good regulation tools should also be reinforced by a *regulatory reform agenda* providing at least the principal area or problems to be addressed over one or more years. In practice, tools based on economic analysis (such as Impact assessment and the SCM) are especially time consuming and costly. Regulators should be able to coordinate the necessary resources and to assure the consistency of reform efforts (for instance, to avoid multiple interventions on a single topic in a short period of time). Further, the use of good regulation tools calls for coordination between the time-pressures of politicians (who usually want an immediate answer to problems) and the time needed by experts to carry out economic analysis of regulations. To these ends agenda setting is crucial. A regulatory reform agenda could also help to coordinate simplifications adopted by regulators acting at the same or different levels of government.

Moreover, the search for good regulation is a continuous process (*life cycle of regulation*). It is important to prevent the gains of simplification from being reversed by new unjustified rules or formalities and to check that rules are still adequate to the economic context and to citizens' needs. At the same time, only an *ex post* evaluation can determine how a rule affects society (the real impact of a rule). Therefore, the implementation of the life-cycle management of regulation imposes the use of tools for good quality regulation through the life of regulations to avoid outdated and unneeded rules which impede competitiveness, consumer welfare and increase regulatory uncertainty ("a review and adjustment process", as emphasized by R. Baldwin, *Better Regulation: Tension aboard the Enterprise*, p. 45].

Finally, data related to human behaviour has to be handled sensitively: the assumption that human behaviour is rational (which informs cost-benefit analysis and the SCM) seems contradictory to the observations of everyday life. In fact, on one hand human persons' choices are influenced "by culture views,

and ethical ideas about the good” [P. Koslowski, *Principles of Ethical Economy*, Kluwer Academic Publishers, 2001, 244]. On the other hand, behavioural economics (based on evidence provided by psychological and neuroscientific studies) suggests an approach to regulation which considers a series of elements which could be more relevant than rational human choices [OMB, *Report on the Benefit and Costs of Federal Regulation*, 2009]. Specifically, people often use heuristics (or mental short-cuts) to assess risks, and probability is mostly neglected; for example, predictions about actions tend to be optimistic or pessimistic according to positive or negative market indexes over a given period of time. Moreover, inertia has a large effect on behaviour and people often procrastinate or decline to make the effort to rethink decisions (“how many households are aware that there may well be ways to save energy – and plan to investigate those plans tomorrow?”). Finally, information that is vivid and salient has a far larger impact on behaviour than detailed information (the presence of an “ambient orb,” which glows red when energy use is high, produces larger decreases in energy use than early attempts to notify people of their energy use by text messages) [these two examples are given by C.R. Sunstein, *Humanizing Cost-Benefit Analysis*, *Administrative Law Review* Conference, February 17, 2010; see also R.H. Thaler and C.R. Sunstein *Nudge. Improving Decisions about Health, Wealth, and Happiness*, Yale University Press, 2008]. An understanding of these findings has numerous implications for regulators. “Rather than educating people out of error, a more effective approach may be to take the biases into account when designing policy” [D. De Meza, B. Irlenbusch and D. Reyners, *Financial Capability: A Behavioural Economics Perspective*, «Consumer Research», 2008]. For instance, disclosures should show consumers the consequences of their financial decisions instead of increasing information about financial products (as suggested by the U.S. Treasury Department to the Consumer Financial Product Agency). Moreover, the simplification of choices through default rules (which specifies the outcome in a given situation if people make no choice at all and is a typical example of “nudging”) could be particularly useful if the logic of intervention is to increase enrolment in a retirement plan, because inertia usually affects our choices [OIRA, guidance on *Disclosure and Simplification as Regulatory Tools*, 2010]. A *behaviourally informed*

approach to regulation in the IA could help to design policy options which consider the incentive to be created for real people and assess compliance considering the possibly irrational reactions of end-users.

10. Conclusions

Over and under-evaluation of good regulation tools is dangerous. Both approaches could be used as a justification for reforms made in name only or for partial reforms.

On one hand, over-evaluation can lead to a use of these tools as the sole answer to bad regulation and consequently overlooks the structural problems which give rise to regulatory inflation. On the other hand, under-evaluation might justify a formalistic approach, such as a box-ticking routine.

In fact, it is crucial to understand what good regulation tools are really intended for.

Impact assessment gives evidence about impacts which are only presumed. This is due to the timing of when it is used (and not only to the correct consideration about unpredictability due to the fallacy of human behaviour). Specifically, CBA is a pure economic instrument, which was not conceived to reduce difficult questions to problems of arithmetic [C.R. Sunstein, *Humanizing Cost-Benefit Analysis*], nor to solve equity or distributional problems, nor to judge controversial political or moral values which “will necessarily be made through ordinary administrative and democratic processes” [R.H. Pilades e C.R. Sunstein, *Reinventing the Regulatory State*, in «University of Chicago Law Review», vol. 62, 1995, n. 1, 62 e 65]. Therefore, Impact Assessment does not substitute political decision-making, but prepares evidence for political decision-makers about the potential impacts of possible policy options, opens procedural decision making to participation and requires decision-makers to give reasons for their final choice (not only as regards the facts and the law which supports the decision, but even regarding data resulting from the analysis and the consultation process). As a result, both the rulemaking procedure and the eventually adopted regulation are modified.

The SCM is intended to quantify administrative formalities in order to make clear to rule-makers which specific parts of the

regulations are especially burdensome for different end users (due to unnecessary information obligations) in order to streamline the way in which public interest is implemented. In other words, the method neither aims to change policy objectives set out in the existing regulation nor the level of ambition in existing legislative texts. As stressed by the European Commission, it is clear that the information obligations simplification “should not compromise the underlying purpose of the legislation and there are clearly cases where, *inter alia*, for reasons to do with the protection of public health, protection of workers’ rights or the environment or the need to protect the Community’s financial interests and ensuring sound financial management, information obligations will remain necessary” [*Action Programme for Reducing Administrative Burdens in the European Union*, COM(2007) 23 final]. Even in these cases politicians have the last word in the decision to reform regulation. However, the quantification of information obligation (and, if necessary, of other costs such as the “costs of delays”) forces regulators to consider costs of regulation which they tend not to consider or even know, involve the end-users in rule-making and reduce administrative burdens of necessary regulations.

Further, good regulation tools are not intended to determine the cumulative burden imposed by different regulations and the cumulative impact of different regulation projects. Not even information written in plain language can ensure that real people receive the right incentives (as demonstrated by behavioural economists).

The functionality of good regulation tools is limited to improving residuality, proportionality, consistency and accessibility of regulation. However, even to achieve these basic objectives they have to be used in a proportionate way, and they must be backed by adequate organizational design and by strong political support.

Moreover, the use of good regulation tools can start a virtuous cycle. They certainly increase transparency in decision-making, reaffirm the duty to give reasons, and improve participated processes. At the same time, their limits could incentivize the search for innovative solutions, such as a special attention on the needs and behaviour of real people, in the design of new regulation and in its measurement and reform. For

instance, Impact Assessment could consider cognitive biases and heuristics as risks whose probability may be analyzed in order to give an indication about the possible opportunity to deal with presumed cognitive errors through regulation, which puts into practice the principle of proportionality. The Standard Cost Model could evolve in its use for regulatory reform to ensure that simplification or de-regulation really benefits consumers. To this end an effort to communicate reforms could be useful (if it becomes easier to comply with an information obligation, then a part of end-users could decide to comply and not ask for help from intermediaries). Another way could be an effective competition between intermediaries, which could involve competition on prices and on the quality of services, which also means not offering clients unnecessary services.

Finally, good regulation tools impose an approach to regulation as a cycle, where residuality, proportionality, consistency and accessibility must be reanalysed periodically and must also be used in the framework of a comprehensive approach to regulatory reform, which addresses regulation sectors through good regulation policies, instead of single regulations through a single good regulation tool.

Short Bibliography

T. Ascarelli, *Certezza del diritto e autonomia delle parti nella realtà giuridica*, «Il diritto dell'economia», 1956, 1238 ss.;

R. Baldwin, *Better Regulation: Tension aboard the Enterprise*, S. Weatherill (ed.) *Better Regulation*, Hart Publishing, 2007, p. 27 ss.;

R. Baldwin, M. Cave and M. Lodge, *Understanding Regulation. Theory, Strategy and Practice*, Oxford University Press, 2011;

J. Black, *Critical Reflection on regulation*, Center for Analysis of Risk and Regulation. LSE, 2002;

F. Carnelutti, *Certezza, autonomia, libertà, diritto*, «Il diritto dell'economia», 1956, 1185 ss.;

G. Corso, *Perché la "complicazione"?*, «Nuove autonomie», n. 3-4, 325 ss.;

M. De Benedetto, M. Martelli and N. Rangone, *La qualità delle regole*, Il Mulino, 2011;

D. De Meza, B. Irlenbusch and D. Reyners, *Financial Capability: A Behavioural Economics Perspective*, «Consumer Research», 2008;

R. Dworkin, *Taking rights seriously*, Harvard University Press, 1977;

D.A. Faber, *Rethinking the Role of Cost-benefit Analysis*, «The University of Chicago Law Review», vol. 76, n. 3, 2009, 1362 ss.;

A. La Spina and G. Majone, *Lo Stato regolatore*, Il Mulino, 2000;

B.G. Mattarella, *La trappola delle leggi. Molte, oscure, complicate*, Il Mulino, 2011;

C. O'Connor Close and D.J. Mancini, *Comparison of US and European Commission guidelines on Regulatory Impact Assessment/Analysis*, «Industrial Policy and Economic Reforms Papers», n. 3, 2007;

U. Karpen, *Law Drafting and the Legislative training course for law drafters*, L. Mader and C. Moll (ed.), *The Learning Legislator*, Nomos, 2006;

P. Koslowski, *Principles of Ethical Economy*, Kluwer Academic Publishers, 2001;

R.H. Pilades e C.R. Sunstein, *Reinventing the Regulatory State*, in «The University of Chicago Law Review», vol. 62, 1995, n. 1, 1 ss.;

R.A. Posner, *Economic Analysis of Law*, Aspen Publishers, 2003,

R. Rose (ed.), *Challenge to Governance. Studies in Overloaded Polities*, Sage Publications, 1980;

C.R. Sunstein, *Humanizing Cost-Benefit Analysis*, *Administrative Law Review Conference*, February 17, 2010.

C.R. Sunstein, *Humanizing Cost-Benefit Analysis*, *Administrative Law Review Conference*, February 17, 2010;

R.H. Thaler and C.R. Sunstein *Nudge. Improving Decisions about Health, Wealth, and Happiness*, Yale University Press, 2008;

B.J. Wiener, *Better Regulation in Europe*, Duke Law School, Research Paper n. 130, 2006;

WITHDRAWAL OF ARTIFICIAL HYDRATION AND
NUTRITION FROM A PATIENT IN A
PERMANENT VEGETATIVE STATE IN ITALY:
SOME CONSIDERATIONS ON THE *ENGLARO* CASE*

Viviana Molaschi**

Abstract

This paper discusses some issues related to end-of-life decisions in Italy: in particular, it addresses the question of withdrawal of artificial nutrition and hydration from a patient in a permanent vegetative state, investigated through the examination of the so-called *Englaro* case.

The acknowledgment of the right to withdraw this kind of treatment is analyzed focusing on three issues: the qualification of artificial hydration and nutrition as medical treatment; the maintenance of the right to refuse and stop this treatment as a corollary of the principle of self determination, sealed and implemented by the principle of informed consent; the possibility to claim this right by decisionally incapable individuals.

The article has a comparative approach: it compares the *Englaro* case with the U.S. *Terri Schiavo* case (sometimes, Eluana Englaro is called the "Italian Terri Schiavo") and examines the influence of U.S. case law on the former.

Finally, it expresses some considerations on the criticalities that have arisen in the Italian Parliamentary debate regarding living wills. It also tackles the question of the opportunity to enact a law on advance directives in Italy and of the features of such a regulation.

* This paper consists of the redrafting of a presentation entitled "*Withdrawal of Artificial Hydration and Nutrition from a Patient in a Permanent Vegetative State in Italy: Some Considerations on the Englaro Case*", given on 20 October 2010 at one of the Bioethics Seminars organised by the Joint Centre for Bioethics of the University of Toronto.

** Researcher of Administrative Law, University of Bergamo.

TABLE OF CONTENTS

1. Some preliminary remarks.....	122
2. The <i>Englaro</i> case: an overview.....	125
3. The acknowledgment of the right to withdraw artificial hydration and nutrition: analysis of the fundamental ruling of the <i>Corte di Cassazione</i> , I civil section, n. 27148/2007.....	128
4. The withdrawal of medical treatment by decisionally incapable individuals.....	131
5. The <i>Englaro</i> case before the Constitutional Court: the complex relationship between law and justice in granting Constitutional rights.....	134
6. The other attempts not to comply with the <i>Corte di Cassazione</i> and the Court of Appeal's decisions. In particular: the administrative obstacles that brought the <i>Englaro</i> case before the Administrative Judge and the attempt of the Government to override the Courts' rulings with a law decree.....	136
7. The <i>Terri Schiavo</i> case: an overview.....	141
8. The <i>Englaro</i> case and the <i>Schiavo</i> case: a comparison. The influence of the <i>Schiavo</i> case and of U.S. case law on the <i>Englaro</i> case.....	148
9. Reflections on the opportunity to enact a law on advance directives in Italy and on the features of such a regulation. Brief analysis of the bill under discussion.....	153

1. Some preliminary remarks

This paper will discuss some issues related to end-of-life decisions in Italy: in particular, it will address the question of withdrawal of artificial hydration and nutrition¹ from a patient in a permanent vegetative state, investigated through the analysis of the so-called *Englaro* case.

Before examining this case, some preliminary remarks are necessary.

¹ "Withdrawing potentially life-sustaining treatment" means "stopping treatment that has the potential to sustain a person's life": for this definition see J. Downie, *Dying Justice. A case for Decriminalizing Euthanasia & Assisted Suicide in Canada* (2004), 6, whose work draws the attention of readers to the systemization of terminology when dealing with end-of-life issues. It should be noted that the expression "withdrawal" must be distinguished from "withholding" which is used to indicate "the failure to start treatment".

First of all, although law scholars claim they have a positivist approach and present their studies and analyses as neutral, based only on legislation and judicial decisions, it is impossible to tackle these complex and difficult issues, related to bioethics and, in particular, to “biolaw”², without being influenced by our personal convictions and beliefs.

Secondly, this article will not discuss euthanasia³ and assisted suicide⁴, because they are prohibited in Italy. In fact, the Italian Criminal Code punishes homicide (article 575), homicide of a consenting person (article 579) and aiding suicide (article 580)⁵.

² So-called “biolaw” aims at studying juridical dimensions regarding the life sciences and human healthcare: for the basic lines of this discipline see S. Rodotà-M. Tallacchini (eds.), *Ambito e fonti del biodiritto* (2010), in S. Rodotà-P. Zatti (eds.), *Trattato di Biodiritto*; C. Casonato, *Introduzione al biodiritto* (2009), whose work is distinguished by a line of inquiry that privileges comparative constitutional law. On this field of study also see G. di Rosa, *Biodiritto. Itinerari di ricerca* (2010); A. Gorassini, *Lezioni di biodiritto* (2007); L. Palazzani, *Introduzione alla biogiuridica* (2002). Finally, on the complex dialectics between law and life see P. Zatti, *Maschere del diritto. Volti della vita* (2009); S. Rodotà, *La vita e le regole. Tra diritto e non diritto* (2007); P. Veronesi, *Il corpo e la Costituzione* (2007).

³ By “euthanasia” is meant “a deliberate act undertaken by one person with the intention of ending the life of another person to relieve that person’s suffering”: B.M. Dickens, J.M. Boyle Jr., Linda Ganzini, *Euthanasia and assisted suicide*, in P.A. Singer, A.M. Viens (eds.), *The Cambridge Textbook of Bioethics* (2008), 72; in the same terms see J. Downie, *supra* note 1, at 6. Therefore, today, the expression euthanasia refers substantially to so-called active euthanasia: on the critical aspects of the by now overcome distinction between active and passive euthanasia see S. Tordini Cagli, *Le forme dell'eutanasia*, in S. Canestrari-G. Ferrando-C.M. Mazzoni-S. Rodotà-P. Zatti (eds.), *Il governo del corpo*, II (2011), 1819 ss., in S. Rodotà-P. Zatti (eds.), *Trattato di Biodiritto*. On euthanasia also see D. Neri, *Il diritto di decidere la propria fine*, *ibid.*, 1785 ss. and, within the framework of a broader discussion on the role of law in scientifically and technologically advanced societies, C. Tripodina, *Il diritto nell’età della tecnica. Il caso dell’eutanasia* (2004).

⁴ By “assisted suicide” is meant “the act of intentionally killing oneself with the assistance of another who deliberately provides the knowledge, means or both”: B.M. Dickens, J.M. Boyle Jr., Linda Ganzini, *Euthanasia and assisted suicide*, *supra* note 3, at 72; for a similar definition see J. Downie, *supra* note 1, at 6. On suicide and end-of-life issues see F. Faenza, *Profili penali del suicidio*, in S. Canestrari-G. Ferrando-C.M. Mazzoni-S. Rodotà-P. Zatti (eds.), *supra* note 3, at 1813 ss.

⁵ In the Italian Criminal Code the words euthanasia and assisted suicide are not used: it must be considered that the Code was enacted in 1939 and the referred provisions have never been amended.

Finally, as to the specific legal framework within which the question of end-of-life decisions in Italy must be settled, the starting point of every reflection is that in Italy there is still no legislation on advance directives⁶.

To address this issue it is therefore important to refer to judicial decisions, that have tried to overcome the lack of regulation.

Obviously, the essential pillar of the legal framework is the Italian Constitution and, in particular, article 32, specific to the right to health.

2. The Englaro case: an overview

The Englaro case⁷ represents for Italians what the Terry Schiavo case has represented for people living in the U.S. Sometimes, Eluana Englaro is called the “Italian Terri Schiavo”, even if there are some differences between the two cases as will be outlined in a subsequent section⁸.

All the main institutions of Italy were involved: the judicial system – including the Corte di Cassazione, that is the Italian Supreme Court, at the top of the judiciary –, the Government, the President of the Republic, the Constitutional Court. Even the European Court of Human Rights was involved.

This case attracted media attention: therefore every Italian could follow and share the vicissitudes of this 38-year-old woman, who on 18 January 1992 had had a car accident that resulted in

⁶ The subject of advance directives is dealt with thoroughly in S. Rodotà-P. Zatti (eds.), *Trattato di Biodiritto*: see M. Azzalini, *Le disposizioni anticipate del paziente: prospettiva civilistica*, in S. Canestrari-G. Ferrando-C.M. Mazzoni-S. Rodotà-P. Zatti (eds.), *supra* note 3, at 1935 ss.; D. Provolo, *Le direttive anticipate: profili penali e prospettiva comparatistica*, *ibid.*, 1969 ss. On this topic also see the monographic issue on end-of-life decisions and living wills of *MicroMega*, n. 2/2009; F.G. Pizzetti, *Alle frontiere della vita: il testamento biologico tra valori costituzionali e promozione della persona* (2008) and the book by the Fondazione Umberto Veronesi, *Testamento biologico. Riflessioni di dieci giuristi* (2006).

⁷ On the Englaro case see, in addition to the works that will be cited in the following notes, S. Moratti, *The Englaro Case: Withdrawal of Treatment from a Patient in a Permanent Vegetative State in Italy*, 19 *Cambridge Quarterly of Healthcare Ethics* 372 (2010); *Italy*, in J. Griffiths and H. Weyers-M. Adams (eds.), *Euthanasia and Law in Europe* (2008), 395 ss.

⁸ See, in particular, section 8.

severe brain damage. She had been unconscious for 17 years; in 1994 she was diagnosed as being in a permanent vegetative state (PVS), and died in February 2009, after the withdrawal of artificial nutrition and hydration.

As soon as the tragedy happened and during the whole period of her unconsciousness her father maintained that, since she was a very lively, energetic, self confident, autonomous person, with an intense social life – this is how she was described by people who knew her – she would have never wanted to be kept alive artificially, in conditions that would have violated her dignity. He also pointed out that she affirmed this conviction when one year before a friend of hers fell into an irreversible coma after a motorbike accident. In the following years this was confirmed also by some acquaintances.

However, the medical procedures went on in spite of Eluana's father's opposition.

When she was taken to the intensive care unit (ICU) in a deep state of coma because of severe brain damage, the doctors continued with the IC protocols, affirming that they were aimed first and foremost at preserving life, independently from all other considerations. Eluana also underwent a tracheotomy.

After one month of coma, Eluana started breathing by herself and opened her eyes, but she was still unconscious, paralyzed, hydrated and fed by a naso-gastric tube.

After two years of observation and sensory stimulation in a long term ward of a hospital – this time it was necessary to say definitively whether there were chances of regaining consciousness or not – in 1994 Eluana was diagnosed as being in a permanent vegetative state (PVS).

She was taken to a National Health Service-accredited nursing home, in Lecco, in Lombardy, close to her family, where she received all the assistance she needed, covered by public funds.

Given the absence of any possibility of recovery, when in 1994 Eluana's permanent vegetative state was assessed, Mr. Englaro decided to press on with his purpose of stopping Eluana's artificial hydration and nutrition.

He started the necessary procedures to have her declared incapacitated and on 19 December 1996 was appointed her

guardian⁹. As her guardian, Mr. Englaro asked the director of the nursing home to withdraw her artificial feeding, but he refused to do so.

Therefore, in 1999 Eluana's father started a judiciary battle to address a petition authorizing him, as the guardian, to direct the nursing home personnel to withdraw artificial feeding and hydration.

There followed many years of court proceedings, in which Eluana's father claimed the right of his daughter to refuse this treatment before every level of the judiciary system, without succeeding.

The arguments on which the Courts based their rejection of Eluana's father claim varied.

Some of them had to do with a potential conflict of interests between Eluana, whose will about the withdrawal of artificial nutrition and hydration was not ascertained, and her father, as guardian. This observation of the Corte di Cassazione, I civil section, expressed in ordinance n. 8291 of 20 April 2005¹⁰, led to the appointment of a special curator, as prescribed by article 78 of the Civil Procedure Code.

Other arguments addressed directly the core of the issue: artificial hydration and nutrition are basic care and not medical treatment, therefore they cannot be renounced; the Italian legal system gives unconditioned protection to human life; advance directives are not regulated in the Italian legal system, so there are no legal grounds for decisions to withdraw life-sustaining treatment.

Only on 6 October 2007 did the Corte di Cassazione, the Italian Supreme Court, reverse the rulings of the lower courts with decision n. 21748¹¹ of the I civil section and held the possibility to withdraw artificial hydration and nutrition from a person who for

⁹ Eluana Englaro was declared incapacitated with the ruling of the Court in Lecco on 19 December 1996.

¹⁰ Cass. Civ., sect. I, ord. 20 April 2005, n. 8291, 9 Foro it. I 2359 (2005).

¹¹ Cass. Civ., sect. I, 16 October 2007, n. 21748, 11 Foro it. I 3025 (2007), with comment of G. Casaburi, *Interruzione dei trattamenti medici: nuovi interventi della giurisprudenza di legittimità e di merito*. On this judgment also see D. Maltese, *Convincimenti già manifestati in passato dall'incapace in stato vegetativo irreversibile e poteri degli organi preposti alla sua assistenza*, 1 Foro it. I 125 (2008) and, among others, the comment of C. Casonato, *Consenso e rifiuto delle cure in una recente sentenza della Cassazione*, 3 Quad. cost. 545 (2008).

many years had been in a permanent vegetative state, as petitioned by the guardian (with the intervention of a curator), under specific conditions: a) rigorous clinical controls showing that the permanent vegetative state is irreversible and on the ground of medical standards, recognized at an international level, there is no possibility to regain even a feeble consciousness or perception of the external world; b) the request corresponds, on the ground of clear, unequivocal, convincing evidence, to the patient's voice, based on previous declarations, personality, lifestyle, convictions, in accordance with his/her way of conceiving human dignity before the state of unconsciousness.

The Supreme Court remanded the case to the Court of Appeal of Milan, that, with a decree of 9 July 2008¹², assessed that in the Englaro case the two requirements indicated were met and that consequently the naso-gastric tube could be removed. The final paragraph of the decision, written with the advice of a palliative care expert, prescribed how the withdrawal had to be carried out in practice.

The Prosecutor's office of the Court of Appeal of Milan appealed to the Corte di Cassazione again, but the Supreme Court declared the appeal inadmissible¹³, holding that the Prosecutor's office was not entitled to lodge it¹⁴.

3. The acknowledgment of the right to withdraw artificial hydration and nutrition: analysis of the fundamental ruling of the Corte di Cassazione, I civil section, n. 27148/2007.

The ruling of the Corte di Cassazione, I civil section, n. 27148/2007 is the result of a reasoning that develops through

¹² App. Milan, decr. 9 July 2008, 1 Foro it. I 35 (2009), with comment of G. Casaburi, *Autodeterminazione del paziente, terapie e trattamenti sanitari «salva-vita»*. On this decision see also R. Caponi-A. Proto Pisani, *Il caso E.: brevi riflessioni dalla prospettiva del processo civile*, 4 Foro it. I 984 (2009); D. Maltese, *Il falso problema della nutrizione artificiale*, 4 Foro it. I 987 (2009); E. Calò, *Caso Englaro: la decisione della Corte d'Appello di Milano*, 9 Corriere giur. 1290 (2008).

¹³ Cass., sect. un., 13 November 2008, n. 27145, 1 Foro it. I 35 (2009). with comment of G. Casaburi, *supra* note 12. On this decision see also R. Caponi-A. Proto Pisani, *supra* note 12; D. Maltese, *Il falso problema della nutrizione artificiale*, *supra* note 12.

¹⁴ In Italian civil suits the presence of the Prosecutor's office is exceptional, limited by law to particular controversies.

three main issues: the qualification of artificial hydration and nutrition as medical treatment; the acknowledgment of the right to refuse this kind of treatment as a corollary of the principle of informed consent; the possibility to claim this right by decisionally incapable subjects.

The fact that life-sustaining treatment is medical treatment is the assumption of the Supreme Court reasoning, that allows it to decide the case under article 32 of the Italian Constitution, that is the article that regulates the right to health¹⁵.

Notwithstanding this qualification it is the subject of an animated debate – we cannot forget that the lower courts had adhered to the different position that artificial nutrition and hydration are basic care – it is noteworthy that the Corte di Cassazione has tackled this issue not at the beginning of the decision, as a preliminary remark would have required, but at the end, almost incidentally, as if it was widely accepted: “there is no doubt”, in the Supreme Court’s view, that such treatment is medical, because it implies a scientific knowledge, is practiced by physicians, even if it is carried out by paramedics, and consists in giving chemical compounds, through technological procedures.

Given the qualification of life-sustaining treatment as medical acts, in the Corte di Cassazione’s arguments it is regulated by article 32 of the Italian Constitution.

After proclaiming that “The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent”, article 32 maintains that “No one may be obliged to undergo any health

¹⁵ On the right to health in the Italian Constitution see, *ex multis*, R. Ferrara, *Il diritto alla salute: i principi costituzionali*, in Id. (ed.), *Salute e sanità* (2010), 3 ss., in S. Rodotà-P. Zatti (eds.), *Trattato di Biodiritto*; Id., *L’ordinamento della Sanità* (2007), 37 ss.; N. Aicardi, *La sanità*, in S. Cassese (ed.), *Trattato di diritto amministrativo. Diritto amministrativo speciale*, I (2003), 625 ss.; D. Morana, *La salute nella Costituzione italiana. Profili sistematici* (2002); C.M. D’Arrigo, entry *Salute (diritto alla)*, in *Enc. dir., Aggiornamento-V* (2001), 1009 ss.; M. Cocconi, *Il diritto alla tutela della salute* (1998); B. Pezzini, *Principi costituzionali e politica nella Sanità: il contributo della giurisprudenza costituzionale alla definizione del diritto sociale alla salute*, in C.E. Gallo-B. Pezzini (eds.), *Profili attuali del diritto alla salute* (1998), 1 ss.; M. Luciani, entry *Salute (diritto alla salute – dir. cost.)*, in *Enc. giur. Treccani*, XXVII (1991); Id., *Il diritto costituzionale alla salute*, 4 *Dir. e società*, 769 (1980); B. Caravita, *La disciplina costituzionale della salute*, 1 *Dir. e società*, 21 (1984).

treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person”.

In the Constitutional perspective, the acknowledgment of the right to health, a many-sided right, also grants the right of self determination, that is the right of a patient to decide about medical treatment. This means that an individual may choose to receive a therapy, may express a preference for a particular treatment instead of another, but may also decide not to be submitted to any therapy at all: the right of self determination has both a positive dimension and a negative one.

The right of self determination has been sealed and implemented by the elaboration of the principle of informed consent¹⁶, that represents the legal grounds of every medical treatment. In fact, without it, a medical intervention is a tort, even if it is in the patient’s interest.

In the Italian Constitution the informed consent principle finds different bases: article 2, that protects the inviolable rights of the person; article 13, that guarantees personal freedom and, of course, article 32, specific to the right to health.

The principle of informed consent is established also by international sources, to which the Corte di Cassazione’s judgment refers: in particular, the Oviedo Convention, “Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine”, issued on 4 April 1997. It must be observed that its ratification has been authorized by law 145 of 28 March 2001, but the instrument of ratification has not been deposited with the Council of Europe; therefore the Convention is not in force in Italy; nevertheless authors and jurisprudence constantly refer to it as a fundamental interpretative means¹⁷.

¹⁶ On the principle of informed consent see, in general, M. Graziadei, *Il consenso informato e i suoi limiti*, in L. Lenti-E. Palermo Fabris-P. Zatti (eds.), *I diritti in medicina* (2011), 191 ss., in S. Rodotà-P. Zatti (eds.), *Trattato di Biodiritto*; A. Pioggia, *Consenso informato ai trattamenti sanitari e amministrazione della salute*, 1 Riv. trim. dir. pubbl. 127 (2011).

¹⁷ On the ratification process of the Oviedo Convention and its implications see C. Casonato, *supra* note 2, at 108-109.

Article 5 of the Convention establishes, as a “general rule”, that “an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time”.

Finally, the principle of informed consent is also provided by the Charter of Fundamental Rights of the European Union, signed and proclaimed on 7 December 2000, to which the Treaty of Lisbon, that entered into force in December 2009, has conferred the same value as Treaties.

It is noteworthy that the Charter has a specific Title, Title I, entitled “Dignity”, article 1 of which proclaims: “Human dignity is inviolable. It must be respected and protected”. In the same Title article 3, related to the “Right to the integrity of person”, includes “the free and informed consent of the person concerned, according to the procedures laid down by law” among the principles to be observed in the fields of medicine and biology.

4. The withdrawal of medical treatment by decisionally incapable individuals

Recognition of the right to refuse medical treatment collides with two extreme cases that hinder individuals in their assertion of it¹⁸.

The first one can be identified in the condition of a decisionally capable person, that cannot physically withdraw a particular treatment. This is, for instance, the situation of patients affected by amyotrophic lateral sclerosis, muscular dystrophy, and so on: the wish of these subjects to interrupt the medical treatment they are undergoing (generally artificial feeding and artificial respiration), requires the intervention of a third person. In Italy this issue has been the subject of the case of Welby, who was affected by muscular dystrophy; however this case will not be analyzed in this paper.

¹⁸ For the analysis of these two situations see G.U. Rescigno, *Dal diritto di rifiutare un determinato trattamento sanitario secondo l'art. 32, co. 2, Cost., al principio di autodeterminazione intorno alla propria vita*, 1 Dir. pubbl. 85 (2008).

The second situation, embodied by the Englaro case, pertains to decisionally incompetent individuals, that are unable to decide the beginning, the prolonging and the end of a medical treatment¹⁹.

Even if the guardian, according to articles 357 and 424 of the Italian Civil Code, takes care of the incapacitated person, his entitlement to address a petition for the authorization to stop artificial hydration and nutrition has been uncertain in the jurisprudence.

Initially, the Corte di Cassazione²⁰ denied the possibility of the guardian to act as a substitute decision maker with regard to very personal decisions, like the ones involving life and death, that imply ethical, religious and, in any case, extra-juridical conceptions.

Also for this reason, as Eluana was incapacitated, and therefore unable to make her choices, in 2005 the Supreme Court held the necessity to appoint a special curator, provided by the Civil Procedure Code in case of conflict of interests with the guardian.

In decision n. 21748/2007 the Supreme Court has partially changed position, giving the guardian the possibility to take end-of-life-related decisions, always with the intervention of a curator. The Corte di Cassazione's ruling holds that the principle of informed consent, together with the principle of equal treatment of every individual, requires the recreation also in cases where decisionally incapable individuals are involved of the duality of subjects that characterize the medical decision, that is the doctor-patient relationship, with the consequence that the guardian has the right, in the exercise of his duty of care, to express the informed consent or deny it.

However, the role of the guardian encounters some limits.

¹⁹ On these specific issues see L. d'Avack, *Il rifiuto delle cure del paziente in stato di incoscienza*, in S. Canestrari-G. Ferrando-C.M. Mazzoni-S. Rodotà-P. Zatti (eds.), *supra* note 3, at 1917 ss.; E. Salvaterra, *Autodeterminazione e consenso nell'incapacità e capacità non completa. Capacità e competence*, in L. Lenti-E. Palermo Fabris-P. Zatti (eds.), *supra* note 16, at 341 ss.; M. Piccinni, *Autodeterminazione e consenso nell'incapacità e capacità non completa. Relazione terapeutica e consenso dell'adulto "incapace": dalla sostituzione al sostegno*, *ibid.*, at 361 ss.

²⁰ Cass. Civ., sect. I, ord. n. 8291/2005.

Since the right to health is personal and has a really private dimension, the guardian cannot replace the patient's will, depriving him/her of the power to decide regarding his/her health and, in the end, about life and death.

First of all, the guardian must decide in the patient's best interests.

Secondly, in doing so, he must act neither "in place of" nor "for" the patient, but "with" the patient, trying to reconstruct his/her presumed will before the state of unconsciousness. Finally, he must consider the subject's previous wishes, personality, lifestyle, inclinations, values, ethical, religious, cultural and philosophical convictions.

As specified by the Court of Appeal's decree of 2008, the guardian must be the patient's "spokesman", "nothing more and nothing less".

As we will see in the following pages²¹, Italian jurisprudence has borrowed these concepts from the legal tradition of the U.S.

It can be observed that, as to the definition of the guardian's role, the Oviedo Convention comes into consideration again.

Article 6, dedicated to "Persons not able to consent", after stating that "an intervention may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit", establishes that "Where, according to law, an adult does not have the capacity to consent to an intervention because of a mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law. The individual concerned shall as far as possible take part in the authorisation procedure".

Among the most significant provisions of the Oviedo Convention there is also article 9, according to which "The previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account".

²¹ See, in particular, section 8.

5. The Englaro case before the Constitutional Court: the complex relationship between law and justice in granting Constitutional rights

After the Supreme Court recognized Eluana's right to stop artificial hydration and nutrition, claimed by her father as her guardian, there were many attempts at impeding its fulfillment²².

In September 2008 the Chamber of Deputies and the Senate challenged the Constitutional Court raising a conflict of competence between the judiciary, which would have intruded into legislative power, replacing the legislative function, and the legislature.

Firstly the legislature recognized an hypothesis of *vindicatio potestatis*, a kind of conflict that emerges when a branch of government is exercising a power that belongs to another branch of government. The Corte di Cassazione would have filled the gap of regulation in the end-of-life field with a ruling, whose principles had been applied by the Court of Appeal of Milan, that, according to the Parliament, was substantially a legislative act. Moreover, the Corte di Cassazione should have challenged the constitutionality of the provisions that, in the Italian Civil Code²³, exclude from the powers of the guardian the possibility to take decisions regarding the incapacitated person's life in the absence of a living will, instead of disapplying them, and substituting them with a regulation drawn up *ex novo*.

Secondly, the conflict would have derived from the interference of the Corte di Cassazione and of the Court of Appeal of Milan with the legislative procedure, regarding the enactment of a law on living wills, that was still in progress.

The Constitutional Court, with its decision n. 334 of 8 October 2008²⁴, declared the claim inadmissible, stating that there had not been any invasion or interference with the legislative

²² For an overview of such episodes see S. Rodotà, *Il caso Englaro: una cronaca istituzionale*, 2 *Micromega* 77, 81-83 (2009); T. Groppi, *Il caso Englaro: un viaggio alle origini dello Stato di diritto e ritorno* (5 March 2009), on <http://www.astrid.eu>.

²³ The reference is to articles 357 and 424 of the Italian Civil Code.

²⁴ Corte Cost., 8 October 2008, n. 334, 1 *Foro it.* I 35, (2009), with comment of R. Romboli, *I conflitti tra poteri dello Stato sulla vicenda E.: un caso di evidente inammissibilità*. On this decision see also R. Caponi-A. Proto Pisani, *supra* note 12; R. Bin, *Se non sale in cielo non sarà forse un raggio d'asino? (a proposito dell'ord. 334/2008)*, on <http://www.forumcostituzionale.it>.

power; in fact Parliament could enact a statute on advance directives at any time. Moreover, the Court held that the conflict of competence that had been raised set out a logical and juridical route which was different from the one followed by the judiciary and therefore had been transformed into an atypical instrument of impugment.

As regards the legislature's censure according to which the judiciary should have challenged the constitutionality of the existing regulation of the guardian's powers, it is important to observe that the Constitutional jurisprudence has progressively enhanced the interpretative powers of the judges, who are called to evaluate if it is possible to find an interpretation consistent with the Constitution, before challenging the constitutionality of a law. In short, a law cannot be challenged and declared unconstitutional because there may be unconstitutional interpretations; this can happen only when it is impossible to give interpretations consistent with the Constitution²⁵.

This implies that the judiciary can apply directly provisions of the Constitution.

An example of this reasoning in the health field can be read in the Constitutional jurisprudence²⁶ on so-called "biological damage"²⁷, which has given a Constitutional reading of article 2043 of the Civil Code²⁸, closely integrated by article 32 of the Constitution, which safeguards the right to health.

The Corte di Cassazione's ruling, which recognized Eluana Englaro's right to withdraw life-sustaining treatment, claimed by her father, as her guardian, can be also seen as the effect of the more active role of the ordinary judges encouraged by the Constitutional Court. This is the consequence of an evolution towards a "mild" coexistence of law, rights and justice, according

²⁵ On these aspects see the in-depth analysis of R. Romboli, *supra* note 24, at 52-53.

²⁶ Corte Cost., 14 July 1986, n. 184, Foro it. I 2053 (1986).

²⁷ According to articles 138, section 2, lett. a), and article 139, section 2 of Legislative Decree 7 September 2005, n. 209, which has implemented the precepts of the Constitutional Court, "biological damage" is "a temporary or permanent lesion to the psycho-physical integrity of the person ascertainable by medical examiners which has a negative impact on the daily activities and on the dynamic-relational aspects of the life of the damaged person, irrespective of any repercussions on his/her capacity to generate income".

²⁸ Article 2043 of the Italian Civil Code regulates liability for damages.

to which “law cannot be the object of the property of one, but the object of the care of many”²⁹.

6. The other attempts not to comply with the Corte di Cassazione and the Court of Appeal’s decisions. In particular: the administrative obstacles that brought the Englaro case before the Administrative Judge and the attempt of the Government to override the Courts’ rulings with a law decree

The Englaro case also crossed the Italian borders. Some associations of relatives and friends of severely disabled persons brought a suit before the European Court of Human Rights (ECHR), arguing that the ruling authorizing the withdrawal of Eluana’s naso-gastric tube was in contrast with the right to life and the principle of non discrimination laid down in the European Convention of Human Rights. The Court held that the petitioners had no relationship with Eluana Englaro and on 22 December 2008 issued an inadmissibility decision³⁰.

In complying with the Corte di Cassazione and the Court of Appeal of Milan ’s rulings, Eluana’s father also faced many administrative obstacles placed by the Lombardy Regional Administration and the Minister of Health.

Despite the Court of Appeal’s permission to withdraw Eluana’s artificial hydration and nutrition, neither the nursing home where she was, nor the competent hospital were willing to stop them. Therefore Mr. Englaro asked Lombardy’s regional health care system to indicate an institution where it was possible to comply with the Court of Appeal’s decree.

The Director of the Lombardy’s regional health care regional system issued a statement replying that it was impossible to accomplish this request for two reasons. First of all, the health care system does not have the duty to admit patients that a priori refuse treatment necessary for their life; the duty of care does not encompass the admission of patients in need of interventions such

²⁹ G. Zagrebelsky, *Il diritto mite* (1992), 213. This position is recalled by R. Romboli, *supra* note 24, at 51-52, who draws an outline of the different forms and ways through which the legislature and the judiciary concur in law production.

³⁰ European Court of Human Rights, 22 December 2008, Rossi and others c. Italia, 3 Foro it. IV 109 (2009).

as the termination of current treatment. Secondly, the withdrawal of artificial hydration and nutrition constitutes a violation of the physicians' and paramedics' professional duties.

Eluana's father sought the annulment of this statement before the Administrative Tribunal of Lombardy-Milan, that issued a decision of annulment on 26 January 2009³¹.

According to Lombardy's Administrative Judge, not admitting a patient who needs support for stopping medical treatment – even if this will lead to the person's death – is a violation of article 32 of the Italian Constitution, that guarantees the right to refuse medical treatment.

The admission of a person to a health care institution cannot be made conditional on the renunciation of a fundamental right.

As to the supposed violation of the physicians' and paramedics' professional duties, the Administrative Tribunal replied that the respect of the right to refuse medical treatment is owed to any person that has a relationship with the patient, including the health care professionals.

In the Administrative Judge's view the admission of a patient cannot be denied even on the ground of conscientious objection³²: the Administrative Tribunal adhered to a position, shared by part of the legal literature, according to which conscientious objection must be established in law³³ and, in any case, the health care institution involved must guarantee the patient's right of self determination.

³¹ Lombardy Administrative Tribunal (TAR), sect. III, 26 January 2009, n. 214, 4 Foro amm. TAR 976 (2009), with comment of V. Molaschi, *Riflessioni sul caso Englaro. Diritto di rifiutare idratazione ed alimentazione artificiali e doveri dell'amministrazione sanitaria*. On this decision see also the comment of A. Pioggia, *Consenso informato e rifiuto di cure: dal riconoscimento alla soddisfazione del diritto*, 3 Giornale dir. amm., 267 (2009).

³² On the possible conflictual situations that may arise, within the framework of relationships between a health care administration and users, between, on the one hand, the right of the latter to obtain a certain service and, on the other, the freedom claimed, by health care staff, of not providing treatment that contrasts with their own convictions, that is expressed in conscientious objection, be allowed, see V. Molaschi, *I rapporti di prestazione nei servizi sociali. Livelli essenziali delle prestazioni e situazioni giuridiche soggettive* (2008), 149 ss. and 280 ss.

³³ On this aspect see B. Randazzo, entry *Obiezione di coscienza (dir. cost.)*, in *Dizionario di diritto pubblico*, edited by S. Cassese, IV (2006), in particular at 3872-3873.

It can be noted that the idea that the health care system has only a “positive” duty of care reflects a strict view of health as a mere absence of disease or infirmity and not as “a state of complete physical, mental and social well-being”, according to the definition of the World Health Organization³⁴.

The value of the human being that inspires the whole Italian Constitution implies that health protection must be functional to the individual and not the contrary. Health is part of the development of persons and of their personality, as implied by a systematic interpretation of articles 2, 3 and 32 of the Italian Constitution.

Moreover, it is essential to observe that the “respect for the human person” prescribed by the Constitution with regard to involuntary treatment provided by law applies also to voluntary ones³⁵.

It was also difficult to find an institution that admitted Eluana because on 16 December 2008 the Minister of Health issued recommendations to all National Health System-accredited institutions against the withdrawal of artificial hydration and nutrition from permanent vegetative state patients³⁶.

Subsequently a Health System-accredited nursing home in Udine, in the region Friuli Venezia Giulia, that had volunteered to admit Eluana, on 16 January 2009 withdrew the offer.

On 17 January 2009, as a result of the Radical Party’s denunciation, the Minister of Health was under investigation by the Prosecutor’s office of Rome for the crime of coercion. It can be said in advance that a dismissal decree would be issued on 20 May 2009 by the competent Ministers’ Tribunal.

³⁴ “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”: Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946, signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, 100) and entered into force on 7 April 1948. The definition has not been amended since 1948.

³⁵ See R. Ferrara, *L’ordinamento della Sanità*, *supra* note 15, at 77.

³⁶ For a critical analysis of these recommendations see F.G. Pizzetti, *L’atto del Ministro Sacconi sugli stati vegetativi, nutrizione e idratazione, alla luce dei principi di diritto affermati dalla Cassazione nel caso Englaro* (29 December 2008), on <http://www.astrid-online.it/Libert--di/TESTAMENTO/>.

In the end, on 3 February 2009, Eluana was brought to another nursing home, that was in Udine too.

It is important to remember that other regions showed important autonomy from the Minister's recommendations: the Presidents of Piedmont and Tuscany declared that they did not see any obstacle to admitting Eluana in one of the health care institutions of their regions³⁷.

A team of health care professionals, led by the head of the ICU of the local university hospital, an anesthesiologist, volunteered to withdraw Eluana's artificial hydration and nutrition and take care of her in the last phase of her life, without being paid.

The Italian Government tried to intervene and stop the procedure of withdrawing hydration and nutrition with a decree, containing a unique provision, stating that pending the enactment of a complete and organic law on advance directives, nutrition and hydration, as life-sustaining treatment, physiologically oriented to soften pain, could not be withdrawn by those who take care of subjects that are unable to look after themselves.

Article 77 of the Italian Constitution establishes that the Government, in case of necessity and urgency, can adopt under its own responsibility a temporary measure, provided that it shall introduce such a measure to Parliament for conversion into law. In any case, according to article 87, decrees having the force of law are issued by the President of the Republic.

The President of the Republic refused to sign the decree aimed at prohibiting the withdrawal of life-sustaining treatment, writing an open letter to the President of the Council of Ministers³⁸, in order to avoid an institutional conflict³⁹.

The refusal of the President of the Republic was based on different reasons⁴⁰: the inappropriateness of a governmental

³⁷ See statements of the President of the Piedmont region Mercedes Bresso in the interview of Marco Todarello, *Bresso: il Piemonte pronto per Eluana*, on <http://www.lastampa.it> (20 January 2009).

³⁸ The President of the Council of Ministers is the Italian Prime Minister.

³⁹ The letter (6 February 2009) that the President of the Republic Napolitano sent to President of the Council of Ministers Berlusconi can be read on <http://www.astrid-online.it/FORUM--II-/>.

⁴⁰ On the refusal of the President of the Republic see, *ex multis*, some of the several articles published on <http://www.astrid-online.it/FORUM--II-/>: U. Allegretti, *Un rifiuto presidenziale ben fondato* (12 February 2009); M. Luciani,

decree to regulate end-of-life issues such as living wills and the withdrawal of artificial hydration and nutrition, a subject, involving fundamental rights, that must be regulated by Parliament; the absence of a situation of necessity and urgency, that cannot consist in the publicity and drama of a single case (nothing new had occurred during the Parliamentary debate on end-of-life decisions that could justify such a decree); the principle of the separation of powers, that does not allow the failure to comply with a final judgment such as the decree of the Court of Appeals, issued in accordance with the principles established by the Corte di Cassazione.

After the President's refusal the decree was converted into a bill (bill n. 1369), reproducing the unique provision of the decree, whose approval, according to the President of the Council of Ministers, should occur "within three days", introduced in the Senate on 6 February 2009.

On 7 February 2009, Eluana's feeding tube was removed. On 9 February Eluana died.

Eluana's death interrupted the Parliamentary debate on the bill. In any case, in the Italian legal system, the principle according to which the legislative intervention finds a limit in final judgments (*res judicata*) is in force. Therefore, according to scholars, such a law, if enacted, would have been, either "practically useless"⁴¹ or unconstitutional⁴².

After Eluana's death the Prosecutor's office of Udine took the medical record and Eluana's father and all the health

L'emanazione presidenziale dei decreti-legge (spunti a partire dal caso E.) (5 March 2009); V. Onida, *Il controllo del Presidente della Repubblica sulla costituzionalità dei decreti-legge* (9 February 2009); F.G. Pizzetti, *In margine ai profili costituzionali degli ultimi sviluppi del caso Englaro: limiti di legge e "progetto di vita"* (5 March 2009); A. Ruggeri, *Il caso Englaro e il controllo contestato* (11 February 2009); S. Stammati, *Breve nota sui problemi costituzionali suscitati dal caso Englaro* (15 February 2009); A. Pace, *L'inutilità pratica della legge "per Eluana"* (Text revised and integrated by the author of the article published in *La Repubblica* of 11 February 2009 entitled *Quella legge ancora inutile*). On this subject see also A. Spadaro, *Può il Presidente della Repubblica rifiutarsi di emanare un decreto legge? Le "ragioni" di Napolitano*, on <http://www.forumcostituzionale.it>; R. Caponi-A. Proto Pisani, *supra* note 12.

⁴¹ A. Pace, *supra* note 40.

⁴² See M. Luciani, *supra* note 40, at 18-19. For the claim of unconstitutionality see also R. Caponi-A. Proto Pisani, *supra* note 12, at 987.

professionals involved in the procedure of withdrawal of her life-sustaining treatment were investigated for the murder of the woman. After expert evidence from which the irreversibility of Eluana's permanent vegetative state was ascertained, the charges of the Prosecutor's office were dismissed on 11 January 2010 and the magistrate in charge of preliminary investigations closed the case.

7. The Terri Schiavo case: an overview

The Terri Schiavo case⁴³ split U.S. public opinion like the Englaro case transfixed Italy. It could be interesting to make a comparison between the two cases, to point out their similarities and differences and, in particular, to evaluate if and how the Terri Schiavo case, which occurred before the Englaro case, has influenced the latter.

In the knowledge and dialectic comparison with foreign experiences, the legal system finds a key factor for understanding its own dynamics and for assessing the suitability and efficiency of its own solutions.

⁴³ On the origins and the evolution of the end-of-life issues in the United States of America see F.G. Pizzetti, *supra* note 6, at 401 ss.; M. Motroni, *La giurisprudenza statunitense e italiana in tema di eutanasia e scelte di fine vita: spunti per una comparazione*, in U. Breccia-A. Pizzorusso, *Atti di disposizione del proprio corpo*, R. Romboli ed. (2007), 319 ss., where it is possible to read a complete analysis of the *Terry Schiavo* Case. On this case see, among the others, K.L. Cerminara, *Critical Essay: Musings on the Need to Convince Some People with Disabilities That End-of-life Decision Making Advocates Are Not Out to Get Them*, 37 *Loyola University Chicago Law Journal* 343 (2006); Id., *Tracking the Storm: The Far-Reaching Power of the Forces Propelling the Schiavo Cases*, 35 *Stetson Law Review* 147 (2005). For an accurate examination of the legal dispute see O. Carter Snead, *Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End of life Context*, 57 *Florida Law Review* 53 (2005); Steven G. Calabresi, *The Terri Schiavo Case: In Defense of the Special Law Enacted by Congress and President Bush*, 100 *Nw. U. L. Rev.* 151 (2006); Jay Wolfson, *A report to Governor Jeb Bush and the 6th Judicial Circuit in The Matter of Theresa Schiavo* (1 December 2003), on <http://abstractappeal.com/schiavo/WolfsonReport.pdf>. More in general, on advance directives in common law systems see R.E. Cerchia, *Le "advance directives" nei Paesi di common law, prospettive per il nostro ordinamento*, 6 *Riv. dir. civ.* 732 (2005). With particular reference to the end-of-life issues in Canada see V. Molaschi, *Le decisioni di fine vita in Canada: spunti di riflessione per il dibattito sul testament biologico in Italia*, 5 *Sanità Pubblica e Privata* 5 (2011).

The circulation of models appears as a natural support to legal studies and jurisprudential evolution; this is all the more valid if we consider the transnational character of the biomedical and biotechnological revolution, including in terms of “biolaw”.

Theresa Marie Schiavo was a severely brain damaged woman, who had been in a permanent or persistent vegetative state for many years, as a consequence of the neurological damage she suffered after an heart attack in 1990, which had left her brain without oxygen for several minutes. When this tragedy struck, she had not written a living will.

After having taken care of her, with her parents, for some years, her husband, Michael Schiavo, who was her legal guardian, petitioned the Circuit Court of Pinellas County, in Florida, for an order directing the withdrawal of her hydration and feeding tube. He claimed that his wife, who was completely unconscious, with no hope of improvement, before the heart attack had expressed to him her wish not to be kept alive artificially, in the case that she became incapacitated.

In February 2000, the Trial Court recognized that there was clear and convincing evidence that Mrs. Schiavo was in a permanent or persistent vegetative state, without chances of recovering capacity and that she would have wanted the removal of her feeding and hydration tube⁴⁴.

Terri Schiavo’s parents, Mary and Robert Schindler, who thought she was responsive and communicated with them and therefore wanted her to be kept alive⁴⁵, appealed.

⁴⁴ The opinion of the Trial Judge Greer in the Circuit Court of Pinellas County, Florida, is unpublished, but it is summarized in Florida District Court of Appeals Judge Altenbernd’s third appellate opinion regarding the case, *Schindler v. Schiavo (In re Schiavo)*, 800 So. 2d 640 (Fla. Sist. Ct. App. 2001), as follows: “(1) Mrs. Schiavo’s medical condition was the type of end-stage condition that permits the withdrawal of life prolonging procedures», (2) she did not have a reasonable medical probability of recovery capacity, so that she could make her own decision to maintain or withdraw life prolonging procedures, (3) the trial court had the authority to make such a decision when a conflict within the family prevented a qualified person from effectively exercising the responsibilities of a proxy, and (4) clear and convincing evidence at the time of trial supported a determination that Mrs. Schiavo would have chosen in February 2000 to withdraw the life prolonging procedures”.

⁴⁵ The Schindlers also argued that Michael Schiavo was not a fit guardian: he had been regularly dating other women since 1993 and he did not give adequate care to his wife.

In January 2001, the Court of Appeal of Florida, Second District, rejected Terri Schiavo parents' claim, confirming the lower Judge's decision⁴⁶.

The Schindlers sought review of the District Court decision, but in April 2001 the Supreme Court of Florida determined to decline to accept jurisdiction and ordered that the petition for review was denied⁴⁷. The next day Terri Schiavo's hydration and feeding tube was clamped.

Her parents filed a motion for relief of judgment, under the Florida Rule of Civil Procedure, maintaining that new evidence showed that Michael Schiavo and their daughter had never discussed her will in case of incapacitation. Pending the suit, the feeding tube was reactivated.

Followed a complex judicial battle, whose outcome resulted in various decisions authorizing termination of Terri Schiavo's life support⁴⁸. The decisions referred to the same grounds: Mrs. Schiavo's vegetative state was irreversible, without any possibility to increase her cognitive functions and there was clear and convincing evidence that she would have wished to withdraw artificial hydration and nutrition.

In October 2003, after the Florida Second District Court of Appeal⁴⁹ had rejected for the fourth time the Schindlers' request to conduct a de novo review of the Trial Court's judgment, affirming that, in any case, it would still have confirmed the lower Court's decision, the removal of Terri Schiavo's life prolonging measures was scheduled again.

⁴⁶ *Schindler v. Schiavo (In re guardianship of Schiavo)*, 780 So. 2d 176 (Fla 2d DCA 2001) (*Schiavo I*). The Court had no doubt about Terri Schiavo's conditions: "The evidence is overwhelming that Theresa is in a permanent or persistent vegetative state. (...) Over the span of this last decade, Theresa's brain has deteriorated because of the lack of oxygen it suffered at the time of the heart attack. By mid-1996, the CAT scans of her brain showed a severely abnormal structure. At this point, much of her cerebral cortex is simply gone and has been replaced by cerebral spinal fluid. Medicine cannot cure this condition". This is also the opinion of the following judicial decisions. However, some scholars have many doubts about the sufficiency of medical assessment of Terri Schiavo's brain activity: see Steven G. Calabresi, *supra* note 43, at 154-155.

⁴⁷ *Schindler v. Schiavo*, 789 So. 2d 348 (2001 Fla)

⁴⁸ *In re Schiavo*, 792 So. 2d 551 (Fla. 2d DCA 2001) (*Schiavo II*); *In re Schiavo*, 800 So. 2d 640 (Fla. 2d DCA 2001) (*Schiavo III*); *In re Schiavo*, 851 So. 2d 182 (Fla. 2d DCA 2003) (*Schiavo IV*).

⁴⁹ *In re Schiavo*, 851 So. 2d 182 (Fla. 2d DCA 2003) (*Schiavo IV*).

After the judiciary gave permission to withdraw Terry Schiavo's artificial hydration and nutrition, newspapers, radio and television focused great attention on the case. Part of the public opinion, moved by the perception of a disabled person who could not stand up for herself to get the care she needed, asked the Governor of Florida, Jeb Bush, brother of the President of the U.S. George W. Bush, to intervene, to stop what was seen as a death by starvation and dehydration.

The result of this popular pressure was Public Law 2003-41850, which allowed the Governor to issue a stay to prevent the withholding of nutrition and hydration from a patient under the specific circumstances: (a) that patient had no written advance directive; (b) the court had found that patient to be in a persistent vegetative state; (c) that patient had had nutrition and hydration withheld; and (d) a member of that patient's family had challenged the withholding of nutrition and hydration⁵¹.

Since it was clear that this law was apparently general, but, de facto, enacted for Terri Schiavo, it was called "Terri's law".

⁵⁰ Public Law 03-418: "An act relating to the authority for the Governor to issue a one-time stay; authorizing the Governor to issue a one-time stay to prevent the withholding of nutrition and hydration under certain circumstances; providing for expiration of the stay; authorizing the Governor to lift the stay at any time; providing that a person is not civilly liable and is not subject to regulatory or disciplinary sanctions for taking an action in compliance with any such stay; providing for the Chief Judge of the Circuit Court to appoint a guardian *ad litem*; providing an effective date".

⁵¹ The law, brief and unequivocal, stated: «Section 1. (1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003: (a) That patient has no written advance directive; (b) The court has found that patient to be in a persistent vegetative state; (c) That patient has had nutrition and hydration withheld; and (d) A member of that patient's family has challenged the withholding of nutrition and hydration.

(2) The Governor's authority to issue the stay expires 15 days after the effective date of this act, and the expiration of the authority does not impact the validity or the effect of any stay issued pursuant to this act. The Governor may lift the stay authorized under this act at any time. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.

(3) Upon issuance of a stay, the Chief Judge of the Circuit Court shall appoint a guardian *ad litem* for the patient to make recommendations to the Governor and the Court. Section 2. This act shall take effect upon becoming a law".

The bill was introduced one day and became a law the next, on 21 October 2003. Governor Bush issued an Executive Order to restore life support treatment to Terri Schiavo⁵², who, in the meanwhile, had been without nutrition and hydration for almost one week.

On the same day Michael Schiavo challenged the constitutionality of the law. The Circuit Court entered a final summary judgment on 6 May, 2004, in favor of him, finding the Act unconstitutional.

The Trial Court's decision was confirmed by the Supreme Court of Florida, which declared Chapter 2003-418 unconstitutional, as applied to Terri Schiavo⁵³.

Specifically, the Court based the declaration of unconstitutionality on the ground of the principle of the separation of powers, expressly codified in article II, section 3, of the Florida Constitution.

The doctrine of the separation of powers, which is "the cornerstone of American democracy"⁵⁴ too, embraces two fundamental prohibitions: "The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power"⁵⁵. According to the Court, chapter 2003-418 violated both of these prohibitions.

As to the former, the Act, as applied to the Schiavo case, "resulted in an executive order that effectively reversed a properly rendered final judgment and thereby constituted an

⁵² Executive Order n. 03-201, Florida Governor's Office, 21 October 2003: "A. Effective immediately, continued withholding of nutrition and hydration from Theresa Schiavo is hereby stayed. B. Effective immediately, all medical facilities and personnel providing medical care for Theresa Schiavo, and all those acting in concert or participation with them, are hereby directed to immediately provide nutrition and hydration to Theresa Schiavo by means of a gastronomy tube, or by any other method determined appropriate in the reasonable judgment of a licensed physician. C. While this order is effective, no person shall interfere with the stay entered pursuant to this order. D. This order shall be binding on all persons having notice of its provisions. E. This order shall be effective until such time as the Governor revokes it. F. The Florida Department of Law Enforcement shall serve a copy of this Executive Order upon the medical facility currently providing care for Theresa Schiavo".

⁵³ *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004).

⁵⁴ *Bush v. Schiavo*, 885 So. 2d at 328.

⁵⁵ *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla 1991).

unconstitutional encroachment on the power that has been reserved for the independent judiciary”⁵⁶. Terri’s law realized a sort of “legislative adjudication”⁵⁷.

As to the latter prohibition, expression of the non delegation doctrine, the Court established⁵⁸ that, “in enacting chapter 2003-418, the Legislature failed to provide any standards by which the Governor should determine whether, in any given case, a stay should be issued and how long a stay should remain in effect”. Moreover, the Legislature failed to provide any criteria for lifting the stay. The absolutely unlimited discretion to decide whether to issue and then when to lift the stay made the Governor’s decision “virtually unreviewable”⁵⁹.

The unrestricted Governor’s discretion in applying the law was particularly problematic, because it affected rights established in the Constitution: the open-ended delegation of authority by the Legislature to the Governor provided no guarantee for the incompetent patient’s right to withdraw life-prolonging procedures⁶⁰.

⁵⁶ *Bush v. Schiavo*, 885 So. 2d at 331. The Court stated (at 332): “When the prescribed procedures are followed according to our rules of court and governing statutes, a final judgment is issued, and all post-judgment procedures are followed, it is without question an invasion of the authority of the judicial branch for the Legislature to pass a law that allows the executive branch to interfere with the final judicial determination in a case. That is precisely what occurred here and for that reason the Act is unconstitutional as applied to Theresa Schiavo”.

⁵⁷ C. Dorf, *How The Florida Legislature and Governor Have Usurped the Judicial Role in the Schiavo “Right to Die case”*, on <http://writ.news.findlaw.com/dorf/20031029.html>, 4. For a different stance see G. LOMBARDI, *Il caso Terri Schiavo. Intervista a Giorgio Lombardi*, 3 Quad. cost. 695, 698 (2005).

⁵⁸ *Bush v. Schiavo*, 885 So. 2d at 334.

⁵⁹ “When legislation is so lacking in guidelines that neither the agency, nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver, rather than the administrator of the law”: *Askew v. Cross Key Waterways*, 372 So. 2d, 913, at 918-919 (Fla. 1978).

⁶⁰ *Bush v. Schiavo*, 885 So. 2d at 336. See *In re Guardianship of Browning*, 568 So. 2d 4, at 12, which affirmed that an incompetent person has the same right to refuse medical treatment as a competent person.

The Schindlers immediately appealed to the U.S. Supreme Court on 24 January 2005, but the petition for writ of certiorari was denied⁶¹.

Terri Schiavo's feeding tube was removed again on 18 March 2005.

Republican leaders in the House of Representatives started a congressional inquiry of the House Government Reform Committee, which was to take place in Clearwater on March 25, and issued subpoenas for Terri and Michael Schiavo and several hospice workers. Because of her condition, Terri Schiavo evidently would not have been able to testify; this escamotage, giving to Terri Schiavo federal protection as a prospective witness, was aimed at avoiding the discontinuance of her life-sustaining treatment. The subpoena was ignored by the competent State Judge.

Because of the popular clamor brought about by the case, on 21 March 2005 President Bush signed into law the Act for the Relief of the Parents of Theresa Marie Schiavo⁶², also known as the "Palm Sunday Compromise", to recall the day in which it was passed by the U.S. Senate and House of Representatives⁶³: it allowed Terri's parents to move the case into a Federal Court. In fact, the second "Terri's Law" gave the Federal Courts jurisdiction "to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life".

Congress's intervention did not help. The United States District Court for the Middle District of Florida, Tampa Division, denied the Schindlers' motion for a temporary restraining order (TRO) against Michael Schiavo, the hospice and the State Judge,

⁶¹ 125 S. Ct. 1086 (2005).

⁶² Public Law n. 109-3, 119 Stat. 15 (2005). The law established: "In such a suit, the District Court shall determine *de novo* any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act, notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings. The District Court shall entertain and determine the suit without any delay or abstention in favor of State court proceedings, and regardless of whether remedies available in the State courts have been exhausted".

⁶³ It was 20th March 2005.

seeking the reestablishment of nutrition and hydration to Terri⁶⁴. The Court of Appeals for the Eleventh Circuit found that the District Court properly denied the TRO⁶⁵. The application for a stay of enforcement of judgment pending the filing and the disposition of a petition for writ of certiorari were denied by the Supreme Court of the United States⁶⁶.

On 31 March 2005 Terri Schiavo died.

8. The Englaro case and the Schiavo case: a comparison. The influence of the Schiavo case and of U.S. case law on the Englaro case

While in the Italian context the Englaro case is a turning point on the road to the recognition of the right of self-determination – the ruling n. 21748/2007 of Corte di Cassazione's I civil section reversed the statements of the lower Courts and changed its position with respect to its ordinance n. 8291/2005 –, the Schiavo case does not represent a shift in the jurisprudential evolution of the U.S.⁶⁷ In the U.S. the end-of-life is characterized by well-established principles, maintained in important cases.

Moreover, that individuals have the right to refuse and withdraw life-sustaining treatment, even if incapacitated, is well settled under Florida law⁶⁸, under which the Schiavo case was decided, and the statutory law of the various States.

The existence of a regulation of advance directives is another difference between the U.S. and Italy, where such a law does not exist yet.

It is therefore noteworthy that in decision n. 21748/2007 the Italian Corte di Cassazione, given the lack of regulation and the absence of a clear jurisprudential framework, has referred to the end-of-life U.S. cases. In particular, it drew inspiration from In re

⁶⁴ *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161 (M.D. Fla., 2005).

⁶⁵ *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. Fla., 2005), rehearing and injunction denied by *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1282 (11th Cir. Fla., 2005), rehearing, en banc, denied by *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270 (11th Cir. Fla., 2005).

⁶⁶ 125 S. Ct. 1722 (2005).

⁶⁷ See F.G. Pizzetti, *supra* note 6, at 442.

⁶⁸ See Health care advance directives, Fla. Stat. Ch. 765.101-765.404 (2012).

Quinlan, Jobs and Cruzan, all of them regarding an incompetent person, without a living will, and from the Vacco case.

In the Italian Supreme Court's ruling there is no reference to the Schiavo case. The peculiarity of this case, in fact, lies in the conflict within the family⁶⁹, an aspect that is extraneous to the Englaro case: apart from the fact that Eluana was not married, there was full agreement between her parents regarding her end-of-life choices.

As to *In re Quinlan*⁷⁰, the first and oldest case, recalled by the Italian Supreme Court, the Supreme Court of New Jersey has stated that the right of privacy, which protects a person from intrusion into many aspects of personal decisions⁷¹, is broad enough to encompass the patient's decision to decline medical treatment under certain circumstances: the State's interest, that is the preservation of human life and the defence of the right of the physician to administer medical treatment according to his best judgment, "weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims". According to the Court, "Ultimately there comes a point at which the individual's rights overcome the State interest".⁷²

Moreover, the Court has established that the exercise of the right of choice – ascribable, in the Court's view, to the right of privacy – should be granted also to an incompetent person through the assertion of it, on his/her behalf, by a guardian or family, who render their best judgment, as to whether the patient would exercise it in these circumstances⁷³.

It is in particular this last principle, oriented to ensure that the surrogate decision maker takes as much as possible the

⁶⁹ Terri Schiavo's husband's version of the facts can be read in M. Schiavo-M. Hirsh, *Terri: The Truth* (2006), while the Schindlers' position has been illustrated in M. Schindler – R. Schindler, *A life that Matters: The Legaci of Terri Schiavo – A lesson for Us All* (2006).

⁷⁰ *In re Quinlan*, 70 N.J. 10; 355 A 2d 647 (1976).

⁷¹ For instance, the Supreme Court had stated that the right of privacy embraced also a woman's decision to terminate pregnancy under certain circumstances: *Roe v. Wade*, 410 U.S. 113; 93 S. Ct. 705 (1973).

⁷² *In re Quinlan*, 70 N.J. at 41.

⁷³ When a person is incompetent "the only practical way to prevent destruction of the rights is to permit the guardian and family ... to render their best judgment, subject to qualifications hereinafter stated, as to whether she would exercise it in these circumstances": *In re Quinlan*, 70 N.J. at 41.

decision that the incompetent person would take if he or she were capable, that has been followed by the Italian Supreme Court in authorizing Eluana's father, who was her guardian, to choose the withdrawal of her artificial hydration and nutrition.

With respect to this aspect, the Corte di Cassazione has been also inspired by the *Jobes'* case⁷⁴, in which the Supreme Court of New Jersey has given important indications about the so-called substituted judgment test. Under this doctrine, when the incompetent person's wishes are not clearly expressed, the surrogate considers the patient's system of values, his/her prior statements about and reactions to medical issues, his/her personality, with particular reference to his/her philosophical, theological and ethical convictions, in order to understand what course of medical treatment the person would choose⁷⁵.

The same reasoning was followed by the Italian Court to ascertain Eluana's wishes, given the absence of a living will.

Another pillar of the end-of-life issue in the U.S., that has marked the Italian jurisprudential shift represented by the *Englaro* case, is the *Cruzan* case⁷⁶, in which the Supreme Court of the United States has stated important principles about the informed consent doctrine (it referred to this, rather than the right to privacy, when ascribing the right to refuse treatment).

In particular, the constitutional challenge regarded the Missouri Living Will statute (1986). The Court has held that the due process clause of the Federal Constitution's Fourteenth Amendment does not forbid a State from requiring that evidence of an incompetent individual's wishes as to the withdrawal of life-sustaining treatment be proved by clear and convincing evidence, and thus a State could apply such a standard in proceedings where a guardian sought to discontinue nutrition and hydration of a person diagnosed as being in a persistent vegetative state⁷⁷.

⁷⁴ *In the matter of Nancy Ellen Jobes*, 108 N.J. 394; 529 A.2d 434 (1987).

⁷⁵ *In the matter of Nancy Ellen Jobes*, 108 N.J. at 414-415. See also *In re Roe*, 383 Mass. 415, 442, 421 N.E.2d 40, 56-59 (1981).

⁷⁶ *Cruzan v. Director, Missouri Department of Health*, 497 US 261; 110 S. Ct. 2841 (1990). This decision can be read also in *Foro it. IV 66* (1991), with comments of A. Santosuosso, *Il paziente non cosciente e le decisioni sulle cure: il criterio della volontà dopo Cruzan*, and of G. Ponzanelli, *Nancy Cruzan, la Corte degli Stati Uniti e il "right to die"*.

⁷⁷ "An incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right.

In the Cruzan case there was not clear and convincing proof of the patient's desire to have hydration and nutrition withdrawn. However, this has become a fundamental precedent because, if Nancy Cruzan's will had been expressed without any evident doubt, her Constitutional right to be disconnected from the feeding and hydration tube would have been respected⁷⁸.

The Italian Corte di Cassazione's ruling has referred also to the Vacco case⁷⁹. This case, regarding the different situation of mentally competent terminally ill patients, is mentioned by the Court because it has drawn a "rational" distinction between withdrawing life-sustaining treatment and assisted suicide, prohibited by the overwhelming majority of State legislatures: the former corresponds to the "protected liberty interest in refusing unwanted medical treatment", and is grounded "on well established traditional rights to bodily integrity and freedom from unwanted touching", as maintained in cases like Cruzan; it has nothing to do with a supposed "right to hasten death" implied by the latter.

The more interesting aspect of the Schiavo case is its "politicization"⁸⁰, politicization that will be also one of the features of the Englaro case some years later, as we have seen in

Such a "right" must be exercised for her, if at all, by some sort of surrogate. Here, Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death, but it has established a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent. Missouri requires that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not": *Cruzan v. Director, Missouri Department of Health*, 497 US at 280.

⁷⁸ See C. DORF, *How The Florida Legislature and Governor Have Usurped the Judicial Role in the Schiavo "Right to Die case"*, on <http://writ.news.findlaw.com/dorf/20031029.html>, 2: "the Court in *Cruzan* did not simply say that a State could recognize an incompetent patient's right to have their wishes respected if the requisite evidentiary showing were made. It also implied that a State had to do so, even if it preferred to keep the patient alive indefinitely, because the Constitution requires that the patient's wishes be respected".

⁷⁹ *Vacco v. Quill*, 521 U.S. 793, 117 S. Ct. 2293 (1997).

⁸⁰ Barbara A. Noah, *Politicizing the End of Life: Lessons from the Schiavo controversy*, 59 U. Miami L. Rev. 107 (2004).

the previous sections. From this point of view, it is possible to say that it is this second phase of the Schiavo case, involving the difficult balance between the branches of government (the judicial power, on the one hand, and the legislative and the executive ones, on the other hand), that has more influenced the Englaro case.

There is no doubt that the Italian Government borrowed from the U.S., where there were two “Terri’s laws”, the idea to intervene in the Englaro case with an *ad personam* regulation, affecting, *de facto*, a single lawsuit, which would have been realized through the enactment of a law decree and, subsequently, with a law, neither of which saw the light of the day.

It is interesting to underline that both legal systems have reacted to the governmental attempt to override the final judgments that had authorized the withdrawal of life-sustaining treatment from patients in permanent vegetative state on the grounds of the principle of the separation of powers.

As to the Englaro case, this was due to the Italian President of the Republic, who refused to sign the governmental decree aimed at prohibiting the discontinuance of Eluana’s feeding and hydration tube.

As to the Terri Schiavo case, the principle of the separation was recalled by the Supreme Court of Florida to declare the first “Terri’s law”, Chapter 2003-418, unconstitutional.

As regards the second “Terri’s law”, a comparison with what happened in Italy is more complex. This law pursued the same goal to nullify the prior State court decisions, but in another way: by “federalizing” the Schiavo case⁸¹. Differently from the U.S., Italy is not characterized by judicial federalism.

In any case, it must be highlighted that with the second “Terri’s law” Congress did not give Terri’s parents a real chance of success: it only gave them the possibility to have a Federal Court forum, without granting any new substantive rights⁸².

⁸¹ On this topic see F.G. Pizzetti, *Il giudice nell’ordinamento complesso* (2003).

⁸² For this observation see E. Lazarus, *Why Congress’s Intervention Predictably Didn’t Help the Schindlers: Putting Federal Judges In an Unfair Pressure Cooker In the Terri Schiavo Case*, on <http://writ.news.findlaw.com/lazarus/20050331.html>, 4.

9. Reflections on the opportunity to enact a law on advance directives in Italy and on the features of such a regulation. Brief analysis of the bill under discussion.

After Eluana Englaro's death, the Parliamentary debate on advance directives accelerated and on 10 February 2009 led to the approval of a motion that qualified artificial hydration and nutrition as life-sustaining measures⁸³. Then, on 26 March 2009, a bill was approved by the Senate, the so-called "Disegno di legge Calabrò"⁸⁴. The bill was later transmitted to the Chamber of Deputies, where it was approved, with amendments, after two years, on 12 July 2011⁸⁵. At present the bill is being debated in the competent Parliamentary commission of the Senate⁸⁶.

The Parliamentary procedure is marked by alternating accelerations and slowdowns. It is difficult to predict whether a law on advanced directives will be enacted by this Parliament: Italy has a technical Government, appointed by the President of the Republic to face the economic crisis; parties that support the Government are trying to find an agreement to carry out constitutional and political reforms and the end-of-life issue is undoubtedly a great source of division among them and within the parties themselves.

The level of the clash of ideas and ideologies should lead to taking a step backwards and to reposing a question the answer to which is not obvious: do we need authoritative guidance? Is a law on living wills necessary in Italy?

According to one viewpoint, the need for a law derives from the "juridical insufficiency" of article 32 of the Italian Constitution, that was conceived for decisionally capable subjects

⁸³ Motion n. 1-00086, signed by Senators Gasparri, Quagliariello and others.

⁸⁴ For an analysis see A. Pioggia, *supra* note 31, at 276 ss.; Id., *Brevi considerazioni sui profili di incostituzionalità del Ddl Calabrò*, on <http://www.astrid-online.it/FORUM--II/>.

⁸⁵ Bill C. 2350, sent from the Senate to the Chamber of Deputies on 31 March 2009 – combined with C. 625, C. 784, C. 1280, C. 1597, C. 1606, C. 1764-bis, C. 1840, C. 1876, C. 1968-bis, C. 2038, C. 2124, C. 2595. Commission examination concluded on 1 March 2011. Debate in the Chamber started on 7 March 2011 and the bill was approved, with amendments, on 12 July 2011.

⁸⁶ Bill S.10-51-136-281-285-483-800-972-994-1095-1188-1323-1363-1368-B, under examination. Debate started on 20 October 2011.

and does not consider the situation of incompetent individuals, as the Englaro case has shown⁸⁷.

According to another point of view, a systematic interpretation of the Italian Constitution provides end-of-life decisions with a sufficient legal framework⁸⁸, that has been implemented by the principles established by the Corte di Cassazione in decision n. 27148/2007; therefore, everyone can express them despite the absence of a regulation, and may be sure of their protection⁸⁹.

It is not easy to take a stance on the alternative between “law” and “no law”⁹⁰.

The truth probably lies in the middle: the absence of a specific law should not prevent people from expressing their living wills and having them respected, but Italy needs a regulatory framework, especially as to the guarantees for individuals and health professionals that comply with them.

What should be the features of such a regulation?

To answer this question it would be appropriate to move from the Parliamentary debate and, in particular, from the main criticalities of the bill that is under examination⁹¹.

Its sphere of application is very limited, regarding only patients with ascertained absence of integrated cortical-subcortical brain activity (art. 3).

As to the content of the advance directives, the patient expresses orientation and information useful for the physician only about the activation of therapeutic treatment (article 3). This provision does not seem to give the possibility to decide to withhold or withdraw medical treatment.

Hydration and nutrition, in the different ways they can be given to a patient according to science and technique, cannot be the object of an advance directive (article 3).

⁸⁷ G.U. Rescigno, *supra* note 18, at 88 ss.

⁸⁸ On this point of view see S. Rodotà, *supra* note 22, at 84.

⁸⁹ U. Veronesi, *Scrivetevi il testamento biologico*, La Stampa, May 7, 2009, at 1 and 39.

⁹⁰ Here the author takes up the title of the book by S. Rodotà, *supra* note 2.

⁹¹ For a critical comment, see U. Veronesi, *Così si apre la strada a tante cause legali*, La Stampa, July 13, 2011, at 1 and 33; M. Ainis, *La fiera dell'ossimoro in quattro paradossi*, Corriere della Sera, July 13, 2011, at 1.

At the basis of this choice there is the idea that this kind of treatment is non medical and, therefore, the safeguard of article 32 to refuse it does not apply.

In the previous bill approved by the Senate, to this extent hydration and nutrition were expressly qualified life-sustaining measures.

This definition was very controversial, because, generally speaking, the qualification of life-sustaining treatment as medical acts is really less discussed in the scientific field than in the bioethical one⁹². Moreover, the introduction of a distinction between what is a therapy and what is not would complicate the content of the advance directives, that would have a “variable geometry” extent.

Although the definition of nutrition and hydration as life-sustaining measures has been cancelled from the latest version of the bill, undoubtedly it is still inspired by this conception.

In any case, even if the view of such treatment as simply basic care and not medical could be accepted, this position would not lead to excluding it from the right of self determination that inspires the whole Italian Constitution. The Constitutional Charter guarantees freedom in general, not only in the health care sector. An example can be seen in another significant article: article 13, that safeguards personal liberty, defined as inviolable⁹³.

The introduction of a feeding tube against the will of a person is an unlawful coercion both in case of a subject that is decisionally competent and in case of an unconscious person who has expressed his or her refusal when he or she was capable.

Furthermore, the bill has drawn the exclusion of hydration and nutrition from the advance directives from the reference to the Convention on the Rights of persons with disabilities, approved on 13 December 2006 and ratified in Italy by Law n. 18

⁹² This aspect is pointed out by F.G. Pizzetti, *supra* note 40, at 14. Also on this subject see A. Pioggia, *supra* note 31, at 277.

⁹³ The importance of article 13 of the Italian Constitution is underlined by L. d’Avack, *supra* note 19, at 1929-1930, who observes how the freedom of each individual to decide what to do with his own body is a postulate of inviolable personal freedom, as sanctioned by the Constitutional Charter. In the same order of ideas see D. Maltese, *supra* note 12, at 987, according to whom the right to refuse any kind of assistance is part of the *status libertatis* that the Constitution recognizes to all individuals as the “unwithdrawable heritage of the personality”.

of 3 March 2009. According to article 25, specific to “Health”, “States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability”. In particular, letter f) of the same article establishes that States Parties shall: “Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability”.

The bill implies a wrong interpretation of the Convention. It is important to point out that article 25 of it, at letter d), also provides that State Parties shall: “Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care”.

The Convention holds that the principle of free and informed consent applies also to individuals with disabilities. This means exactly the opposite of what the bill under discussion derives from the Convention: the principle of non discrimination requires the non misrepresentation of advance directives of persons with disabilities. Consequently, the prohibition of denying health care, health services, food and fluids regard individuals who wish them.

Another controversial issue of the bill is the provision according to which in case of urgencies or when the person is risking his/her life, his/her advance directives do not apply (article 4, last paragraph).

This provision seems once again to deny the possibility to withhold medical treatment in emergency situations. The individual’s right of self determination is again violated.

The idea of making a provision that establishes the non binding character of the advance directives for the physician (article 7) also raises perplexity. The physician should consider the patient’s advance directives, but is not obliged to follow them.

Such a provision would be a source of discrimination between patients that are capable and therefore able to have their wishes respected and patients that are decisionally incompetent, whose living wills are only a kind of orientation for the health professionals.

It would violate not only the right of self determination, but also the principle of equality, established by article 3 of the Italian Constitution.

In the view of some scholars the physician's substitution of the patient could be probably admissible only if scientific or technical progress made the advance directives no longer well-informed or correspondent to the wishes of the patient: this could be the case of a scientific discovery that makes the permanent vegetative state reversible.

However, the physician's assessment would not be easy at all: many problems related to the quality of life of the "reborn" patient would arise.

Another issue regards how advance directives should be expressed.

It can be observed that many of the main perplexities regarding the Englaro case result from the presumptive reconstruction of Eluana's advance directives.

There is no doubt that it is better to put living wills "in black and white". The crux is that the bill that is under discussion prescribes too precisely how end-of-life decisions should be drawn up: it requires the signature of the family doctor and establishes that the doctor is the only subject authorized to collect them; any statements of intent or orientation expressed by the individual not conforming to the forms and ways established by the law therefore have no value and cannot be used in order to reconstruct the individual's will (article 4).

However, in the legal literature the risks of an excessive bureaucratization have been underlined: the living will should not be the only way for individuals to express their convictions about the end-of-life⁹⁴.

The previous question "do we really need authoritative guidance?" could be probably reformulated as "do we really need such authoritative guidance?".

The analysis of the debate on advance directives shows the risks of an excessive "juridification": the creation of a legal

⁹⁴ For this observation see S. Rodotà, *supra* note 2, at 259.

framework that appropriates the “bare life”⁹⁵, areas that should belong to the conscience of individuals and their families⁹⁶.

In facing the alternative between “law” and “no law”, it would be advisable to have a minimal regulation, developed through principles, that protect the right of self determination, identifying an area of autonomy of the individual, to which the law, however, must remain extraneous⁹⁷. The legislator should give only general provisions that implement it, with the function of, for instance, establishing rigorous rules to ascertain the patient’s wishes in the absence of a living will, guarantees for individuals and health professionals that comply with his/her advance directives, etc., without intruding into the personal sphere of the patient.

⁹⁵ The reference is to the book by G. Agamben, *Homo sacer. Il potere sovrano e la nuda vita* (2005).

⁹⁶ On these aspects see S. Rodotà, *supra* note 2, at 9 ss.; Id., *supra* note 22, at 84 ss.

⁹⁷ For this analysis see, again, S. Rodotà, *supra* note 2, at 19 ss.; Id., *supra* note 22, at 84.

A COMPARISON OF EUROPEAN SYSTEMS OF DIRECT ACCESS TO CONSTITUTIONAL JUDGES: EXPLORING ADVANTAGES FOR THE ITALIAN CONSTITUTIONAL COURT

Gianluca Gentili*

Abstract

As protection of fundamental rights increasingly becomes a defining feature of modern constitutionalism, some countries debate over the opportunity to introduce systems of direct individual access to constitutional judges to increase protection of constitutional rights. Part I of the article provides a comparative overview of the systems of individual constitutional complaint adopted in Europe, focusing on their functioning, structure and admissibility requirements. Part II addresses possible benefits of the introduction of such a system in Italy. After describing the main features of the Italian system of judicial review, the article details proposals that, since 1947, have been presented to introduce a system of direct individual access to the Italian Constitutional Court. Finally, Part III offers reflections on the potential advantages that adoption of such complaint would bring to the Italian legal system, compared to the currently existing avenues of access to the Court.

* Ph.D., Comparative Public Law, University of Siena, Italy. This article has benefited from comparative research and study on systems of judicial review conducted during a traineeship at the European Commission for Democracy through Law (Venice Commission) of the Council of Europe, an opportunity for which I am grateful. I wish to thank Professor Tania Groppi of the University of Siena and Professors Louis F. Del Duca and Robert E. Rains of The Dickinson School of Law of The Pennsylvania State University for helpful comments on previous drafts of this article. I would also like to express my appreciation to Dr. Schnutz Durr, Head of the Constitutional Justice Division of the Venice Commission, for illuminating discussions on comparative systems of judicial review. The author holds the sole responsibility for remaining errors and inaccuracies. Comments are welcome: gianluca.gentili@unisi.it.

TABLE OF CONTENTS

Introduction: defining the object of the analysis.....	160
I. A comparative overview of european systems of individual constitutional complaint.....	164
A. Austria.....	165
B. Germany.....	167
C. Spain.....	170
D. Switzerland.....	172
E. Belgium.....	174
F. Central and Eastern European States.....	175
G. Other ECHR Signatory States.....	179
H. A Common European Frame of Reference for the Individual Constitutional Complaint.....	182
II. Individual constitutional complaint and the Italian system of judicial review.....	183
A. Overview of the Italian System of Judicial Review.....	183
B. Proposals of Introduction of a System of Individual Constitutional Complaint in Italy. The First Fifty Years: 1947-1997.....	188
C. 1997: The Parliamentary Commission for Constitutional Reforms and the Revision of the Italian Constitution.....	194
D. Incidenter Review: An Already Effective System?.....	198
III. Final remarks on the advisability to adopt the individual constitutional complaint in Italy.....	202

Introduction - Defining the object of the analysis

In the past thirty years, the original centralized model of judicial review, adopted in almost all European countries, has progressively developed into a more “subjective” form of constitutional control¹, as a result of the expansive force of

¹ In classifying different systems of judicial review, Spanish constitutional scholar Francisco Rubio Llorente developed a juxtaposition between “objective” and “subjective” systems, based on the systems’ main center of interest. “Objective” systems of judicial review focus on the defense of the authority of the law, which can be preserved only if the statutory laws enacted in the system are consistent with the constitution; this consistency is seen as a value in itself, beneficial to the “purity” of the constitutional system as a whole. Conversely, “subjective” models of judicial review focus on the protection of fundamental rights. These two aspects are, of course, interrelated: to a certain degree, the exercise of a more “objective” type of control also furthers – indirectly – protection of fundamental rights, every time that it expels from the system a law that unconstitutionally limits the exercise of fundamental rights. At the

fundamental rights in modern societies and the adoption of comprehensive charters of rights in central and eastern European countries. Constitutional courts have come to play a central role in the protection of first-, second- and third-generation rights in both consolidated and newly established democracies.

With the assistance of the Council of Europe², several central and eastern European countries that achieved independence after the fall of communist rule have revised their old constitutions or adopted new fundamental charters to include systems of direct individual access to constitutional and supreme courts (also called systems of “individual constitutional complaint,” hereinafter “ICC”)³. These systems grant natural and legal persons direct access to a constitutional or supreme court to claim infringement of fundamental constitutional rights and to request a declaration of the unconstitutionality of the challenged

same time, a declaration of the unconstitutionality of a statute limiting fundamental rights contributes to the general “objective” “purity” of the system, diminishing the number of unconstitutional laws existing in the system. The difference between the two models lies, therefore, in the main goals they seek to achieve. See F.R. Llorente, *Seis tesis sobre la jurisdiccion constitucional en Europa*, 12 *Revista Espanola de Derecho Constitucional* 9 (1992); F.R. Llorente, *Tendances actuelles de la juridiction constitutionnelle en Europe*, in *Annuaire International de Justice Constitutionnelle* 9 (1996). For an analysis of the differences between “centralized” and “decentralized” systems of judicial review, vesting functions of judicial review, respectively, in one single specialized court or, conversely, in all ordinary judges, see M. Cappelletti, *Judicial Review in the Contemporary World* 45 (1971); L. Favoreau, *Constitutional Review in Europe*, in L. Henkin & A.J. Rosenthal (eds.), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* 38 (1990); V.C. Jackson & M. Tushnet, *Comparative Constitutional Law* 464 2d ed. (1999); N. Dorsen, M. Rosenfel, A. Sajo & S. Baer, *Comparative Constitutionalism: Cases and Materials* 113 (2003).

² The Council of Europe (“CoE”) is a regional human-rights organization established by the Treaty of London on May 5, 1949. The CoE seeks to develop throughout Europe common democratic principles based on the *European Convention on Human Rights* (“ECHR”), an international human-rights treaty signed in Rome on November 4, 1950, see *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221. The CoE has now forty-seven Member States with a total population of about 800 million people. Respect of the ECHR is guaranteed by a supranational judicial body, the European Court of Human Rights (“ECtHR”), whose interpretation of the ECHR and decisions are binding on Member States.

³ For present purposes, the expressions “individual constitutional complaint” (“ICC”) and “direct individual recourse” to a supreme or constitutional court will be considered synonymous.

act(s) or action(s) violating their rights (whether with *erga omnes* or *inter partes* effects)⁴.

The Italian Constitution, a product of the wave of constitution-drafting that took place after the Second World War⁵, does not envisage the possibility that an action seeking constitutional review may be lodged by a citizen or a group of citizens directly with the Constitutional Court. In the mixed centralized-decentralized system of judicial review adopted in Italy, an issue of the constitutionality of legislation – besides those cases when a direct action can be filed by constitutionally-designated State bodies – can be raised only in the course of ordinary judicial proceedings in which the challenged law should be applied, either upon petition of one of the private parties or of the public prosecutor, or on its own initiative by the court. However, as protection of fundamental rights becomes a defining and predominant feature of modern constitutionalism, the debate over the introduction of the possibility for an individual to directly apply to the Constitutional Court, claiming infringement of a constitutionally-entrenched right by unconstitutional actions of a public power, has been increasingly recurrent in Italy. Yet it is a debate that dates back to the very foundation of the Italian Republic and the adoption of the 1948 Constitution.

Systems of direct access to constitutional and supreme courts are generally considered positively, as they can supplement the existing avenues for access to constitutional or supreme courts and provide protection of fundamental rights in so-called “grey areas” not covered by these types of remedies. Moreover, from a supranational perspective, the European Commission for Democracy through Law of the Council of Europe⁶ considers

⁴ Conversely, in systems of indirect individual access, the constitutionality of an act or action can be challenged only through the action of previously identified state bodies (e.g. courts).

⁵ See J. Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 Duke L.J. 364, 368-373 (1995) (identifying seven waves of constitution-making). With specific regard to judicial review, Louis Favoreau speaks of four waves of constitutional justice: see L. Favoreau, *Les Cours Constitutionnelles* 1-2, 4, 3d ed. (1996).

⁶ The European Commission for Democracy through Law (also known as “Venice Commission”) is the Council of Europe’s advisory body on constitutional matters. Established in 1990, over the years it has played a leading role in advising on the adoption of constitutions that conform to the standards of Europe’s constitutional heritage. In 2002, it was authorized by the CoE to accept non-European observer members and currently has fifty-seven

positively the adoption of such systems – provided they do not overburden the domestic court vested with power of judicial review – as they represent an effective filter for cases of alleged violations of fundamental rights before they reach the European Court of Human Rights⁷.

However, if not properly designed, these systems are likely to result in the overburdening of a constitutional or supreme court due to the high number of applications lodged⁸. The balance between an effective protection of human rights and an efficient and timely exercise of the high court's functions has been struck differently in different jurisdictions: several States have declined to adopt a system of individual constitutional complaint altogether, while others have established strict accessibility requirements making direct recourse a merely subsidiary mechanism for the protection of constitutional rights and requiring, for example, the previous exhaustion of all other legal remedies or the special "constitutional significance" of the question of constitutionality to be presented.

Part I of this article will provide a comparative overview of the structure and functioning of the systems of direct access to constitutional and supreme courts adopted in Europe, focusing on the structure of the individual constitutional complaint and on admissibility requirements. With regard to this latter aspect, the present analysis will comprise all systems of individual constitutional complaint irrespective of requirements (if any) established for standing to file the claim. The analysis will

Member States and eleven more Associate, Observer and Special-Status States. See Venice Commission, Council of Europe, http://www.venice.coe.int/site/main/Presentation_E.asp (last visited January 2012).

⁷ The Commission underlines that: "the European Court of Human Rights' statistics show that those countries in which such a full constitutional complaint mechanism exists have a lower number of complaints (in proportion to the number of their population) before the Court than others, which do not have such a mechanism. Such complaint mechanisms therefore help to avoid overburdening the European Court of Human Rights". Venice Commission Study no. 538/2009, adopted by the Commission during its 85th Plenary session held in Venice, Italy on 17-18 December 2010 at 4, *available at* [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)039rev-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)039rev-e.pdf) (last visited January 2012). For the final version of the "Study on Individual Access to Constitutional Justice," see 86th Plenary Session of the Commission (Venice), Calendar of Events, Venice Commission, Council of Europe, <http://www.venice.coe.int> (last visited January 2012).

⁸ As it happened, for example, in Croatia and Spain.

therefore include both systems which adopted the so-called “*actio popularis*” (where every person is entitled to challenge an act of the public powers after its enactment, without the need to prove that he or she is affected by the provision: e.g., Croatia and Liechtenstein) and systems where evidence of (probable) harm is required. Also, the analysis will be conducted on several systems of individual constitutional complaint, irrespective of the choice made in the single legal system with regard to the possible object of the challenge: actions and/or omissions of public powers, statutory laws and/or regulations.

Part II will then address possible benefits (if any) of the introduction of such a system in Italy. After presenting the main features of the Italian system of judicial review, the article will describe proposals that, since 1947, have been presented to introduce a system of direct individual access to the Italian Constitutional Court in order to supplement the already existing avenues of access to the Court.

Part III will then offer some reflections on the actual advantages (if any) that adoption of such a system would bring to the Italian legal system, compared to the already existing incidental control of constitutionality (“*controllo di costituzionalità in via incidentale*”).

I. A Comparative Overview of the European Systems of Individual Constitutional Complaint

In Europe, several countries have adopted a system of individual constitutional complaint, in a variety of structures and forms. A more detailed analysis of a few of these jurisdictions and of the specific systems of individual constitutional complaint adopted therein will provide a general comparative framework for our study and help determine whether Italy too should incorporate such a system to enhance protection of fundamental rights. Austria and Germany have been chosen since their constitutions belong - as the Italian one - to the wave of constitution-drafting which took place after the Second World War; Spain has been chosen to illustrate the possible shortcomings of the adoption of a highly open system of individual constitutional complaint; Switzerland as a country characterized by a tradition of direct popular participation and direct access to institutional bodies; finally, Belgium has been chosen to show how

even a relatively old constitution can be modified to include a system of individual constitutional complaint.

A) Austria

Austria has both historical and contemporary significance for any comparative study of systems of judicial review: on one hand, it represents one of the two European countries to first adopt a system of judicial review in its archetypal centralized (Kelsenian) form⁹; on the other, and more relevantly to this study, Austria represents the jurisdiction that first adopted – among the German-speaking areas of Europe – a system of individual constitutional complaint¹⁰.

The current Constitution of the Republic of Austria (“*Bundesverfassungsgesetz*”) was adopted in 1920¹¹. After undergoing revision in 1929, it was suspended in 1933 until the end of the Second World War and then reinstated in 1945.

⁹ The first European centralized systems of judicial review were established in Czechoslovakia and Austria by, respectively, the Constitution of Czechoslovakia of February 29, 1920, and by the Constitution of Austria of October 1, 1920. The systems were based on the ideas of the Prague-born jurist Hans Kelsen and are universally recognized as the prototypes of the centralized systems of judicial review, and as a counter model to the United States system of judicial review. Some authors note, however, that a form of centralized constitutional review already existed in 1858 in Venezuela, although it did not develop into a prototype: see J.O. Frosini, *Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification*, in A. Harding & P. Leyland (eds.), *Constitutional Courts. A Comparative Study*, JCL Studies in Comparative Law 1, 348 (2009).

¹⁰ *Staatsgrundgesetz uber die allgemeinen Rechte der Staatsburger* [StGG] [federal bill of rights] RGBI No. 1867/143 (Austria). The individual constitutional complaint was first introduced in Austria by the Fundamental Law of the State (*Staatsgrundgesetz*) which created a new “Court of the Reich” (*Oberstes Reichsgericht*), a forerunner of the current Constitutional Court. One of the functions of the Court was to judge complaints filed by citizens alleging a violation of the political rights – especially fundamental rights and the right to vote – protected in the Fundamental Law of the State on the Rights of the Citizens against administrative acts (legislative acts were excluded from scrutiny); see *Staatsgrundgesetz uber die allgemeinen Rechte der Staatsburger* [StGG] [federal bill of rights] RGBI No. 1867/142, as last amended by *Bundesgesetz* [BG] BGB I No. 100/2003, art. 142 (Austria).

¹¹ *Bundes-Verfassungsgesetz der Republik Osterreich* [B-VG] [Constitution] BGBI No. 1/1920 (Austria). Between 1934 and 1945, Austria was ruled under the 1934 authoritarian Constitution. The activity of the Austrian Constitutional Court was interrupted in May 1933 to resume only in 1946.

In addition to the extant incidenter procedure for the assessment of the constitutionality of legal acts set forth in articles 89 and 129 of the Constitution, the current text of the Austrian Constitution provides two possible avenues for individuals to directly access the Constitutional Court (“*Verfassungsgerichtshof*”) in order to challenge legal acts allegedly violating their fundamental rights.

The first avenue (so-called *Bescheidbeschwerde*) is described at article 144 of the Constitution, which allows direct individual complaints against an administrative decision violating a person’s rights through the application of an illegal general norm. As a precondition to the admissibility of the challenge, the applicant is requested to have previously exhausted all remedies made available by administrative law, so that, in practice, only the ruling of the last (supreme) administrative instance may be a subject of the Court’s review¹². Moreover, a challenge to the last administrative ruling can be filed only within six weeks of its delivery.

The second avenue was created by a 1975 amendment that introduced an additional type of individual constitutional complaint (called *Individualantrag* or *Individualbeschwerde*)¹³. With regard to this second avenue, articles 139 and 140 of the Constitution indicate that the Constitutional Court pronounces on the unconstitutionality of statutes and on the illegality of regulations when the application alleges direct infringement of personal rights through such unconstitutionality or illegality in so far as the law or the regulation has become operative for the applicant without the delivery of a judicial decision or the issue of a ruling¹⁴. Admissibility requirements are therefore quite demanding: in order for the complaint to be admissible, the applicant (either a natural or a legal person) must show that no chance of obtaining another legal remedy is available and that

¹² See A. Gamper, *The Constitutional Court of Austria: Modern Profiles of an Archetype of Constitutional Review*, in A. Harding & P. Leyland (eds.), *Constitutional Courts. A Comparative Study*, JCL Studies in Comparative Law 1, 44 (2009).

¹³ *Bundesverfassungsgesetz* [BVG] [Amendment of the Federal Constitution, as amended in 1929, provisions for the extension of the States of the Board Administrative Court and the Constitutional Court] *Bundesgesetzblatt* [BGBl] No. 302/1975 (Austria).

¹⁴ *Bundes-Verfassungsgesetz der Republik Osterreich*, supra note 47, at art. 139 and art. 140 (Austria).

neither a judgment nor an administrative ruling has been delivered in the case. Moreover, the alleged harm to the applicant's rights must be personal, direct and actual.

Both types of individual constitutional complaints clearly have a subsidiary character and are designed only to supplement the other avenues available to an individual to challenge the constitutionality of normative enactments (mainly the incidenter proceedings).

B) Germany

Together with the incidenter review of legislation regulated at article 100, the 1949 German Constitution ("*Grundgesetz*") today also establishes at article 93(4a) a system of individual constitutional complaint (direct individual recourse or *Verfassungsbeschwerde*). In Germany, the possibility for an individual to directly access the Constitutional Court ("*Bundesverfassungsgericht*") for the protection of fundamental rights, is consistent with the general spirit of the German Constitution, which – adopted in the aftermath of the Second World War – strongly reaffirmed the central role of human dignity and fundamental rights in order to prevent the reoccurrence of the tragic violations of human rights the country had experienced during the war¹⁵.

The original text of the Constitution did not establish a system of individual constitutional complaint. This system was first introduced in 1951 with the enactment of the Law on the Federal Constitutional Court, which also marked the beginning of the activities of that Court¹⁶. The system was then entrenched in the Constitution with a constitutional amendment in 1969¹⁷. The

¹⁵ *Grundgesetz für die Bundesrepublik Deutschland* [Federal Constitution] [GG] art. 1 (F.R.G.). This commitment to protection of human dignity and fundamental rights is celebrated in article 1 of the German Constitution, which famously asserts: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority... . The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law."

¹⁶ *Bundesverfassungsgerichts-Gesetz* [Federal Constitutional Court Act], March 12, 1951, BGBl. I at 243 (F.R.G.).

¹⁷ Article 93(4a) of the German Constitution now states that the Federal Constitutional Court has jurisdiction over constitutional complaints filed by any person alleging that one of his or her basic rights has been infringed by an act or

recourse can be lodged – without cost and with few formal requirements – by every person (both citizens and foreign nationals, legal and natural persons) against an action or omission of the public powers allegedly violating civil and political rights entrenched in the Constitution¹⁸.

Since its establishment, the direct individual recourse has become the most frequently resorted-to avenue to access the Court, which, over the years, has developed in its jurisprudence some admissibility criteria in order to limit use of the individual-constitutional-complaint system and avoid the overburdening of the Court¹⁹. These conditions are: a) the previous exhaustion of all available legal remedies²⁰; b) the existence of a personal, direct, and current interest in the recourse²¹; c) filing within a statute of limitation: the recourse can be lodged with the Court only within one month from the date the administrative act or the judicial decision has been issued, or one year from the entry into force of the challenged statute²²; d) the possibility to challenge only self-

action or omission of the public authority (including judicial decisions). See *Grundgesetz für die Bundesrepublik Deutschland* [Federal Constitution] [GG] art. 93(4) (F.R.G.). A complaint can be lodged against the unconstitutional violation of articles 1-19, 20(2), 33, 38, 101, 102, 103 and 104 of the Constitution. See, *Bundesverfassungsgerichts-Gesetz* [Federal Constitutional Court Act] arts. 13, 90 & 95, as last amended July 16, 1998, BGBl. I at 1473 (F.R.G.). Over the years, the Constitutional Court has adopted a generous interpretation of the right to a “free development of [one’s own] personality” of article 2, cl. 1 Cont. and has therefore broadened the protection offered and the possibility to lodge a recourse.

¹⁸ See *Bundesverfassungsgerichts-Gesetz* [Federal Constitutional Court Act] art. 93, as last amended July 16, 1998, BGBl. I at 1473 (F.R.G.). See also D.P. Kommers, *Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court*, in A. Harding & P. Leyland (eds.), *Constitutional Courts. A Comparative Study*, JCL Studies in Comparative Law 1, 113 (2009).

¹⁹ In 2006, for the first time, the applications filed with the Constitutional Court within the year were more than 6,000. In the average, the Court receives around 5,000 applications each year: 98% of them are individual constitutional complaints. Notwithstanding these high figures, 70% of the direct individual recourses are taken care of within a year. The percentage of successful recourses is low, around 2.5%. See F. Palermo, *La Giustizia Costituzionale in Germania*, in L. Mezzetti (ed.), *Sistemi e modelli di giustizia costituzionale* 152 (2009). Figures are available, in English, on the website of the German Constitutional Court: <http://www.bverfg.de> (last visited, January 2012).

²⁰ Art. 93 of the Law on the Federal Constitutional Court.

²¹ *Id.*

²² *Id.*

executing statutes²³. The screening of the petitions is entrusted to special three-judge panels of the Court, the so-called “*Kammer*” (chambers) during a prehearing stage, and the decision is not appealable²⁴. The Court also has the power to issue fines to those who lodge applications lacking the very basic elements for their admissibility²⁵. In addition to these conditions, the Law on the Federal Constitutional Court states that a constitutional complaint will be admitted to consideration only if it has “fundamental constitutional significance” (i.e. the issue has not already been addressed by the Court), and the complainant may suffer “especially grave disadvantage as a result of refusal to decide on the complaint.”²⁶

As of today, the Court reviews in full about one percent of all the individual constitutional complaints lodged, but according to some commentators, “such complaints result in some of its most significant decisions and make up more than fifty percent of its published opinions.”²⁷

C) Spain

Spain represents a very interesting country study in the analysis of the general effects that adoption of the ICC can have on a country’s system of judicial review. Influenced by the example of the German *Verfassungsbeschwerde*²⁸, the Spanish “individual appeal for protection” (“*recurso de amparo*”) or “constitutional amparo” was introduced by article 53, cl. 2 of the 1978 Constitution²⁹. The constitutional amparo was then implemented in the Organic Law on the Constitutional Court enacted in 1979.

²³ See K. Schlaich, *Procedures and techniques de protection des droit fondamentaux. Tribunal Constitutionnel Federal allemand*, in L. Favoreu (ed.), *Cours constitutionnelles europeennes et droits fondamentaux* 105-164 (1982).

²⁴ See W. Heun, *The Constitution of Germany. A Contextual Analysis* 175 (2011).

²⁵ Fines can be as high as 2,600 Euros.

²⁶ Art. 93a, cl.2 of the Law on the Federal Constitutional Court.

²⁷ D.P. Kommers & R.A. Miller, *Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court*, 3 J. COMP. L. 194-211 (2008).

²⁸ On the influence exerted by the German system of judicial review on the Spanish Constitution, see F.R. Llorente, *La jurisdiccion constitucional en Espana*, in R.F. Llorente & J.J. Campo (eds.), *Estudios sobre la jurisdiccion constitucional* (1997).

²⁹ However, a “*recurso de amparo*” had been originally established in Spain by the 1931 Constitution of the Spanish Second Republic, at that time influenced by both the Austrian model of individual constitutional complaint adopted in 1920 and the Mexican model. The 1931 Constitution created a Tribunal of Constitutional Guaranties vested with the power to judge upon the

Today, in Spain, any natural and legal person (not just citizens) with a “legitimate interest”³⁰ can apply to the *Tribunal Constitucional* by means of the constitutional amparo to challenge violations of the rights protected in articles 14-30 of the 1978 Constitution allegedly caused by actions or omissions of public powers³¹. More specifically, the constitutional amparo can be exercised to challenge administrative acts, judicial decisions and legislative enactments – with the exclusion of statutory laws – after prior exhaustion of all available legal remedies³².

Since the enactment of the Constitution and the introduction of the ICC, an increasing number of appeals for protection have reached the Constitutional Court, most of them claiming violations of the rights granted under article 24 of the

constitutionality of statutes and to protect fundamental rights by means of a recourse for constitutional protection: *see*, A.R. Brewer-Carias, *Constitutional protection of Human Rights in Latin America* 74 (2009); E.F. Mac-Gregor, *La accion constitucional de amparo en Mexico y Espana, Estudio de Derecho Comparado* 4th ed. (2007).

³⁰ Article 162 of the Constitution.

³¹ See articles 53(2) and 161 of the 1978 Constitution of Spain and articles 41-47 and 50 of Organic Law on the Constitutional Court no. 2/1979 of Oct. 3, 1979 (last amended in 2007). Provisions of the original 1979 Organic Law concerning the constitutional amparo have been amended a few times: Organic Law no. 8/1984 amended article 45 concerning use of the amparo for protection of the right to conscientious objection; Organic Law of June 9, 1988, amended articles 50 and 86 concerning admissibility criteria for the amparo; Organic Law no. 6/2007 introduced the requirement of the “significant constitutional relevance” of the issue for the recourse to be declared admissible. The rights protected are so-called “first” and “second” generation rights (that is, civil and political), while “third” generation rights (social) cannot be protected through the constitutional amparo, since they are listed at arts. 39 through 52; the same exclusion applies to the right to property, entrenched in art. 33. *See* D.M. Carrasco, *Los procesos para la tutela judicial de los derechos fundamentales* (2002). For an overview of the structure and functions of the *Tribunal Constitucional* in Spain, *see* E.G. Lopez, *Judicial Review In Spain: The Constitutional Court*, 41 *Loy. L.A. L. REV.* 529 (2008).

³² Article 41 of the Organic law on the Constitutional Court states: “provisions, legal enactments, omissions or flagrantly illegal actions by the public authorities of the State, the Autonomous Communities and other territorial, corporate or institutional public bodies, as well as their officials or agents.” Article 47 of the Organic Law states that, in cases in which a judicial decision is challenged, “those who benefited by the decision, act or fact that led to the appeal or persons with a legitimate interest therein may appear in the proceedings for constitutional protection as a defendant or additional party.”

Spanish Constitution: effective protection from judges³³. As a consequence of the high number of individual complaints filed with the *Tribunal Constitucional*, the functionality of the body was significantly affected: most of the activity of the Tribunal was devoted to deciding the appeals for constitutional amparo and, over the years, the average time needed for the Court to perform all its functions significantly increased, almost creating a real “crisis” for the functionality of the Court³⁴.

The structure of the constitutional amparo underwent therefore significant reform in 2007, focusing on the requirements for accessing the *Tribunal Constitucional*³⁵. The purpose of the reform was to limit the possibility for individuals to directly access the Constitutional Court, on the assumption that fundamental rights could and should be protected – first and foremost – by ordinary judges and only afterward by the Constitutional Court and exclusively in cases in which the plaintiff could demonstrate the novelty of the constitutional issues³⁶. The 2007 reform, therefore, introduced an additional accessibility requirement: the applicant needed now demonstrate the “significant constitutional relevance” of the recourse presented³⁷.

³³ On this point see M. Iacometti, *La Spagna*, in P. Carrozza, A. Di Giovine & G.F. Ferrari (eds.), *Diritto costituzionale comparato* (2009).

³⁴ Between 1980 and 1998, about 48,000 appeals for constitutional protection were filed, with the number gradually increasing over the years. More specifically, in 1980 the appeals were 218; in 1981, they were 393; 1982 (438); 1983 (834); 1984 (807); 1985 (970); 1986 (1.229); 1987 (1.659); 1988 (2.129); 1989 (2.604); 1990 (2.910); 1991 (2.707); 1992 (3.229); 1993 (3.877); 1994 (4.173); 1995 (4.369); 1996 (4.689); 1997 (5.391); 1998 (5.441). Of the 9.708 applications filed with the *Tribunal Constitucional* in 2005, 9.476 of them were individual appeals lodged through the constitutional amparo. Figures are available on the website of the Spanish *Tribunal Constitucional*: <http://www.tribunalconstitucional.es> (last visited January 2012). Prof. Tania Groppi referred to this phenomenon as a “crisis of the amparo recourse.” T. Groppi, *Il ricorso di amparo in Spagna: caratteri, problemi e prospettive*, 4340 in *Giurisprudenza Costituzionale* (1997); E.C. Cuenca, *La crisis del recurso de amparo: la proteccion de los derechos fundamentales entre el Poder judicial y el Tribunal constitucional* (2005).

³⁵ Organic Law no. 6/2007.

³⁶ V.F. Comella, *The Spanish Constitutional Court: Time for Reforms*, in A. Harding & P. Leyland (eds.), *Constitutional Courts* 193 (2009).

³⁷ In the original Spanish “*trascendencia constitucional*.” See article 50(1)(b) of the Organic law as amended in 2007. According to article 50(1) of the Organic Law, in order for the recourse to have “significant relevance,” the issue must be significant for the “importance for the interpretation, application and general efficacy of the Constitution and for a determination of the content and

Today, the vast majority of applications lodged with the Court are declared inadmissible due to the very lack of the constitutional nature of the alleged violation³⁸.

A different statute of limitations applies to the various acts that can be challenged: while legislative enactments can be challenged only within three months from their enactment approval, a constitutional amparo against judicial decisions must be filed within thirty days from notification of the decision³⁹.

D) Switzerland

The so-called “recourse in cases of public law” finds its basic regulation in article 189 of the 1999 Federal Constitution of the Swiss Confederation and in article 82 of the Law on the Federal Tribunal⁴⁰. According to these provisions, the Federal Supreme Court (the highest Court of the system, vested with powers of judicial review in Switzerland) has jurisdiction over complaints about violations of constitutional rights prompted by judicial decisions issued in public-law cases and by normative acts enacted by the administrative and legislative bodies of the Cantons (i.e. the sub-national units of the federation). It also has competence over applications filed by citizens for violations of the right to vote and of regulations on general election and popular voting procedures⁴¹.

significance of fundamental rights.” The Constitutional Court has further specified this requirement in decision STC no. 155/2009.

³⁸ V.F. Comella, *The Spanish Constitutional Court: Time for Reforms*, cit. at 36, 193.

³⁹ *Id.*

⁴⁰ The current Constitution of the Confederation of Switzerland was adopted by popular vote on April 18, 1999. The Constitution replaces the prior 1874 Federal Constitution after a total revision intended to update the previous document without changing its substance. The 1999 Constitution describes the Swiss Confederation as a full-fledged federal republic composed of 26 Cantons (sub-national units). It also includes a catalogue of individual and popular rights (including rights to call for popular referenda on federal laws and constitutional amendments, in analogy to constitutional-initiatives mechanisms included in several United States state constitutions) and indicates the competences of the Cantons and the Federal Government. See A. Auer, G. Malinverni, & J. Hottelier, *Droit constitutionnel suisse 2* (2006). Together with article 189 of the Constitution, articles 82, 86, 89, 113, 115 and 116 of the Law on the Federal Tribunal of June 17, 2005 detail the procedure for lodging an individual constitutional complaint.

⁴¹ See Federal Judicature Act, arts. 82 & 86 (1943).

According to article 89 of the Federal Judicature Act, the recourse can be lodged with the Federal Supreme Court by those subjects who were parties in a case (in case of judicial decisions) and by everyone who is “significantly affected by the challenged decision or act” and who can demonstrate a significant interest in the annulment of the acts⁴².

The main purpose of the constitutional complaint is therefore to protect citizens from the action of public powers; only indirectly does it guarantee that unconstitutional laws are not kept in effect within the legal systems⁴³. The challenged acts can be of a legislative, judicial⁴⁴ or administrative nature. However, an important limit to the system of individual constitutional complaint, here, is determined by the fact that only Cantonal acts – and not those of the Federation – can be challenged for constitutionality⁴⁵ and only provided the absence at the Cantonal level of any other legal remedy against the act.

The recourse must be lodged within thirty days from the judicial decision or the entry into force of the act.

E) Belgium

The original 1831 Constitution of the Kingdom of Belgium has undergone significant revision in recent years. The possibility for a legal or natural person to lodge an individual constitutional complaint with the Belgian Constitutional Court was introduced in 1988 to supplement the already existing incidenter review⁴⁶. In 2007, the original *Cour d'Arbitrage* – whose activity had

⁴² *Id.* art. 89.

⁴³ See E. Ferioli, *La Giustizia Costituzionale in Svizzera*, in L. Mezzetti (ed.), *Sistemi e Modelli di Giustizia Costituzionale* (2009).

⁴⁴ Federal Judicature Act, arts. 83 & 90-93 (1943) specify further prerequisites for judicial decisions to be challenged and also a few typologies of decisions which are – at the opposite – excluded from the complaint.

⁴⁵ The Constitutions of the Cantons are, however, excluded. See Constitution Federale [Cst] [Constitution] Apr. 18, 1999, RO 101 art. 51, cl. 2 (Switz.). Article 190 of the 1999 Federal Constitution has been consistently interpreted by the Federal Tribunal as precluding the Tribunal from judging on the constitutionality of Federal acts. Article 190 of the Federal Constitution states: “The Federal Supreme Court and the other judicial authorities shall apply the federal acts and international law.” This exclusion, however, has recently been subject to significant exceptions. See E. Ferioli, *La Svizzera*, in P. Carrozza, A. Di Giovine & G.F. Ferrari (eds.), *Diritto costituzionale comparato* 326 (2009).

⁴⁶ See 1831 Const. art. 142 (Belg.); Special Act Law of Jan. 6, 1989, *Moniteur Belge* [M.B.] [Official Gazette of Belgium], Jan. 7, 1989, art. 2 (Belg.).

increasingly shifted from mere policing of the areas of competence of the federal government and the federated units, towards a role akin to a judge protecting the rights and liberties entrenched in the Constitution – formally changed into a full-fledged Constitutional Court (“*Cour Constitutionnelle*”) which now protects and enforces the constitutional rights listed under Title II (arts. 8-32) and at arts. 170, 172 and 191 of the Constitution⁴⁷.

The individual constitutional complaint can be lodged by a legal or natural person to obtain a declaration of unconstitutionality within six months of the enactment of the challenged normative act (generally, federal statutes – ordinary and special – regional decrees, ordinances of the Bruxelles Region and acts with the force of law issued by the Executive)⁴⁸. A declaration of unconstitutionality has the effect of annulling the challenged acts and – generally – acts retroactively⁴⁹. Similarly, a rejection of the constitutional challenge binds all judges to the interpretation of the challenged norm given by the Court⁵⁰.

F) Central and Eastern European States

The fall of the communist regimes in central and eastern Europe and the resulting need to establish new constitutional foundations for the emerging democracies prompted a wave of constitution-making and democracy-building characterized by the establishment, in the newly independent states, of centralized systems of judicial review⁵¹. The adoption of such systems was the

⁴⁷ See E. Ferioli, *Il Belgio*, in P. Carrozza, A. Di Giovine & G.F. Ferrari (eds.), *Diritto costituzionale comparato* 326 (2009).

⁴⁸ Const. art. 142 (Belg.).

⁴⁹ See N. Vizioli, *La giustizia costituzionale in Belgio*, in J. Luther, R. Romboli & R. Tarchi (eds.), *Esperienze di giustizia costituzionale* 491 (2000); P. Carrozza, *La Cour d'Arbitrage belge*, in G.F. Ferrari & A. Gambaro (eds.), *Corti nazionali e comparazione giuridica* 105 (2006).

⁵⁰ Special Act Law of Jan. 6, 1989, *Moniteur Belge* [M.B.] [Official Gazette of Belgium], Jan. 7, 1989, art. 9 (Belg.).

⁵¹ According to Prof. Andrew Harding, constitutional courts have become a key element of constitutional design since, in addition to upholding values of legality and constitutionalism, “[they] might be conceived as a device to counter-balance the otherwise potentially overwhelming capacity of the elected majority to achieve domination at the expense of any opposition” and “defending provisions intended to protect human rights and minority rights.” Moreover, “in many developing nations negotiating a hazardous path to democracy, the constitutional court has come to be regarded as a vital guarding

product of an intense circulation of models of constitutional justice. The German and Austrian models were particularly influential not only for reasons of geographical and cultural proximity, but also due to the role played by the Council of Europe in the processes of revision of constitutional documents and constitution-drafting⁵². The Council of Europe's special constitutional advisory body, the European Commission for Democracy Through Law (Venice Commission), indeed stressed the importance of the creation of constitutional courts as a fundamental element to recognize a country's achieved democratic status and its adherence to the rule of law⁵³.

In these countries the creation of Constitutional Courts occurred, in most cases⁵⁴, in conjunction with the introduction of systems of individual constitutional complaint, designed to supplement the already existing systems of incidenter review to access the Constitutional Court vested with functions of judicial review. Moreover, the ICC system was almost always introduced with the requirement of the previous exhaustion of all available judicial remedies.

The individual constitutional complaint has been adopted in the following countries: Republic of Albania⁵⁵, Armenia⁵⁶,

of the constitution." A. Harding, *Preface*, in A. Harding & P. Leyland (eds.), *Constitutional Courts: A Comparative Study* 1 (2009).

⁵² The German and Austrian models of constitutional justice have been considered so influential that some commentators were drawn to state that "the establishing of constitutional review was a clear case of constitutional borrowing." K. Lach & W. Sadurski, *Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity*, in A. Harding & P. Leyland (eds.), *Constitutional Courts: A Comparative Study* 58 (2009).

⁵³ See V. Commission, *The Role of the Constitutional Court in the Consolidation of the Rule of Law*, in 10 *Science and Techniques of Democracy* (1994). This follows Laszlo Solyom's belief that "the very existence of these courts obviously served as a 'trade mark,' or as a proof, of the democratic character of the respective country." L. Solyom, *The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary*, 18 *Int'l Soc.* 133, 134 (2003). For more information on the Council of Europe's role in these processes and in the establishment of constitutional courts, see W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* 2d ed. (2007).

⁵⁴ With the exception of Bulgaria, Bosnia and Herzegovina, Lithuania, Moldova, Romania.

⁵⁵ See Const., arts. 131 & 134 (1998) (Alb.).

⁵⁶ For a description of individual appeals, see Constitution, Art. 101(6) (2005) (Arm.); see also Law on the Constitutional Court, arts. 25 & 69 (2006) (Arm.). In addition to natural persons, legal persons are also eligible to apply directly to

Croatia⁵⁷, Czech Republic⁵⁸, Estonia⁵⁹, Georgia⁶⁰, Hungary⁶¹, Latvia⁶², Montenegro⁶³, Poland⁶⁴, Serbia⁶⁵, Slovak Republic⁶⁶, Slovenia⁶⁷, the Former Yugoslav Republic of Macedonia⁶⁸, and Ukraine⁶⁹. Other eastern European countries which did not adopt

the Constitutional Court. *See* Constitution, art. 42.1 (2005) (Arm.); *see also* Constitutional Ct. Act, art. 25 (2006).

⁵⁷ *See* Constitution, art. 128 (1990) (Croat.). *See also* Constitutional Act on the Constitutional Ct., arts. 30, 40, & 62 (Official Gazette No. 49/2002) (Croat.).

⁵⁸ *See* Constitution, art. 87 (1992) (Czech.); *see also* Constitutional Ct. Act, arts. 64, 72, & 74 (1993) (Czech.).

⁵⁹ *See* Constitution, art. 152 (1992) (Est.); *see also* Law on the Constitutional Review Ct. Procedure Act, arts. 16 & 18 (Est.).

⁶⁰ *See* Constitution, art. 89 (1995) (Geor.); *see also* Law on the Constitutional Legal Proceedings, art. 1 (1996) (Geor.); *see also* Organic Law on the Constitutional Ct., art. 39 (amended 2004) (Geor.).

⁶¹ *See* Constitution, Art. 32/A (1949) (Hung.); *see also* Act. No. XXXII on the Constitutional Ct., Arts. 1, 21, 38, & 48 (1989) (Hung.). *See also* Constitution, Art. 24 (enacted on April 25, 2011) (Hung.).

⁶² *See* Constitution, art. 85 (amended 2007) (Lat.); *see also* Law on the Constitutional Ct., art. 19(2) (Lat.).

⁶³ *See* Constitution, art. 149 (2007) (Montenegro); *see also* Law on the Constitutional Ct. of Montenegro, arts. 48-59 (Official Gazette 64/2008) (Montenegro).

⁶⁴ *See* Constitution, art. 79 (1997) (Pol.); *see also* Constitutional Trib. Act, arts. 27 & 46 (1997) (Pol.)

⁶⁵ The Constitution of 2006 introduced a system of constitutional complaint in Serbia for the first time. *See* Constitution, arts. 168-170 (Serb.); *see also* Law on the Constitutional Ct., arts. 82-90 (2007) (Serb.). For an overview of the ICC system in Serbia, *see* N. Plavsic, *Individual Constitutional Complaint: Serbian Model* (2008) (unpublished dissertation for the Comparing Constitutional Adjudication Summer School (Co.Co.A.) at the University of Trento, Italy) available at <http://www.jus.unitn.it/cocoa/papers/papers.html> (last visited January 2012).

⁶⁶ *See* Constitution, arts. 127, 127(a), & 130 (1992) (Slovk.); *see also* Law on the Organization of the Constitutional Ct., arts. 18 & 49 (Slovk.).

⁶⁷ *See* Constitution, arts. 160 & 162 (1991) (Slovn.); *see also* Constitutional Court Act, arts. 24 & 50 (1994) (Slovn.). On the Slovenian ICC system, *see* T. Melart, L. Zore, *The Individual Constitutional Complaint in Slovenia* (2008) (unpublished dissertation for Co.Co.A. at the University of Trento, Italy) available at <http://www.jus.unitn.it/cocoa/papers/papers.html> (last visited January 2012). The paper also describes in detail the strict criteria recently adopted to determine admissibility of the recourses to promote judicial economy.

⁶⁸ Article 110 of the 1991 Constitution of the former Yugoslav Republic of Macedonia and articles 11, 12, 28 and 51 of the Rules of Procedure were adopted by the Constitutional Court of the Republic of Macedonia on October 7, 1992.

⁶⁹ Ukr. Const. of 1996, ch. 2, arts. 55, 150; Law on the Constitutional Court of Ukraine (promulgated by the Verkhovna Rada of Ukr., Oct. 16, 1996, effective

the ICC system when their constitutions were drafted have subsequently considered its adoption⁷⁰.

The systems of individual constitutional complaint (ICC) adopted in these countries drew inspiration from the model outlined by the guidelines of the Venice Commission. Indeed, as we have seen, the Venice Commission favors the adoption of such a system for a variety of reasons, including that direct recourse to a constitutional court can operate as filter for cases of alleged violations of fundamental rights before they are lodged with the European Court of Human Rights, helping to avoid overburdening of the Strasbourg Court⁷¹.

Due to this influence, the ICC systems adopted in these countries share several common features, of which the following should be noted: a) the requirement that an aggrieved party exhaust all available legal remedies before filing a complaint with the Constitutional Court⁷²; b) the right of an individual (in some jurisdictions) to file for recourse against acts or actions of private entities (natural and legal persons), provided they exercise public authority (generally, the acts that can be challenged for violation of constitutionally protected rights are those of public powers)⁷³; c) the challengeability of not only statutes but also regulations, administrative acts, and less frequently, judicial decisions⁷⁴; d) the ICC's use for challenging solely acts, and not omissions, of public powers; e) the right (now in most countries) of legal persons, like

Oct. 22, 1996) 1996, No. 422/96-vr, arts. 42-43, *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=422%2F96%2D%2E%2F0> (last visited January 2012).

⁷⁰ This is the case, for example, in the Republic of Lithuania, whose Constitution, adopted in 1992, did not envisage a system of direct access to the Constitutional Court. However, the adoption of such a system has received serious consideration: *see* Vitalija Tamaviciute, *Individual Constitutional Complaint: Lithuanian Perspective*, Co.Co.A. (Comparing Constitutional Adjudication) (2008), *available at*: www.jus.unitn.it/cocoa/papers/PAPERS%203RD%20PDF/ICC%20Lithuania%20edit%20ok.pdf (last visited January 2012).

⁷¹ *See* Venice Commission, *supra* note 7, at 4.

⁷² In Serbia, the ICC can be utilized without the previous exhaustion of all other legal remedies in those cases in which a plaintiff's right to a trial within a reasonable time has been violated.

⁷³ For example, Croatia ("legal person exercising public authority"); Montenegro ("legal person vested with public powers"); Serbia ("organizations exercising delegated public powers"); the FYRM.

⁷⁴ Judicial decisions can be challenged in Czech Republic, Poland, Serbia, Slovak Republic, and Slovenia.

natural persons, to file an ICC with the Court⁷⁵; f) the practice of allowing an ICC only for actions of public powers that have already occurred or legal enactments already in effect⁷⁶; g) the declaration by the Constitutional Court that a constitutional right has been violated with declarations of unconstitutionality of the act or action at issue with *erga omnes* effects; h) the establishment (in some countries) of statutes of limitations for the exercise of the ICC⁷⁷.

G) Other ECHR Signatory States

Because of the membership of the Republic of Turkey and the Russian Federation in the regional system of human-rights protection established by the Council of Europe, it is appropriate we also address briefly these two jurisdictions, in Part I of this study.

With regard to the Republic of Turkey, a system of individual constitutional complaint was introduced in September 2010 as the result of approval by referendum of a package of amendments to the 1982 Turkish Constitution⁷⁸. The recourse has been designed so that individuals claiming that a public authority has infringed “rights within the scope of the ECHR which are guaranteed by the Constitution” can directly lodge an application

⁷⁵ Specifically: Armenia, Croatia, Czech Republic, Georgia, Hungary, Latvia, Montenegro, Serbia, Slovak Republic, and Ukraine. A few countries also allow collective action: E.g., the Slovak Republic (“bodies of the territorial self-administration”).

⁷⁶ Conversely, Georgia also allows challenge of an act which *could* infringe the fundamental rights of a person.

⁷⁷ For example: FYRM (within two months from entry into force of the act); Montenegro (two months from act), Slovenia (two months from act); Poland (within three months from judicial decision); Croatia (one year from entry into force of the challenged act); and Albania (two years from act).

⁷⁸ See Law No. 5982 of July 7, 2010, Resmi Gazete [R.G.] No. 27580 (May. 13, 2010) (Turk.) [hereinafter Law No. 5982], available at <http://rega.basbakanlik.gov.tr/Eskiler/2001/10/20011017M1.htm>. Official English translation available at The Republic of Turkey Prime Ministry: Secretariat General for European Union Affairs, http://www.abgs.gov.tr/files/Bas%C4%B1nMusavirlik/haberler/constituional_amendments.pdf (last visited January 2012). The referendum, which confirmed the package of amendments to the Constitution originally submitted to the Turkish Grand National Assembly on March 30, 2010, was held on September 12, 2010, adopted by the Assembly on May 7, 2010, and published in the Official Gazette on May 13, 2010.

with the Constitutional Court⁷⁹; a recourse, therefore, seems limited only to those rights or freedoms guaranteed by the ECHR that are also enumerated in the Constitution. By establishing a domestic filter for cases of violations of fundamental rights before they are lodged with the Strasbourg Court, this requirement seems to respond to the Venice Commission's previously noted concern of the overburdening of the ECtHR. The Constitution also mandates the exhaustion of all available legal remedies as a further admissibility requirement and expressly notes that in cases of individual constitutional complaints, judicial review "shall not be made for matters which would be taken into account during the process of recourse to legal remedies⁸⁰."

With regard to the Russian Federation, a system of direct recourse to the Constitutional Court was first introduced in 1991, when the first Constitutional Court of Russia was created⁸¹. This Court, whose design drew inspiration from the systems of judicial review adopted in Austria, Germany and Italy, operated until 1993 (when then-President Boris Yeltsin suspended its activity⁸²)

⁷⁹ The revised text of article 148 prescribes in relevant part that: "Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted. In the individual application, judicial review shall not be made for matters which would be taken into account during the process of recourse to legal remedies. Procedures and principles concerning the individual application shall be laid down in law [then Law No. 5982]."

⁸⁰ See Turk. Const. art. 148/1 (Turkey).

⁸¹ The Constitutional Court of Russia was established in 1991 with the Law "On the Constitutional Court of the Russian Soviet Federated Socialist Republic." *Vedomosti S'yezda Narodnykh Deputatov i Verkhovnogo Soveta RSFSR* [The Bulletin of the Congress of People's Deputies and of the Supreme Soviet of the RSFSR], July 25, 1991, No. 30, Art. 1017. The Court initiated its activity at the end of October 1991. In December 1991, the former USSR was dissolved, leaving its constituents as independent states. For a thorough analysis of the history, structure and functions of the Russian Constitutional Court, see A. Trochev, *Judging Russia: Constitutional Court in Russian politics 1990-2006* (2008); J. Henderson, *The Constitution of the Russian Federation: A Contextual Analysis* (2011).

⁸² The suspension was announced after the opinion issued by the Court on September 21, 1993, which declared unconstitutional the act with which President Boris Yeltsin had dissolved the country's legislature. Finding No. 2-Z of Sept. 21, 1993, (On Conformity of the Actions and Decisions of the Russian President with the Constitution), *Vestnik Konstitutsionnogo Suda RF* (Bulletin of the RF Constitutional Court) 1994, No. 6, p. 40.

under the 1978 Constitution of the Russian Soviet Federative Socialist Republics ("RSFSR"), as revised in December 1990⁸³. Under this first system of individual constitutional complaint, citizens claiming a violation of constitutionally protected rights could apply directly to the Constitutional Court and challenge every "application of law" by a public power, after the previous exhaustion of all available legal remedies. Citizens were therefore allowed to challenge not only statutory laws but also other normative acts and legislative omissions⁸⁴.

After the new Constitution for the Russian Federation had been adopted by national referendum on December 12, 1993, a new federal constitutional law on the Constitutional Court was enacted in 1994, and the Court eventually resumed its activity in February 1995. A new typology of direct access to the Constitutional Court - significantly different from the previous - was introduced⁸⁵. According to the 1994 Federal Constitutional Law, the application can be lodged with the Court by natural persons (citizens as well as foreign nationals and stateless), groups, legal persons and associations for an alleged violation of constitutional rights. The violation must have been determined by legislation (only statutory law)⁸⁶ applied or likely to be applied to a concrete case whose analysis before a judicial body has already been initiated⁸⁷. This last admissibility requirement changes therefore the new direct constitutional complaint adopted in the

⁸³ See Law on the Improvement of the System of State Management, 1990. On the influence of the Austrian, German and Italian models of judicial review see H. Hausmaninger, *From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court*, 25 *Cornell Int'l L.J.* 305, 332 (1992).

⁸⁴ A. Di Gregorio, *La Corte costituzionale della Russia*, in L. Mezzetti (ed.), *Sistemi e Modelli di Giustizia Costituzionale* 447 (2009).

⁸⁵ *Konstitutsiia Rossiiskoi Federatsii* [Konst. RF] [Constitution] art. 125 (Russ.); *Federal'nyi Konstitutsionnyi Zakon* [FKZ] [Federal Constitutional Law], *OKonstitutsionnyi Sud Rossiiskoi Federatsii* [Konst. Sud RF] [On the Constitutional Court of the Russian Federation], *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 1994, No. 13, Item 1447, art. 3, 96-100.

⁸⁶ It is no longer possible to challenge a legislative omission.

⁸⁷ *Federal'nyi Konstitutsionnyi Zakon* [FKZ] [Federal Constitutional Law], *OKonstitutsionnyi Sud Rossiiskoi Federatsii* [Konst. Sud RF] [On the Constitutional Court of the Russian Federation], *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 1994, No. 13, Item 1447, art. 97.

Russian federation into a hybrid between an incidenter review system and a pure individual constitutional complaint⁸⁸.

Finally, without any claim to comprehensiveness but in order to complete the overview of signatory countries to the ECHR, it is worth mentioning that other relevant jurisdictions have adopted systems of individual constitutional complaint. These are: the Hellenic Republic (Greece)⁸⁹, the Principality of Andorra⁹⁰, the Principality of Liechtenstein⁹¹, the Republic of Cyprus⁹², and the Republic of San Marino⁹³.

H) A Common European Frame of Reference for the Individual Constitutional Complain

From the overview presented in the previous paragraphs, it is possible to draw a few tentative conclusions. It is this author's view that, considering the common, recurring features of the systems of individual constitutional complaint presented, it is possible to identify a common European frame of reference for direct access to constitutional judges, or, in other words, a

⁸⁸ See A. Di Gregorio, *La Corte costituzionale della Russia*, cit. at 84, 460-61.

⁸⁹ 1975 Syntagma [Syn.] [Constitution] art. 100. (Gr.) and art. 48 of Law no. 345 establishes the Special Highest Court and states that "where conflicting judgments have been delivered by the Council of State, the Supreme Court or the Controllers Council as to the assessment of the constitutionality of a law or its interpretation, the Special Highest Court shall resolve the conflict at the request of: ... b. any person having a lawful interest."

⁹⁰ La Constitucio del Principat d'Andorra [Constitution] Apr. 28, 1993, arts. 41.1, 102 (Andorra) and Llei Qualificada de la Justícia [Qualified Law on the Constitutional Court] Titles V-VI, art. 85-96 (Andorra), which describe the so-called "*empara*" appeal, also called "appeal for constitutional protection." Interestingly, the *empara* appeal is excluded for the rights protected in article 22 of the Constitution: denial of residence permit renewal and expulsion of a lawful resident.

⁹¹ Constitution of the Principality of Liechtenstein Oct. 5, 1921, LR 101, art. 43, 104); *uber den Staatsgerichtshof (StGHG)* [The Constitutional Court Act], Liechtensteinsches Landesgesetzblatt, Nr. 32, Jan. 20, 2004, arts. 15 & 20 (Liech.).

⁹² Cyprus, CMND. 1093 [Constitution] 1960, art. 146. Here the ICC can also be activated to challenge an omission of the public powers.

⁹³ Declaration of Citizens' Rights and of the Fundamental Principles of the San Marinese Legal Order, Albo del Pubblico Palazzo, no. 59, art. 16, July 8, 1974 (allowing "a number of citizens entitled to vote representing a minimum of 1.5% of the electorate" to lodge a direct question of constitutionality of "laws and normative acts" with the Collegio Garante in order to determine their compatibility with the fundamental principles expressed in the Declaration and in the laws referred to in the Declaration itself).

distinctive “European model of individual constitutional complaint”⁹⁴.

Generally, this model is characterized by the following features: i) the system of direct access to supreme and constitutional courts usually supplements the extant systems of *incidenter* review of constitutionality, which remains the main avenue to access the court vested with power of judicial review; ii) it requires the previous exhaustion of all available legal remedies before the complaint can be lodged; iii) it allows complaints to be filed against actions (and in some cases omissions) of public powers, including primary and secondary sources of law, administrative acts and, in some cases, judicial decisions; iv) foresees a statute of limitations for the filing of the complaint, which ranges from 30 days to 2 years since the enactment of the challenged act or decision; v) requires either the novelty or the fundamental constitutional significance of the question presented with the recourse, in addition to vi) a showing of personal, direct and actual interest in the recourse or an harm suffered from enactment of the act(s) or decision(s); vii) the applicants are usually natural and (less frequently) legal persons, residing on the territory of the State; viii) the complaint is allowed for both actions and omissions of public powers and ix) it usually protects a limited and well-identified number of first- and second-generation rights entrenched in the national constitution, usually leaving outside of its protection more modern, third-generation rights.

As anticipated, the Italian Constitution does not currently envision the possibility for a private individual to apply directly to the Constitutional Court claiming infringement of fundamental constitutional rights. The question whether Italy should adopt a system of individual constitutional complaint and with what characteristics, can only be answered after careful consideration of the distinctive features of the Italian system of judicial review as designed by the Constituent Assembly in 1948 and its subsequent developments.

⁹⁴ Our research shows that several other world jurisdictions have adopted systems of direct access to constitutional judges, among which it is possible to include, without claim of completeness: in Latin America, Costa Rica, El Salvador and Nicaragua; in Asia, Republic of Azerbaijan, the Republic of China (Taiwan), the Republic of India, the Republic of Indonesia, the Republic of Korea (South Korea), the Republic of Mongolia, and the Republic of the Philippines; in Africa, the Republic of South Africa.

II. Individual Constitutional Complaint and the Italian System of Judicial Review

A) Overview of the Italian System of Judicial Review

In the aftermath of the Second World War, Europe witnessed the establishment in some European States of so-called “centralized” systems of judicial review, which vested the power to review the constitutionality of norms or actions in a single specialized Court situated outside of the traditional structure of the judicial branch⁹⁵. At the time when the Italian Constituent Assembly started working on the draft of a new constitution for the newly established Republic of Italy, two models of judicial review were widely known: the Austrian (or Kelsenian) centralized model and the United States decentralized one⁹⁶. Members of the Constituent Assembly⁹⁷ designed for Italy a model of judicial review that had no precedent at that time and that can be defined as a compromise between the centralized and the decentralized systems of judicial review. This special model made the Italian system of judicial review stand out among the Western systems of constitutional control.

The 1948 Constitution of the Italian Republic provided for the establishment – for the first time in the Italian constitutional history – of a Constitutional Court (“*Corte Costituzionale*”)⁹⁸. The

⁹⁵ This is the so-called “second generation” of constitutional courts. According to this classification, “first generation” constitutional courts are those established in Europe in the 1920s and 1930s (Austria, Czechoslovakia, II Republic Spain). “Second generation” are the constitutional courts established in Italy and Germany in the mid-1940s while the “third generation” include constitutional courts established in countries that achieved full democracy only in the 1970s, like Greece, Spain and Portugal. Finally, the “fourth generation” would be represented by those established in former socialist countries in central and eastern Europe at the beginning of the 1990s: see J. Luther, R. Romboli & R. Tarchi, *Giustizia Costituzionale in Spagna*, cit. at. 49, vol. II, 290.

⁹⁶ See H. Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. Pol. 183, 185-86 (1942), explaining that Austria’s 1920 Constitution prohibited ordinary courts from reviewing the constitutionality of statutes; this task was left to a special Constitutional Court.

⁹⁷ The Constituent Assembly was elected at the same time the constitutional referendum was held on June 2, 1946, in which Italian citizens chose a republican form of government for Italy over the previous monarchic regime under the House of Savoy. The constitutional referendum marked the first time in Italy that women were allowed to vote. The Assembly conducted its activities from June 25, 1946, until January 31, 1948.

⁹⁸ For recent, English materials on the Italian Constitutional Court, see A. Pizzorusso, *Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies*, 38 Am. J. Comp. L. 373 (1990); A.

idea of entrusting the constitutional control of legislation to an ad hoc body was indeed unknown to the previous Italian constitutional experience under the 1848 “flexible” Constitution: the Albertine Statute (“*Statuto Albertino*”)⁹⁹.

Italian legal scholars have identified three main reasons for the introduction of a system of constitutional justice in Italy in 1948: a) the need to guarantee the “rigidity” of the new

Baldassarre, *Structure and Organization of the Italian Constitutional Court*, 40 St. Louis U. L.J. 649 (1996); P. Pasquino, *Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy*, 11 Ratio Juris 38 (1998); W. J. Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 Seton Hall L. Rev. 1 (1999); M. L. Volcansek, *Constitutional Politics in Italy: The Constitutional Court* (2000); D. S. Dengler, *The Italian Constitutional Court: Safeguard of the Constitution*, 19 Dick. J. Int'l L. 363 (2001); T. Groppi, *The Italian Constitutional Court: Towards a “Multilevel System” of Constitutional Review?* 23 J. Comp. L. 100 (2008); J. O. Frosini, *Constitutional Justice*, in G.F. Ferrari (ed.), *Introduction to Italian Public Law* 183 (2008); L.F. Del Duca, *Introduction of Judicial Review in Italy - Transition from Decentralized to Centralized Review (1948-1956) - A Successful Transplant Case Study*, 28 Penn St. Int'l L. Rev. 357 (2010); G.F. Ferrari & A. Gambaro, *The Italian Constitutional Court and Comparative Law. A Premise*, 1 Comp. L. Rev. 1 (2010), available at <http://www.comparativelawreview.com> (last visited January 2012); E. Lamarque, *Interpreting Statutes in Conformity with the Constitution: The Role of the Constitutional Court and Ordinary Judges*, 2 IJPL 91 (2010), available at <http://www.ijpl.eu> (last visited January 2012). An overview of the most important decisions of the Italian Constitutional Court is available in French: see T. Groppi, *Les grandes décisions de la Cour constitutionnelle italienne*, in P. Bon & D. Maus (eds.), *Les grandes décisions des Cours constitutionnelles européennes* (2008). An English translation of a selection of the most important decisions of the Italian Constitutional Court is available on the website of the Court at http://www.cortecostituzionale.it/ActionPagina_325.do (last visited January 2012). Finally, in 1972, current Associate Justice of the United States Supreme Court Samuel Alito conducted a comprehensive study on the Italian Constitutional Court in order to draft his senior thesis at the Woodrow Wilson School of Public and International Affairs. The study is currently available for download from the website of the Seeley G. Mudd Manuscript Library of the University of Princeton: see S.A. Alito, *An Introduction to the Italian Constitutional Court* (May 31, 1972) (unpublished senior thesis, Woodrow Wilson School of Public and International Affairs), available at [http://www.princeton.edu/\[#x7E\]mudd/news/Alito_thesis.pdf](http://www.princeton.edu/[#x7E]mudd/news/Alito_thesis.pdf) (last visited January 2012).

⁹⁹ The Albertine Statute (*Statuto Albertino*) was the Constitution that King Vittorio Emanuele conceded to the Kingdom of Sardinia on March 4, 1848. In 1861, the *Statuto* became the Constitution of the now unified Kingdom of Italy and remained in force until 1947. It is conventionally qualified as a “flexible constitution” since it did not require any special procedure – that is, different from the ordinary legislative procedure – nor any parliamentary supermajority to be amended.

Republican Constitution, protecting it against infringements in the form of statutory law inconsistent with the Constitution enacted by a transient political majority in the Parliament; b) the need to establish a “judge of freedoms” to whom the protection of the fundamental rights entrenched in the new Republican Constitution could be entrusted and c) the need to identify an institutional body that could adjudicate controversies between different organs of the State and between the State and the sub-national units (the Regions) of the newly created regional State¹⁰⁰.

The Court is therefore a special body acting in a judicial manner for the safeguarding of the Constitution and the fundamental rights of the citizens against infringements originating from the legislative body in the form of unconstitutional statutory laws or acts with the force of law. It is the only institution vested with the power to decide questions regarding the constitutionality of laws¹⁰¹.

Articles 134-137 of the 1948 Constitution¹⁰² define the main features, structure and functions of the Court¹⁰³. Although the Constitution became effective in 1948, the Constitutional Court was actually established only in 1956¹⁰⁴, after the necessary

¹⁰⁰ See E. Cheli & F. Donati, *Methods and Criteria of Judgment on the Question of Rights to Freedom in Italy*, in D.M. Beatty (ed.), *Human Rights and Judicial Review: A Comparative Perspective* 227, 228-29 (1994).

¹⁰¹ See Art. 134 Costituzione (It.). Primary sources of law (statutes and acts with the force of law) are the only two types of sources of law that the Constitutional Court can review for constitutionality. Regulations and other secondary sources of law are excluded from its scrutiny.

¹⁰² The English text of the Italian Constitution is available on the website of the Italian Senate at http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last visited January 2012).

¹⁰³ The *Corte Costituzionale* is composed of fifteen judges, 1/3 appointed by the Parliament in joint session, 1/3 by the President of the Republic and 1/3 by the Supreme, ordinary, and administrative Courts (the Court of Cassation, the Council of State, and the Court of Accounts). See Art. 135 Cost. (It.).

¹⁰⁴ The Constitutional Court was not established until 1956 due to political difficulties in selecting its judges. After the enactment of the Constitution and before the establishment of the Constitutional Court (i.e. between 1948 and 1956), Italy experimented with a decentralized system of judicial review, where ordinary courts could refuse to apply those statutes they deemed unconstitutional. See Transitory and Final Provisions of the Constitution no. VII, *supra* note 102, for availability. The experience has been criticized, due to the resistance of the judges to implement the innovative provisions and principles of the new Constitution: see P. Calamandrei, *La Costituzione e le leggi per attuarla. (Come si fa a disfare una Costituzione)*, in A. Battaglia et al. (eds.), *Dieci anni dopo:*

implementing legislation was enacted - mainly through constitutional laws - in 1948 and 1953¹⁰⁵. The adoption of a centralized - or Kelsenian - model of judicial review was tempered with some elements taken from the decentralized model vesting every ordinary and administrative judge with the power to raise a question of the constitutional validity of the norms he or she had to apply in the case before him or her¹⁰⁶. Therefore, while the system was, on one hand, marked by an "abstract" review of the constitutionality of the challenged statutory law or act with the force of law, on the other hand it was also "concrete" in the sense that it was triggered by a real controversy that had arisen before an ad hoc judge called to apply the challenged norm in the adjudication of a specific case.

Besides those cases in which a claim of unconstitutionality can be lodged directly with the Constitutional Court by the Central Government or the Regions (so-called "*principaliter*" proceedings)¹⁰⁷, questions of the constitutionality of legislation usually reach the Court through "*incidenter*" proceedings. Through these "*incidenter*" proceedings, claims can be brought before the Constitutional Court in two ways: issues arising in the course of civil, criminal, or administrative proceedings may come before the Court upon petition of either party or upon the *ad hoc* judge's own initiative (so called "*incidenter*" review). If the ad hoc judge considers the issue of constitutionality "not manifestly

1945-1955: *Saggi sulla vita democratica italiana* (1955). See also J.H. Merryman & V. Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 Am. J. Comp. L. 665 (1966-1967).

¹⁰⁵ The laws that implemented art. 137 Cost. (It.) are Constitutional Law no. 1/1948, enacted on February 9, 1948; Constitutional Law no. 1/1953, enacted on March 11, 1953; and Law no. 87/1953, enacted on March 11, 1953. Arts. 23-24 of the Law define procedures to access the Constitutional Court.

¹⁰⁶ For an account of this discussion in the Constituent Assembly, see Italian Chamber of Deputies, 5 *La Costituzione della Repubblica negli atti preparatori dell'Assemblea Costituente*, 3657 (1970). For a recent comment on this debate, see R. Romboli, *Riforma della giustizia costituzionale e ruolo della magistratura*, 1 *Questione Giustizia* 122 (1998).

¹⁰⁷ The *principaliter* proceeding is regulated by article 127 of the Italian Constitution, last amended in 2001. Art. 127 Costituzione (It.). This proceeding can be used by the State to lodge a claim against a regional law and by the Regions to file a complaint against a state law. According to article 127 of the Constitution, both the State and the Regions have sixty days following publication of the regional or state law in the Official Gazette to file a claim with the Constitutional Court. *Id.* A Region may also take action against a law approved by another Region. See Frosini, *supra* note 98, at 198.

unfounded” (“*giudizio di non manifesta infondatezza*”) and the challenged statutory law “relevant” (“*giudizio di rilevanza*”) – that is, necessary in order to issue a decision – then the judge is bound to stay the trial and refer the matter with a “certification order” to the Constitutional Court, whose decisions, according to article 137 of the Constitution, are final¹⁰⁸. In order for the question of constitutionality to be admissible, the ad hoc judge is requested to indicate in the certification order – together with the relevance and plausibility of the question – the law challenged and the constitutional provisions allegedly violated by the law.

With regard to the cases submitted by the ad hoc judge, the Constitutional Court does not decide on the merits of the dispute but, instead, only on the compatibility of the law with the Constitution. With regard to individuals, this is the only way to access the Constitutional Court. When an individual believes that one of his or her fundamental constitutional rights has been violated by a State or a Regional statutory law, the only way he or she can request the Constitutional Court to judge the constitutionality of the law is to file a case before an ordinary or administrative court and have the question of constitutionality raised before the Constitutional Court by the ad hoc judge. Only State and Regional Governments can directly refer issues of constitutionality to the Court, claiming that the area of reserved competences the Constitution assigns them has been encroached.

The only exception to the rule that an individual generally lacks the power to challenge a law by lodging an application directly with the Constitutional Court can be found in the Special Statute for the Trentino-Alto Adige Region¹⁰⁹. Indeed, Article 98 of the Special Statute¹¹⁰ allows the President of the Region or of one

¹⁰⁸ See Article 1 of Constitutional Law no. 1/1948 (It.) and Article 23 of Law no. 87/1953 (It.).

¹⁰⁹ Enacted with Constitutional Law no. 5/1948 (It.) of Feb. 26, 1948.

¹¹⁰ Art. 98 of the Special Statute for the Trentino-Alto Adige Region (1972), available at: www.gfbv.it/3dossier/diritto/statutoit.html#r14 (last visited January 2012), so provides:

“1. Laws and acts having the force of law of the Republic can be contested by the President of the Region or of the Province following a resolution of the respective Parliament, for violation of the present Statute or of the principle of protection of the German and Ladin linguistic minorities.

2. Should an Act by the State encroach upon the sphere of competence assigned by the present Statute to the Region or the Provinces, the Region or the respective Province may appeal to the Constitutional Court for a ruling in regard to the matter of competence.

of the two Provinces of Trento and Bolzano (following resolution of the Regional or Provincial legislative body) to directly raise an issue of constitutionality before the Constitutional Court, challenging a law or an act with the force of law adopted by the State and claiming a violation of the Trentino-Alto Adige Statute (which enjoys constitutional status) or the principle of protection of German and Ladin minorities. The special nature of the action, the category of individuals authorized to raise an issue of constitutionality of the law, and the possibility to challenge the law – not only on grounds of encroachment of the competences, but also for protection of fundamental rights (protection of German and Ladin minorities) – are all elements underlining the difference between this mechanism and the incidenter control of constitutionality. It should be noted, however, that this narrow exception does not in any way diminish the validity of the general rule that an individual does not normally have the right to apply directly to the Court.

B) Proposals of Introduction of a System of Individual Constitutional Complaint in Italy. The First Fifty Years: 1947-1997

When the Italian Constituent Assembly, back in 1947, was in the process of drafting the Constitution and deciding on the adoption of a centralized model of judicial review, it also considered the possibility of introducing a mechanism of individual constitutional complaint¹¹¹. According to the text approved by the second section of the second subcommittee of the Constituent Assembly on January 24, 1947, every citizen could have challenged a law – within one year from the law's enactment – before the Constitutional Court on grounds of unconstitutionality¹¹². The text of the provision, intended to be

3. The appeal shall be lodged by the President of the Region or that of the Province, following a resolution by the respective Government.”

¹¹¹ For an account of the projects addressing the introduction of the ICC and presented during the work of the Constituent Assembly, see C. Mezzanotte, *Il giudizio sulle leggi. Le Ideologie del Costituente*, Vol. 1 (1979); T. Groppi, *Il ricorso di amparo in Spagna*, cit. at 34, 4340; G. Volpe, *L'accesso alla giustizia costituzionale: le origini di un modello*, in R. Romboli (ed.), *L'accesso alla giustizia costituzionale: caratteri, limiti, prospettive di un modello* 3 (2006).

¹¹² The approved text stated: “Everyone, within the term of one year [from the enactment] can challenge a law before the Constitutional Court on ground of its unconstitutionality. A rejected application of unconstitutionality will be banned

incorporated into the Second Part of the Constitution, was drafted at that stage in a broad fashion, without any further information on the acts that could have been challenged (the text refers generically to “laws,” without further explaining if the term includes both State and Regional laws and also acts with the force of law), or on the circumstances allowing recourse (no reference was made to the infringement of fundamental rights, but only to the alleged unconstitutionality of a law). Any reference to the ICC, however, was eventually excluded by the Editorial Committee of the Constituent Assembly from the text of the draft Constitution submitted to the Constituent Assembly for approval¹¹³.

On December 2, 1947, reference to the ICC was made again in two proposed amendments to the draft Constitution, both presented during the debate before the Constituent Assembly. The text of the proposed amendments was more carefully drafted, and some additional elements were introduced with regard to the circumstances granting access to the Constitutional Court¹¹⁴. Indeed, Giuseppe Codacci Pisanelli, one of the members of the Constituent Assembly, presented a first amendment to the text under scrutiny, which vested the power to raise a question of constitutionality before the Constitutional Court with “every citizen who could demonstrate to have an interest [in raising the question] due to a harm inflicted to his constitutionally guaranteed rights or interests¹¹⁵.”

from being lodged again.” The transcript of the proceedings of the second section of the second subcommittee are available at <http://www.nascitacostituzione.it/05appendici/06p2/06p2t6/03/01/index.htm?001.htm&2> (last visited January 2012). The original Italian: “Chiunque, entro il termine di un anno, può impugnare una legge avanti la Corte per incostituzionalità. Una domanda di incostituzionalità respinta non può essere più riproposta.” Available at <http://www.nascitacostituzione.it/05appendici/06p2/06p2t6/03/01/index.htm?001.htm&2> at the bottom (last visited January 2012). See also F. Rigano, *Costituzione e Potere Giudiziario: Ricerca sulla formazione delle norme costituzionali* 240 (1982); R. Romboli, *Il giudizio costituzionale incidentale come processo senza parti* 17 (1985); C. Mezzanotte, *Il giudizio sulle leggi*, cit. at 111; L. Carlassare, *I diritti davanti alla Corte costituzionale: ricorso individuale o rilettura dell'art. 27 L. n. 87/1953?*, in *Diritto e Società* 443 (1997).

¹¹³ See *La Costituzione della Repubblica negli atti preparatori dell'Assemblea Costituente*, cit. at 106.

¹¹⁴ *Id.*

¹¹⁵ The original Italian text of the amendment stated: “L'annullamento di una legge ordinaria invalida da parte della Corte costituzionale avrà efficacia oggettiva e potrà, inoltre, essere promosso in via principale dal Governo, da

The second proposed amendment was introduced, on that same day, by Costantino Mortati, recommending that “a recourse for constitutional illegitimacy c[ould] be lodged directly with the Constitutional Court within the term of prescription established by law, by those subjects who claim a direct harm to a right or to a legitimate interest deriving from a statutory provision... .¹¹⁶”

The Constituent Assembly eventually decided to leave the determination of the “conditions, forms and terms for proposing judgments on constitutional legitimacy¹¹⁷” to a subsequent constitutional law, without excluding the possibility of introducing the ICC. Openness to reception of the ICC is also evident in the fact that the Editorial Committee of the Constituent Assembly, in addition to the text submitted to and finally adopted by the Assembly, drafted a tentative text of Article 137 of the Constitution including a provision introducing the ICC, in case the Assembly had decided to vote on its establishment¹¹⁸.

When the implementing law was enacted in 1948, no reference was made to the ICC, which therefore remained excluded from the circumstances granting access to the Court.

cinquanta deputati, da un Consiglio regionale, da non meno di diecimila elettori, o da qualsiasi cittadino che dimostri di avervi interesse per la lesione di un suo diritto o interesse costituzionalmente garantito” (emphasis added).

¹¹⁶ In original: “Il ricorso per illegittimità costituzionale può essere prodotto direttamente innanzi alla Corte costituzionale nel termine che sarà fissato dalla legge, da chi pretenda direttamente leso dalla norma un suo diritto o interesse legittimo... .” Reference to the ICC was also made on December 3, 1947, by Francesco Dominedò in the debate over the proposed text of Article 137 of the Constitution. Remarks of Francesco Dominedò, Deb. (Dec. 3, 1947).

¹¹⁷ Art. 137 Costituzione [Cost.] (It.).

¹¹⁸ In regards to the part of the article addressing the ICC, it stated that, “the citizen or the body which claims a direct and current harm to a right or to a legitimate interest can lodge directly with the Court an issue of constitutionality.” The full Italian text of Article 137 of the Constitution, in the version including the ICC, stated: “La questione di legittimità costituzionale, che nel corso d'un giudizio sia rilevata d'ufficio o sollevata da una delle parti e non ritenute dal giudice manifestamente infondata, è rimessa alla Corte costituzionale per la sua decisione. Il cittadino o l'ente che ritenga leso in modo diretto ed attuale un suo diritto o interesse legittimo può promuovere direttamente il giudizio di legittimità costituzionale davanti alla Corte. Tale giudizio può essere altresì promosso, nell'interesse generale, dal Governo o da un quinto dei componenti d'una Camera o da tre Consigli regionali.” See Meuccio Ruini, President, Committee for the Constitution, Statement Regarding Article 137 of the Constitution (Dec. 22, 1947).

According to some commentators¹¹⁹, had the ICC been introduced in 1947-1948, allowing an individual to challenge decisions issued by courts, the jurisprudence of the highest ordinary and administrative courts would have been influenced by the values and principles embodied in the new Italian Constitution and made consistent with them in a more timely manner.

Since 1947-1948, in Italy, proposals for introduction of a system of individual constitutional complaint have recurred¹²⁰. Generally, there have been two main reasons weighing in support of its adoption: first, the need to develop a more comprehensive system for the protection of fundamental rights; second, the need to correct some of the shortcomings that have supposedly arisen in the application of the incidenter control of constitutionality¹²¹. Before the establishment of the Constitutional Court in 1956, a proposal for the introduction of a system of individual constitutional complaint was first presented by Mauro Cappelletti¹²². Another proposal in support of the introduction of a system of individual constitutional complaint was later presented by several Italian constitutional-law scholars in a roundtable held in Florence on December 9-10, 1965¹²³. That same

¹¹⁹ See E. Crivelli, *La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale* 12 (2003). The author explicitly cites the Post-Franco Spain and Germany in the aftermath of the Second World War, where – in the author's perspective – the individual constitutional complaint helped making citizens more readily aware of the new rights entrenched in the Constitution and of the occurred transition to a whole new constitutional system. *Id.*

¹²⁰ See also A. Scavone, *Appunti sulle proposte di introduzione del ricorso costituzionale diretto in Italia*, in *Rivista trimestrale di diritto e procedura civile* 1241 (1981). C. Mezzanotte, *Il problema della fungibilità tra eccezione di incostituzionalità e ricorso diretto alla Corte costituzionale*, in *Giustizia e Costituzione* 77 (1997).

¹²¹ *Id.*

¹²² M. Cappelletti, *La giurisdizione costituzionale delle libertà* (1955).

¹²³ It was on this occasion that Italian constitutional scholars underlined for the first time the existence of so-called “grey areas” (i.e., normative acts not challengeable for constitutionality before the Court) in the protection provided by the Constitutional Court against unconstitutional acts of the State. See G. Maranini (ed.), *La giustizia costituzionale* (1966) (proceedings of the roundtable with Italian constitutional scholars). See also P. Carrozza, R. Romboli & E. Rossi, *I limiti all'accesso al giudizio sulle leggi e le prospettive per il loro superamento*, in R. Romboli (ed.), *L'accesso alla giustizia Costituzionale: caratteri, limiti, prospettive di un modello* 679 (2006); see also A. Sandulli, *Rapporti tra giustizia comune e giustizia costituzionale in Italia* (1968). Participants in the roundtable drafted a constitutional amendment for the introduction of a system granting direct

year, a draft constitutional amendment was introduced into the Parliament on December 15¹²⁴. Despite arousing the interest and partial support of constitutional scholars and practitioners, these proposals were not further pursued and, as a result, were eventually abandoned.

Scholars have long since recognized that the incidenter control of constitutionality represents an adequate means to protect the fundamental rights of the citizens. Moreover, the Constitutional Court, in the past twenty years, has increasingly interpreted the rules regulating the procedure before the Court and the provisions of the Constitution in light of the Court's purpose to broaden protection of fundamental rights. The Court itself and constitutional-law scholars, however, have come to realize that in some circumstances the protection provided through this mechanism may not be complete. This recognition has led some citizens, in several circumstances, to set up so-called *lites fictae* (i.e., fictitious cases) before an ordinary court in order to have access to the Constitutional Court and have their rights protected from an unconstitutional law¹²⁵. Indeed, the introduction of the ICC in the Italian legal system has always been intended to supplement - rather than substitute for - the extant system of incidenter control of constitutionality, in order to address its shortcomings.

Subsequent initiatives aimed at introducing an individual constitutional complaint are worth mentioning¹²⁶. In 1989, a proposal for an amendment to the Italian Constitution was introduced into the Parliament¹²⁷. The proposed amendment

access to the Constitutional Court not to mere individuals but, conversely, to a certain number of citizens (so-called "popular action"): "all citizens, within one year from the entry into force of a law or an act with the force of law, can challenge it directly before the Constitutional Court": U. Spagnoli, *I problemi della Corte. Appunti di giustizia costituzionale* 104 (1996).

¹²⁴ Draft Constitutional law no. 2870, introduced into the Italian Chamber of Deputy on December 15, 1965. The constitutional law, if approved, would have allowed direct recourse to the Constitutional Court against decisions of the highest ordinary and administrative Courts (Court of Cassation and Council of State) in case of incorrect application of constitutional provisions.

¹²⁵ See, generally, E. Crivelli, *La tutela dei diritti fondamentali*, cit. at 119.

¹²⁶ The following projects have been presented before the establishment of the Bicameral Commission for Constitutional Reforms in the XIII Legislature whose role and functions will be detailed further infra.

¹²⁷ See Records of the Italian Parliament (Atti Parlamentari), Chamber of Deputies, n. 4168, Aug. 3, 1989, signatories Andò, Cappiello, et al.

would have introduced the possibility for a citizen to apply directly to the Constitutional Court to challenge statutes, acts with the force of law, judicial decisions, and acts issued by the public administration whenever a fundamental right guaranteed by the Constitution had been violated. The same year, a seminar was also organized at the Constitutional Court to address the possibility of adopting a system of individual constitutional complaint¹²⁸.

During the XII Legislature of the Italian Parliament (April 1994-May 1996), a Studying Committee for the Institutional, Electoral and Constitutional Reforms was set up by then-President of the Council of Ministers, Silvio Berlusconi¹²⁹. The Committee drafted a project aimed at increasing the competences of the Constitutional Court, including the possibility of judging on “recourses presented by anyone claiming to have been harmed by an act of the public authority in one of the inviolable rights recognized and guaranteed by the Constitution¹³⁰.”

The text of the proposed amendment went on, stating:

“Recourses are admissible only after exhaustion of all remedies of the ordinary and administrative jurisdictions. However, the Constitutional Court can nonetheless judge upon those constitutional recourses already lodged and deemed to be of an important and general interest or when serious, immediate and irreparable harm can be suffered by the applicant due to the time required to receive protection from ordinary and administrative courts¹³¹.”

Despite initial consideration, none of these attempts proved, in the end, successful.

¹²⁸ The seminar was held on November 13-14, 1989. The proceedings have been published in AA.VV., *Giudizio “a quo” e promuovimento del processo costituzionale* (1990).

¹²⁹ The Studying Committee was established by President of the Council of Ministers Decree of July 14, 1994.

¹³⁰ The final report of the Committee, presented on December 21, 1994, was published by the Department for Constitutional Reform under the Presidency of the Council of Ministers in 1995. An account of the Committee’s aims and of the content of its final report can be found at <http://www.camera.it/parlam/bicam/rifcost/dossier/prec08.htm> (last visited January 2012).

¹³¹ *Id.*

C). 1997: The Parliamentary Commission for Constitutional Reforms and the Revision of the Italian Constitution

In 1997, a new Congress on the subject was organized in Ferrara, on the occasion of the celebration for the 200 years since the establishment of the first Constitutional Law chair in Europe at the University of Ferrara¹³². Also in 1997, the newly established Parliamentary Commission for Constitutional Reform (“*Commissione Parlamentare per le Riforme Costituzionali*”) preliminarily approved the project for a comprehensive reform of the Italian Constitution drafted within the XIII Legislature of the Italian Parliament (May 9, 1996 - May 29, 2001)¹³³. This project deserves a more detailed consideration.

The Commission, also referred to as “Bicameral Commission,” was composed of thirty-five members of the Chamber of Deputies and thirty-five members of the Senate, appointed by the Presidents of the two Houses of Parliament. The Bicameral Commission started its activity in February 1997 with the purpose of drafting a comprehensive reform of the Second Part of the Italian Constitution.

Even though the project drafted by the Commission was eventually rejected by the Parliament and never came into effect, it nonetheless represents, to date, the most comprehensive attempt to revise the Second Part of the Italian Constitution, attempting to introduce – among other institutions – a system of individual constitutional complaint in the Italian legal system. The projected revision of the Constitution, in the part addressing the

¹³² L. Carlassare (ed.), *Il diritto costituzionale a duecento anni dalla prima cattedra in Europa* (1998). The first chair in Constitutional Law in Europe was indeed established at the University of Ferrara in 1797. The Congress was held on May 2-3, 1997); see also V. Onida, *La Corte e i diritti: tutela dei diritti fondamentali e accesso alla giustizia costituzionale*, in A. Pace (ed.), *Studi in Onore di Leopoldo Elia, Tomo II* (1999). During the Congress, then-Constitutional Court Judge Valerio Onida expressed the opinion that the introduction of a system of direct access to the Court for appeal of judicial decisions violating fundamental constitutional rights would have been desirable. The majority of the other participants, however, expressed a more cautious stance on the advisability of introducing such a system, especially for fear of developing a conflicting relationship between the Constitutional Court and ordinary judges.

¹³³ Legge Costituzionale 24 gennaio 1997, n. 1 (It.) (The Bicameral Commission was established with Constitutional Law no. 1/1997 titled “Establishment of a Parliamentary Commission for Constitutional Reforms”), available at <http://www.camera.it/parlam/bicam/rifcost/legist/legge.htm> (last visited January 2012).

Constitutional Court, aimed at increasing its competences and functions, introducing new circumstances providing for the possibility of lodging an application with the Constitutional Court¹³⁴. Among those new competences, the text of Article 134 would have been amended in order to include, under letter g), the power to judge on “recourses lodged with the Court in order to protect, against all public powers, the fundamental rights guaranteed by the Constitution, according to the conditions, forms and statutes of limitations established through [a subsequent] constitutional law.”¹³⁵

The Report on the System of Guarantees¹³⁶, drafted within the Commission by Marco Boato, explicitly identifies the reasons for introduction of the individual constitutional complaint in the purpose of supplementing the protection of fundamental rights already provided through the *incidenter* system of judicial review, in order to provide protection to those cases falling outside of the Court’s existing competences. The Report also shows that the members of the Commission were aware of the application that this mechanism had found in several foreign jurisdiction¹³⁷, as

¹³⁴ The project would have modified articles 59, 134, and 137 of the Constitution of the Italian Republic.

¹³⁵ The final draft of the proposed new art. 134, approved by the Bicameral Commission, in relevant part, read as follows: “The Constitutional Court shall pass judgments on: ...

- (g) Recourses lodged with the Court in order to protect, against all public powers, the fundamental rights guaranteed by the Constitution, according to the conditions, forms and statutes of limitations established through [a subsequent] constitutional law.” (Original Italian wording of letter g): “sui ricorsi per la tutela, nei confronti dei pubblici poteri, dei diritti fondamentali garantiti dalla Costituzione, secondo condizioni, forme e termini di proponibilità stabiliti con legge costituzionale.” Commissione parlamentare per le riforme costituzionali, Progetto di legge costituzionale (1997), *available at* <http://www.camera.it/parlam/bicam/rifcost/docapp/rel7.htm> (last visited January 2012).

¹³⁶ Commissione parlamentare per le riforme costituzionali, Relazione sul sistema delle garanzie del deputato Marco Boato (Parliamentary Committee on Constitutional Reform, Report on the system of guarantees by Member Marco Boato) (2008), *available at* <http://www.camera.it/parlam/bicam/rifcost/docapp/rel6.htm> (last visited October 2011).

¹³⁷ *Id.* In the Report, express reference was made to the Spanish *recurso de amparo*, the German *Verfassungsbeschwerde*, and the Austrian *Individualbeschwerde* or *Individualantrag*. All three models were considered; specifically highlighted were the differences between these three models with regard to the acts reviewable for constitutionality.

well as the increased workload for foreign constitutional courts deriving from its adoption. Despite this significant disadvantage, however, the ICC system was deemed worth introducing. In the Commission's view, the complaint should have been designed as an exceptional means for protection of fundamental rights and should have avoided compromising the Court's functionality. This latter purpose would have been achieved through the establishment of clear admissibility requirements. On the other hand, the purpose of the Commission was to achieve a protection as broad as possible for the fundamental rights entrenched in the Constitution¹³⁸, making them protectable by the Constitutional Court even in the absence of a controversy. The Report was eventually sent to the Parliament together with the final draft of the proposed amendment.

Throughout the drafting process, constitutional-law scholars provided advice and comments on the different options available and on the choices made by the Commission. When the Commission approved the project, and the final text was ready to be introduced into the Parliament for a final vote, criticism was expressed over several of the choices that had been made¹³⁹.

Criticism focused, on one hand, on the fact that, while the project had acknowledged the residual character of the individual constitutional complaint in the protection of fundamental rights, it eventually established quite broad admissibility criteria. Indeed, according to the proposed new text of Article 134 Const., the complaint could have been proposed against any act issued by a public power, including judicial decisions. Moreover, in the final

¹³⁸ Generally recognized as those listed in Articles 1-11 of the Italian Constitution. However, the category of "fundamental rights" is far from being unanimously recognized in its content and has been variously defined by the doctrine. See, e.g., A. Pace, *Diritti fondamentali al di là della Costituzione*, in *Politica del Diritto* 3 (1993). Some scholars have sustained a perfect coincidence between the category of "fundamental right" and those listed in the Constitution; but see A. Baldassare, *Diritti Inviolabili*, in 11 *Enciclopedia Giuridica* 18 (1989). Some others have stated that the two categories should be kept separated, the category of "fundamental rights" being, on one hand, narrower than that of the rights entrenched in the Italian Constitution, and at the same time, on the other hand, wider, including some rights which are only implicitly addressed by the Constitution. For a detailed account of these theories, see A. Spadaro, *Il problema del "fondamento" dei diritti "fondamentali"*, in *I Diritti Fondamentali Oggi* 64 (1995).

¹³⁹ See L. Paladin, *Corte costituzionale: aumentano le funzioni ma il futuro potrebbe portare la paralisi*, in *Guida al Diritto* 43, 65 (1997). See also M. Carducci, *Ipotesi di accesso diretto alla Corte costituzionale*, in 2 *Quaderni Cost.* 315 (1998).

draft, the requirement of previous exhaustion of judicial remedies, present in earlier drafts, was eventually omitted. The Report itself underlines how the final draft of the proposed amendment significantly differed from the first. This first draft was clear in providing access to the Court only when a subject could not resort to any other jurisdictional remedy¹⁴⁰. The Committee first rephrased the final part of the article, requiring the previous exhaustion of judicial remedies, and then, eventually, omitted any such reference altogether¹⁴¹.

On the other hand, further criticism focused over the legitimacy and opportunity to leave to a subsequent constitutional law the identification of the fundamental rights whose infringement could be claimed by an individual. The explanatory Report suggested that the Constitutional Court be given some leeway in determining the category of “fundamental rights” at issue.

Finally, the new provision referenced neither the acts that could be challenged nor the criteria to be applied by the Court in selecting applications. The indeterminacy of the provision led some commentators to state that the project, far from leaving to a subsequent constitutional law the mere implementation of an already defined mechanism, left to that law the definition of the very core features of the constitutional complaint¹⁴².

As previously noted, the project was not adopted by the Parliament and was eventually abandoned¹⁴³.

Additional structured proposals for the introduction of a system of individual constitutional complaint have not been advanced since 1997, but the issue was raised again in 1999 during

¹⁴⁰ The first draft stated: “The Constitutional Court shall pass judgment: ... g) On complaints lodged by anyone claiming a harm to one of the fundamental rights guaranteed by the Constitution inflicted by an act of a Public Power, in case no other judicial remedy is provided.” The original text, in Italian, provided: “g) ricorsi presentati da chiunque ritenga di essere stato leso in uno dei diritti fondamentali garantiti dalla Costituzione da un atto dei pubblici poteri avverso il quale non sia dato rimedio giurisdizionale.”

¹⁴¹ See *Relazione Sul Sistema Delle Garanzie del Deputato Marco Boato*, www.camera.it/parlam/bicam/rifcost/docapp/rel6.htm (last visited January 2012) (It.).

¹⁴² See e.g., S. Panizza, *Il ricorso diretto dei singoli*, in A. Anzon, P. Caretti & S. Grassi (eds.), *Prospettive di accesso alla giustizia costituzionale (Atti del Convegno di Firenze del 28-29 maggio 1999)* 81 (2000).

¹⁴³ See *Riforme, la fine della Bicamerale*, *Corriere della Sera*, June 3, 1998.

a Conference organized in Florence¹⁴⁴ and has been addressed periodically by various Presidents of the Italian Constitutional Court in their annual press conferences¹⁴⁵.

D). Incidenter Review: An Already Effective System?

Recurrently over the past forty years, several constitutional-law scholars have expressed the view that a more comprehensive and efficient protection of fundamental rights in Italy could be achieved with the introduction of a system of individual constitutional complaint in one of its various forms, to supplement and enhance the protection of fundamental rights already in existence¹⁴⁶. The recurring interest in the establishment of this type of recourse to the Constitutional Court can be explained with the desire of legal scholars and practitioners to achieve protection for those legal situations and areas of law that are not already covered by the incidenter control of constitutionality¹⁴⁷. It is worth asking, however, if – and to what degree – introduction of an individual constitutional complaint into the system would be really useful in overcoming some of the supposed shortcomings and the so-called “grey areas” of the Italian system of judicial review.

¹⁴⁴ A. Anzon, P. Caretti & S. Grassi (eds.), *Prospettive di accesso alla giustizia costituzionale (Atti del Convegno di Firenze del 28-29 maggio 1999)* 81 (2000). The Congress was organized by the so-called “Gruppo di Pisa” and held in Florence on May 28-29, 1999.

¹⁴⁵ See *La giustizia costituzionale nel 1997*, in *Foro italiano*, Feb. 11, 1998, 133: transcript of the annual press conference of the President of the Constitutional Court, Judge Renato Granata. See also Annual press conference of the President of the Constitutional Court, Judge Valerio Onida, Jan. 20, 2005, available at www.cortecostituzionale.it (last visited January 2012). See also P. Passaglia, *Sull'inopportunità di introdurre il ricorso diretto individuale: qualche riflessione (ed una provocazione)*, available at http://joomla.ddp.unipi.it/documenti/persdoc/contributi/Ricorso_diretto_in_dividuale.pdf (last visited January 2012), offering reflections on the (in)opportunity to adopt a system of ICC in Italy after consideration and comparison of the statements of the two Presidents.

¹⁴⁶ See M. Cappelletti, *La giurisdizione costituzionale delle libertà*, cit. at 122. See also V. Onida, *La Corte e i diritti*, cit. at 132. See also A. Anzon, *Per una più ampia garanzia dei diritti costituzionali dinanzi alla Corte: il ricorso individuale diretto*, in V. Angiolini (ed.), *Libertà e giurisprudenza costituzionale* (1992); R. Caponi, «Ciò che non fa la legge, lo fa il giudice, se capace»: *l'impatto costituzionale della giurisprudenza della Corte di cassazione italiana*, in AA.VV., *Annuario di Diritto Comparato e di Studi Legislativi* (2011).

¹⁴⁷ See generally, R. Balduzzi & P. Costanzo (eds.), *Le zone d'ombra della giustizia costituzionale. I giudizi sulle leggi* (2007).

Often included amongst these shortcomings is the impossibility for the Italian Constitutional Court to judge the constitutionality of secondary sources (e.g. regulations), administrative acts and judicial decisions, and the supposed untimely protection that the “incidenter” review would grant when law-decrees or election laws would be involved¹⁴⁸. However, it is this author’s opinion that the introduction of a system of direct individual access offers uncertain advantages and some clear risks. The protection of fundamental rights should, therefore, preferably be addressed by ordinary courts, and a system of individual constitutional complaint – if introduced – should be designed in order to become a merely residual recourse providing citizens an additional avenue to access the Court for protection of “rights or interests” from an unconstitutional encroachment originating from public powers.

Consistent with this approach, the Italian Constitutional Court, through its jurisprudence, has tried to develop all the potentialities of the *incidenter* system of judicial review to provide a broad and comprehensive protection of fundamental rights. One of the mechanisms the Court has used to enhance rights protection has been a progressive interpretation of the rules regulating third-party participation to the hearings before the Constitutional Court, thus overruling its own previous strict interpretation, which had categorically excluded any third-party intervention¹⁴⁹. This broader interpretation has prompted a shift from a so called “objective interest” in the judicial review of the constitutionality of legislation (i.e. a general interest of the whole legal system in the constitutionality of legislation), to a more “subjective” one (i.e. a specific interest in the protection of the subjective fundamental rights at stake in the decision of constitutionality). According to some authors, with this shift, the Court has increasingly become “a rights Court¹⁵⁰.”

Moreover, the Court has also used its power to decide on the “relevant” and “not manifestly unfounded” character of the question of constitutionality raised by the ad hoc judge, in order to move toward a “more decentralized system” of judicial review of

¹⁴⁸ See E. Crivelli, *La tutela dei diritti fondamentali*, cit. at 119, 18.

¹⁴⁹ See Corte cost., decisions no. 20/1982, no. 421/1991, nos. 314 and 315/1992 and no. 176/1996.

¹⁵⁰ V. Onida, & M. D’Amico, *Il giudizio di costituzionalità delle leggi*, *Materiali di diritto costituzionale. Il giudizio in via incidentale*, Vol. I, 247 (1997).

legislation¹⁵¹. Indeed, the Constitutional Court has repeatedly urged ordinary judges to directly further an “adapting interpretation” (“*interpretazione adeguatrice*”), that is, to directly address an issue of constitutionality of legislation without raising a question before the Constitutional Court when – among the many possible scenarios – a constitutionally oriented interpretation of the applicable law is available¹⁵². While this practice brings with it the risk that ordinary judges will avoid referring questions of constitutional legitimacy to the Constitutional Court, even in cases when this would be necessary, it also has the advantage of determining a more concrete (i.e. closer to the facts of the case) and more tailored analysis of the constitutionality of legislation which eventually results in a decision with only *inter partes* effect. Conversely, decisions of the Constitutional Court that declare the unconstitutionality of a statute have *erga omnes* effect. The protection of fundamental rights in this case is therefore also enhanced.

The “incidenter” system of judicial review also leaves certain types of laws outside the protection provided by the Constitutional Court. The system is deemed to be inadequate, for example, to evaluate the constitutional legitimacy of laws whose alleged unconstitutionality should be ascertained timely and without delay¹⁵³. Until recently, this was the case, for example, of those acts with the force of law adopted by the Government according to the procedure established by Article 77 of the Italian Constitution (decrees-law)¹⁵⁴. According to the original stance of the Constitutional Court, the constitutionality of these acts with specific regard to the existence of the requirements of urgency and necessity for their adoption could no longer be assessed after they had been converted into law by the Parliament (conversion must

¹⁵¹ See M. Cappelletti, *Questioni nuove (e vecchie) sulla giustizia costituzionale*, in *Giurisprudenza Costituzionale* 857 (1990).

¹⁵² See generally Corte cost. decisions nos. 347/1998, 349/1998, 418/1998, 450/1998, 283/1999 and 436/1999.

¹⁵³ See E. Crivelli, *La tutela dei diritti fondamentali*, cit. at 119, 47.

¹⁵⁴ See Republic of Italy Cost. art. 77, which states that, in relevant part: “When in extraordinary cases of necessity and urgency the Government adopts under its own responsibility provisional measures having the force of law, it must on the same day present them for conversion into law to the Houses that, even if dissolved, shall be especially summoned and shall be assembled within five days. The decrees lose effect from their inception if they are not converted into law within sixty days from their publication”.

take place within sixty days of enactment)¹⁵⁵. Only in 1995 did the Court, realizing the gap that its own jurisprudence had created, overrule its previous decisions and affirmed its competence to judge the constitutionality of already converted decrees-law (together with the converting Law) with regard to the necessity and urgency requirements that justified the measure¹⁵⁶.

Other problems are usually deemed to arise with regard to those statutory laws – fundamental for the functioning of the whole democratic system – whose first application could take place well before a question of constitutionality could be referred to and resolved by the Constitutional Court, for example, election laws¹⁵⁷.

With regard to the category of acts that the Court can scrutinize for consistency with the Constitution, article 134 Const., as interpreted by the Constitutional Court, precludes the Court from considering the constitutionality of secondary sources, such as regulations¹⁵⁸. The Court has consistently stated that it is allowed to review the constitutionality of only primary sources of law, that is, statutory laws and acts with the force of law (namely, decrees-law and legislative decrees). Secondary sources, however, and more specifically regulations, in many cases represent the only source of law regulating a whole area of human activities as a consequence of recurring efforts of delegification¹⁵⁹, and cannot,

¹⁵⁵ See generally Corte cost. Decision no. 108/1986.

¹⁵⁶ The Constitutional Court overruled its previous jurisprudence to affirm its competence to judge on already converted decrees-law in decision no. 29/1995. For an account of the development of the Court's jurisprudence on the constitutionality of decrees-law, see R. Romboli, *Decreto-legge e giurisprudenza della Corte costituzionale*, in A. Simoncini (ed.), *L'emergenza infinita. La decretazione d'urgenza in Italia* 107 (2006).

¹⁵⁷ See E. Crivelli, *La tutela dei diritti fondamentali*, cit. at 119, 47. With regard to election laws, the author recalls how, back in 1956, Piero Calamandrei had already highlighted the possible shortcoming of the incidenter system of judicial review, especially with regard to election laws infringing upon the principle of equal suffrage or that modify, in violation of the Constitution, the age for franchise and eligibility: see P. Calamandrei, *Corte costituzionale e autorità giudiziaria*, in *Rivista di diritto processuale* 16 (1956).

¹⁵⁸ See Corte Cost. no. 23/1989 and no. 456/1994.

¹⁵⁹ Through processes of "delegification" the Parliament authorizes administrative authorities to adopt regulations in areas previously governed by statutory law, for efficiency purposes. For a treatment of this phenomenon, in connection with access to the Constitutional Court, see T. Giovannetti, *Delegificazione, regolamenti e atti amministrativi*, in R. Romboli, *L'accesso alla giustizia costituzionale* 467 (2006).

therefore, be scrutinized either by the Constitutional Court or by ordinary judges for consistency with a law or with an act having the force of law, since these latter are missing. In all those cases, introduction of the possibility for an individual to apply directly to the Constitutional Court would provide protection to rights otherwise left without guarantees.

III. Final Remarks on the Advisability to Adopt the Individual Constitutional Complaint in Italy

The examples provided by several of the European countries analyzed in the Part I of the article show that a system of individual constitutional complaint can be introduced in a constitution even at a subsequent stage in the development of the constitutional system.

In this respect, while adoption of a broad system of individual constitutional complaint in new democracies may enhance legitimacy and acceptance of a newly established constitutional or supreme court in the system, and offer the opportunity to subject to constitutional scrutiny legislation enacted during the previous – often undemocratic – regime, it is our view that different considerations should apply with regard to those constitutional systems and systems of judicial review – as the Italian – that have already achieved full legitimacy, acceptance and support and that have also developed a considerable line of decisions. In this latter case, only a truly compelling need to address important “grey areas” in the protections of fundamental rights should mandate adoption of a system of direct access to the Constitutional Court. The debate on the introduction of the individual constitutional complaint in Italy is, therefore, deeply linked to the achieved effectiveness of the already existing system of *incidenter* and concrete judicial review of legislation chosen by the Constituent Assembly and as further developed by the Constitutional Court over the past years of activity.

In Italy, the impossibility of directly resorting to the Constitutional Court for protection of constitutional rights has led, over time, to the enhancement of the *incidenter* review of legislation as a way to protect fundamental rights and to the development of this type of review in original ways. Ordinary judges are seen as the “door keepers”¹⁶⁰ of the Court, in a

¹⁶⁰ The expression was originally created by Piero Calamandrei.

“bottom-up” process activated through the *incidenter* review. The role that the Italian Constitutional Court has played in the system has relied on and has been directly proportional to the sensitivity of ordinary judges with regard to issues like the protection of fundamental rights and the implementation of the principles entrenched in the Constitution. Indeed, as we have seen, it is up to ordinary and administrative judges to decide when – and if – to raise an issue of constitutionality of a law before the Constitutional Court when some prerequisites (“*non manifesta infondatezza*” e “*rilevanza*”) are present.

The Constitutional Court, in the past years, however, through its case law, has reversed this process, making it a “top-down” one. The Court has recognized that all judges have an important role, not only in applying its decisions, but also, and more importantly, in directly conducting a limited control of the constitutionality of statutory laws (including those affecting fundamental rights), with the only limit represented by the impossibility for ordinary judges to refuse to apply directly (i.e. without first resorting to the Constitutional Court) those laws they considered unconstitutional (a role that is still reserved exclusively to the Constitutional Court)¹⁶¹.

Increasingly often, the Constitutional Court has declared inadmissible the questions of constitutional legitimacy presented and has asked the ad hoc judges to directly provide a “constitutionally oriented” interpretation of the challenged statutory law¹⁶². Before referring a question to the Constitutional Court, an ordinary judge is now expected to look for an interpretation of the statute at issue that would preserve its constitutional validity¹⁶³ and show – together with the two

¹⁶¹ It is worth remembering, though, that ordinary judges can already decide to not apply – in Italy as in all the other Member States of the European Union – national statutory laws which they deem are inconsistent with European Union law, probably furthering the general level of decentralization of the system.

¹⁶² See, e.g., Corte Cost. no. 356/1990: “in principle, laws are not declared unconstitutional when it is theoretically possible to interpret them in unconstitutional ways, but when it is impossible to interpret them in a way which is consistent with the Constitution.” See also Corte Cost. nos. 347/1998, 349/1998, 418/1998, 450/1998, 283/1999 and 436/1999.

¹⁶³ While in Spain this is explicitly required by art. 5.3 of the Ley Organica del Poder Judicial (1985), the Constitutional Court of Italy developed this requirement through case law: see Corte Cost. no. 356/1990. See T. Groppi, *The Italian Constitutional Court: Towards a ‘Multilevel System’ of Constitutional Review?* 2 J. Comp. L. 100, 116 (2008).

abovementioned requirements – that a constitutionally adequate interpretation is impossible¹⁶⁴. As a consequence of this evolution, the protection of constitutional rights against unconstitutional legislation is enhanced and can be addressed directly before ordinary judges.

This “virtuous connection” between the Constitutional Court and ordinary courts has contributed to dispel the original distrust towards ordinary judges that characterized the early years following the enactment of the 1948 Constitution and that represented the main reason for the adoption of a centralized system of judicial review¹⁶⁵. It is this author’s view that the introduction of a system of direct constitutional recourse, especially in cases in which a decision issued by ordinary or administrative judges could be challenged before the Constitutional Court, would run the risk of breaking this “virtuous connection,” implicitly accusing ordinary judges of providing an ineffective protection of rights. This is the reason why, while some Italian scholars support the introduction of a broad ICC system¹⁶⁶, others – whose opinion we share – look favorably at the introduction of a constitutional complaint on condition that judicial decisions cannot be challenged¹⁶⁷.

¹⁶⁴ T. Groppi, *Corte costituzionale e principio di effettività*, 1 Rassegna Parlamentare 189, 213 (2004). See, e.g., Corte Cost. no. 343/2006: “the ad hoc judge ... has the duty to choose, among the several possible interpretations of a provision, the one which can dispel doubts of constitutional illegitimacy, raising an issue of constitutionality only when the text of the provision precludes any possibility to interpret it in a constitutionally-oriented way.”

¹⁶⁵ See E. Lamarque, *Interpreting Statutes in Conformity with the Constitution: The Role of the Constitutional Court and Ordinary Judges*, 1 It. J. Pub. L. 91, 105 (2010), quoting P. Calamandrei, *Corte Costituzionale e autorità giudiziaria*, 1 Rivista di diritto processuale 8, 9 & 53 (1956) (discussing the importance of an “active collaboration” between the Constitutional Court and ordinary judges “working together like two complementary and inseparable gears of a single procedural mechanism” for the correct functioning of constitutional review in Italy), available at http://www.ijpl.eu/assets/files/pdf/2010_volume_1/IJPL%20volume%201_2010.pdf (last visited January 2012).

¹⁶⁶ See A. Anzon, *Per una più ampia garanzia dei diritti costituzionali*, cit. at 146, 24; R. Caponi, «Ciò che non fa la legge, lo fa il giudice, se capace», cit. at 146. In fact, this is actually the case in Czech Republic, Germany, Poland, Serbia, Slovak Republic, Slovenia, Spain and Switzerland where judicial decisions are among the acts that may be challenged through direct recourse.

¹⁶⁷ See R. Romboli, *Ampliamento dell'accesso alla Corte costituzionale e introduzione di un ricorso diretto a tutela dei diritti fondamentali*, in A. Anzon, P. Caretti & S. Grassi (eds.), *Prospettive di accesso alla giustizia costituzionale (Atti del Convegno di*

On a different note, it is our opinion that the advisability (or lack thereof) of the introduction of the ICC in Italy should also – and more properly – be assessed in light of the possibility for an individual to receive supranational protection of rights by applying to the European Court of Human Rights for violation of the rights entrenched in the Convention¹⁶⁸; or the possibility – since 2007 – to directly claim infringement of rights protected by the European Convention on Human Rights before Italian ordinary and administrative judges. Indeed, with regard to this latter development, the Constitutional Court, in four pivotal decisions¹⁶⁹, in light of the amended text of article 117 of the Constitution¹⁷⁰, has recognized infra-constitutional (but supra-legislative) status to the ECHR, defining it as “intermediate law”

Firenze del 28-29 maggio 1999) 81 (2000); R. Romboli, “Torniamo alla Costituente”: considerazioni in ordine all'introduzione di un ricorso diretto del singolo e delle minoranze parlamentari alla Corte costituzionale, in 43 RIPE - Revista do Instituto de Pesquisas e Estudos 31 (2008).

¹⁶⁸ According to the individual application procedure set up in article 34 of the Convention. On this topic, see M. Cappelletti, *Questioni nuove (e vecchie) sulla giustizia costituzionale*, cit. at 151, 32, where the author expresses the view that, in light of Italy's participation in the system of the European Convention of Human Rights, the introduction of a national individual constitutional complaint would be, under many aspects, redundant. See also E. Crivelli, *La tutela dei diritti fondamentali*, cit. at 119, 150.

¹⁶⁹ See Corte cost. decisions nos. 348 and 349/2007; Corte cost. decisions nos. 311 and 317/2009 (decisions are available, in English, on the website of the Italian Constitutional Court: http://www.cortecostituzionale.it/ActionPagina_325.do (last visited January 2012). See also Corte Cost. decision no. 80/2011, confirming the status of the ECHR as “intermediate law” (“norma interposta”) after the entry into force of the Lisbon Treaty. On the first four pivotal decisions, see G. Gentili, *The status of the ECHR in the Italian hierarchy of sources as determined by the Italian Constitutional Court (Constitutional Court decisions ns. 348, 349/2007)*, in Palomar, available at http://www.unisi.it/dipec/palomar/italy001_2008.html#3 (last visited January 2012); G. Gentili, *The Italian Constitutional Court and the legal status of the European Convention on Human Rights in the national legal system: positive competition between fundamental rights provisions (Constitutional Court decisions ns. 311, 317/2009)*, PALOMAR, available at http://www.unisi.it/dipec/palomar/italy009_2010.html#5 (last visited January 2012).

¹⁷⁰ Art. 117, cl. 1 Costituzione [Cost.] (It.), indicating that “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” (emphasis provided), with the ECHR being considered by the Court in decisions 348 and 349/2007 as falling within the latter type of constraints.

(*norma interposta*)¹⁷¹." As a consequence of this achieved status, the Convention is now directly applicable in the Italian legal system and is now part of the Constitutional Court's parameter for constitutional review of domestic legislation¹⁷².

It is beyond doubt that the direct individual access has the capacity to highly affect the system of judicial review adopted in a country, especially considering its primary side-effects: a significant increase in the docket of a constitutional court, most likely affecting its ability to provide timely justice for claims falling within the Court's jurisdiction (as happened in Spain before the 2007 reform); as well as a possible delegitimation of ordinary judges, especially when the individual constitutional complaint system allows applications against decisions of ordinary and administrative courts.

The Italian system of judicial review has shown, over the years, the ability to re-define itself to address "grey areas" in fundamental-rights protection through a progressive interpretation of the existing rules on the incidental procedure to access the Constitutional Court. If a system of individual constitutional complaint needs to be adopted, this system also needs to be carefully designed, in order to structure the direct recourse in a way that would not affect the existing "virtuous connection" between the Constitutional Court and ordinary judges, and would not increase the Court's workload to the point of making its decisions untimely and - ultimately - ineffective. Also, in light of the very recent development regarding the infra-constitutional status now accorded to the European Convention on Human Rights in the Italian system of sources of law, it is our view that adoption of a general and broad system of ICC would ultimately bring about more disadvantages than advantages. A more narrowly designed system, introducing only very specific

¹⁷¹ Meaning that the Convention now has supremacy over legislative materials but remains subordinate to the Constitution in the Italian hierarchy of sources of law

¹⁷² However, as highlighted by Philipp Cede: "the ECHR's status does not reach the same level as [EU] law: As opposed to norms of [EU] law - which automatically prevail over contrary domestic legislation in such a way that any court must leave the conflicting domestic norm disapplied, conflicts between ECHR law and domestic legislation may not be resolved by ordinary Courts directly but must be referred to the *Corte Costituzionale*," P. Cede, *Report on Austria and Germany*, in G. Martinico & O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws* 55 (2010) (comparing the approaches followed by the Constitutional Courts in Austria and Germany).

and not-generalized cases of direct recourse and granting access to “enumerated and well-defined individuals or state bodies ... and/or for enumerated and well-identified violations” - as emphasized by the Constitutional Court itself in one of its decisions¹⁷³ - seems to be more compatible with the current development of the Italian structure of judicial review.

This system - in our view - should borrow from some of the features of what we have previously defined as the “European model of individual constitutional complaint,” bearing in mind, at the same time, that fundamental rights could and should be protected - first and foremost - by ordinary judges and only afterward by the Constitutional Court (mandating therefore the previous exhaustion of all other available legal remedies), and exclusively in cases in which the applicant could demonstrate the novelty of the constitutional question (i.e. that the issue has not already been addressed by the Constitutional Court) and a personal, direct, and current interest in the annulment of the act(s). The determination on the existence of these two prerequisites should be rather strict and, in any case, be left to the Constitutional Court itself (or to a special panel within the Court specifically created to conduct this review, on the German example), in order to allow the Court to exercise a significant control over its own docket and workload.

On the other hand, for the sake of legal certainty and to safeguard both the principle of separation of powers and the independence of the judiciary, the identification of the rights protected through direct recourse should be left to the legislator rather than to the Constitutional Court, and the complaint should be allowed only in cases of actions (not omissions) by the public powers in the form of legislation and regulations, but in this latter case only in those areas not regulated by primary sources of law¹⁷⁴. Consistent with the same *rationale* (legal certainty) and in

¹⁷³ The issue was indeed addressed by the Constitutional Court in an *obiter dicta* in decision no. 406 of July 14, 1989, par. 3 of the “Conclusions on points of law.” According to the Court, “grey areas” can be addressed by “modifying (through constitutional amendment) the system of judicial review with the introduction of new *principaliter* proceedings (actionable by enumerated and well-defined individuals or state bodies ... and/or for enumerated and well-identified violations).” See Corte cost. decision no. 406/1989

¹⁷⁴ The decision on the admissibility in these cases still falling - as anticipated - within the exclusive purview of the Constitutional Court.

order to further equality of treatment, a clear statute of limitation should also be established.¹⁷⁵

To balance out these rather strict accessibility requirements, the possibility to file a recourse should be granted to both legal and natural persons, and, in this latter case, to both citizens and foreign nationals residing in Italy, with few formal requirements¹⁷⁶.

Structured as a “weaker,” or “narrower” form of individual constitutional complaint (as opposed to the “stronger” or “broader” form, adopted in most eastern European countries and in pre-2007 Spain), the individual constitutional complaint could supplement the already existing and fully-developed Italian *incidenter* system of judicial review without altering the balance between ordinary judges and the Constitutional Court achieved through years of exercise of judicial review. Furthermore, it would also provide effective protection for the “grey areas” currently not covered by the *incidenter* review, without overburdening the Court.

It is indeed our view that, in designing a system of direct individual access to the Italian Constitutional Court, drafters should be guided by a leading Italian legal scholar’s observation that a system of judicial review operating more broadly but less timely (due to the overburdening of the Court) would be less beneficial than one operating promptly but on a narrower scale¹⁷⁷.

¹⁷⁵ In our view, the statute of limitation for filing of the complaint should not exceed one year (as in Germany and Croatia) nor be shorter than two months (as in FYRM, Montenegro, Slovenia) since the enactment of the challenged act(s). The two-year time period adopted in Albania seems indeed too extensive while, conversely, Switzerland’s 30-day time-frame appears rather short. Spain and Belgium have adopted, respectively, a three-months and a six-months statutes of limitation.

¹⁷⁶ But with the possibility, for the Constitutional Court, to issue fines for those individual complaints which are filed and clearly lack one or more basic requirements, in analogy with the system adopted in Germany.

¹⁷⁷ See M. Cappelletti, *Intervento*, in G. Maranini (ed.), *La giustizia costituzionale* 399-400 (1966).

SOCIAL SERVICES IN THE EU LEGAL SYSTEM:
BALANCING COMPETITION AND THE PROTECTION OF
NATIONAL-SPECIFIC PUBLIC INTERESTS

Remo Morzenti Pellegrini*

Abstract

This paper investigates the reorientation processes implemented by public authorities in EU Member States with regards to social services management. The paper focuses on welfare services, although a wider range of social services (health, education, work, social security) are taken into account where relevant. Current reorientation involves a shift in welfare policies, from the traditional approach based on solidarity, towards a view that emphasizes economic relevance of social services. As a result, organization and management of social services are subject to free competition, and might therefore potentially collide with the non-economic peculiarities of social services; services where personal and human factors have a major relevance and impact, both on their performance and on their legal denomination. Such reorientation has triggered a not yet concluded process characterized by the tentative balance of opposing needs: the needs of social services users and the need for free competition between the agencies supplying such services.

TABLE OF CONTENTS

1.	
Introduction.....	210
2. Services of Public Interest and Social Services within the Original EC Legal System and in the Framework of the EU Institution's Initiatives.....	212
3. Social Services and European Community Regulations in the Judiciary System of the Court of Justice.....	228
3.1. The Organisation of Social Services amid Competition, Solidarity, and the Economic-Financial Balance	

of National Systems.....	228
3.2. Irrelevance of non profit nature of providers, and the concepts of Enterprise and Economic Activity. The Reimbursement Issue.....	230
3.3. Derogations to the Application of General Rules on Competition. The Necessary Economic-financial Balance of the Management Systems of Services of General Economic Interest.....	236
3.4. The Fulfilment of a Mission of Public Interest and the Concepts of State Aid and Abuse of a Dominant Position. The Criterion of Tangible Activity Performed.....	241
3.5. Social Protection of Workers with Respect to the Freedom to Provide Services and the Right of Establishment.....	249
4. Conclusions: the emergence of the concept of “social services of general economic interest”	252

1. Introduction

This study aims at illustrating the modified perspective that characterises the sector of social services within the European Community legal system. This sector is experiencing an ongoing evolutionary process. This evolution has distanced social services from the traditional view focused on the logic of solidarity and lacking economic relevance, towards a view that brings the activities being examined closer to the concept of services of general economic interest, thus marking the beginning of a “contamination” process of social services by the principles of free competition, especially in matters related to organisation and management. Hence, the purpose of this paper is to shed light on the aforementioned shift in welfare policies and related legal scholarship by investigating the implementation status of this process in the EU legal system.

As to the object of this study, we should firstly point out that the focus is mainly on social services in the strict sense of the term, that is, welfare services. All activities belonging to a wider concept of social services, such as services for individuals (*e.g.*, health, education, work, and social security), will be investigated only with respect to contributions and studies that add significant elements to the main topic of our discussion, namely social assistance.

From this viewpoint, we are able to detect a significant change in perspective. This change is the result of an original indifference of the social welfare sector to market laws, and it is leading towards a view that will include social services within the scope of economically relevant ones; these very functions are the specific recipients of a system of norms based on the protection and promotion of competition. The result is a radical transformation of social welfare management, with its undoubted and recognised peculiarity that characterises the supply of services related to social welfare, wherein personal and human elements acquire unquestionable and unique value; a value which must be adequately taken into account as it is absent in the fields of other services characterised by economic relevance.

The greatest difficulty here lies in finding a balance between opposing needs. On the one hand, there is the self-evident need to protect and promote competition between economic players delivering social services within current welfare system. On the other hand, there is the equally unavoidable need to preserve the traditional peculiarities of this sector, based on both knowledge and the ability to interpret the users' personal needs; a sector that traditionally applies a human and solidarity approach as to the principles guiding the assignment of such services, thereby favouring local operators. Such practice often fails to reach a sufficient level of competition promotion which is intended to ensure a more efficient allocation and use of the resources involved.

To achieve, or at least come close to, a satisfactory coexistence of such opposing objectives the concept of social services must be brought closer to the more general concept of services of general economic interest, as defined by the European Community. Accordingly, this work attempts at exploring to what extent the regulatory system governing services of economic interest may be applied to the sector of social services (the latter being a sector which has traditionally been protected from such "economic" contamination as that recently imposed by the current financial situation). In doing so, this work will also take into consideration the specific features of social services which discourage an approach aimed at the indiscriminate extension to them of rules primarily associated with economic relevance.

2. Services of Public Interest and Social Services within the Original EC Legal System and in the Framework of the EU Institution's Initiatives

The notion of service of general interest does not appear in the original EC Treaty, which only contained a more narrow definition of the concept of service of general economic interest that is particularly relevant within the European construction, at least as it was originally conceived. This definition has a rather blurred connotation, probably deriving from the need to reconcile the different experiences in this field as occurred to various Member States¹.

The distinction between this last concept and that of service of general interest is relevant within the European Community legal system because inclusion in one category versus the other implies that there should be compliance with a different set of rules. In fact, if non-discrimination and free-circulation principles were applied to any kind of services, then, conversely the freedom to provide services, the right of establishment, the norms on competition and State aid would apply only to so-called economic activities.

From this point of view, the traditional statement declaring that any activity implying the offer of goods and services to a

* Professor of Administrative Law, University of Bergamo.

¹ On this point, see G.M. Racca, *I servizi pubblici nell'ordinamento comunitario*, 2 Dir. Amm. 201 (1994); D. Gallo, *I servizi di interesse economico generale. Stato, mercato e welfare nel diritto dell'Unione europea*, Milan (2010). For a comparative view of the experiences in different European countries see E. Ferrari (ed.), *Attività economiche ed attività sociali nei servizi di interesse generale*, Turin (2007). See also, M. Freedland and S. Sciarra, *Public Services and Citizenship in European Law: Public and Labour Law Perspectives* (1998); K. Laenerts-A. Verhoeven, *Towards a legal framework for executive rules making in the EU?* 3 Comm. Mark. Law Rev. 645 (2000); A. Héritier, *Market Integration and Social Cohesion: the Politics of Public Services in European Regulation*, 5 Journ. Eur. Publ. Pol. 825 (2001); M. Marti, M. Schmidt, U. Springer, *Libéralisation des Services publics: y a-t-il une Convergence en Europe?*, 24 L'Économie politique, 75 (2004); M. Onnée, L. Ghékiere, *Social Services of General Interest in the Internal Market of the 21st Century - The Reform Treaty: The New State of Affairs* (2007); S. Van de Walle, *What Services are Public? What Aspects of Performance are to be Ranked? The Case of "Services of General Interest"*, 3 Int. Publ. Manag. Journ. 256 (2008).

certain market constitutes an economic activity appears to be too simplistic. As a matter of fact, technological, economic, and social evolution impacted the range of services available on the market in a way which has led to the traditional distinction between economic and non-economic activities. Nevertheless, these activities have indisputably acquired a dynamic and evolving nature which makes it therefore impossible to crystallize the above said distinction *a priori*². In this context, the European Community legal system assigns to national judges the task of assessing the circumstances and conditions in which the service is supplied, taking into account certain symptomatic indicators, such as the absence of a mainly lucrative purpose, the non-assumption of risks related to the activity and the possibility of obtaining public financing for it (provided it is aimed at covering costs and not at remunerating investments)³.

Essentially, a service can be defined as of economic relevance when it is offered on the market against suitable payment that covers costs and remunerates capital. On the contrary, a service is not economic when it is offered with a non-lucrative purpose for mutual assistance, or when its costs are covered through general taxation or user fees for participation that do not cover the costs.

In other words, the difference between economically relevant services and services that do not have this relevance must be looked for in the impact of the activity on the competition scenario and on its profitability aspect. We can thus say that a

² For doctrinal comments on the pending references, see also D. Sorace, *I servizi "pubblici" economici nell'ordinamento nazionale ed europeo alla fine del primo decennio del XXI° secolo*, 1 Dir. amm. 1 (2010); L. Bertonazzi, R. Villata, *Servizi di interesse economico generale*, in *Trattato di diritto amministrativo europeo*, G. Greco, M.P. Chiti (eds.) (2007) 1805 et seq.; see also P. Sandevour, *Les vicissitudes de la notion de service public industriel et commercial* (1974); A.S. Mescheriakoff, *L'arrêt du Bac d'Eloka. Légende et réalité d'une gestion privée de la puissance publique*, 4 Rev. Dr. Pub. 1059 (1988); G. Guglielmi-G. Koubi, *Droit du service public* (2000); L. Dubouis, *Missions de service public ou missions d'intérêt général*, janv-fév Rev. Gén. Collect. Territ. 588 (2001); E. Fatome, *La détermination du caractère des établissements publics*, 3 Act. Jurid. Dr. Adm. 222 (2001); J.F. Lachaume, *L'identification d'un service public industriel et commercial: la neutralisation du critère fondé sur les modalités de gestion du service*, 1 Rev. Franç. Dr. Adm. 119 (2006); J. Clifton, F. Comín, D. Diaz Fuentes, *Privatizing Public Enterprises in the European Union 1960-2002: Ideological, Pragmatic, Inevitable?*, 5 Journ. Eur. Pub. Pol. 736 (2006).

³ See also, among others, Court of Justice EC, 22 May 2003, in law suit C-18/2001, in *Foro amm. CdS*, 2003, 1498.

service is economically relevant if it belongs to a sector that is characterised, at least potentially, by a certain profitability and therefore by competitiveness that also allows for the fulfilment of objectives that are in the public interest. On the other hand, residual services that, by their very nature or because of the constraints imposed on the relevant management, do not generate any competition can be considered as not having economic relevance and irrelevant for the purposes of competition⁴.

As to services of general economic interest, article 86, paragraph 2 of the EC Treaty, now article 106 TFUE, has stated undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaties, in particular to the rules on competition, provided that the application of such norms does not hinder the *de jure* or *de facto* fulfilment of the specific mission assigned to them.

From the EU Law point of view, additional indications on this issue have been provided, however restricted to *soft law* and, therefore, whose meaning is more descriptive than prescriptive. On top of that, paragraph 3 of the above-mentioned article 86 has entitled the Commission to watch over the application of the relevant provisions giving the Member States, where necessary, appropriate instructions and decisions, and also by other documents issued by European Community institutions for various reasons⁵.

⁴ For doctrinal comments on the pending references, see also M. Giorello, *Gestions in house, entreprises publiques et marchés publics: la CJCE au croisement des chemins du marché intérieur et des services d'intérêt économique général*, 1 Rév. Dr. Un. Eur. 23 (2006); S. Monzani, *Controllo "analogo" e governance societaria nell'affidamento diretto dei servizi pubblici locali* (2009) p. 121 et seq.; R. Sermier, D. Epaud, *Nouvelle règle pour le in house: mettre fin au contrat en cas d'ouverture du capital de l'entreprise exécutant le marché*, 40 Dr. Adm. 2227 (2009); H. Wollmann, G. Marcou, *The provision of public services in Europe: between state, local government and market* (2010); G. Terrien, *Le développement des sociétés publiques locales*, 10 Dr. Adm. 7 (2010); P.M. Probst, *Anforderungen an die Vergabe eines Auftrags an eine öffentliche Aktiengesellschaft - In-house-Gestaltung erneut auf dem Prüfstand*, 2 Eur. Law Rep. 53 (2010); S. Bernard, *Réflexions sur l'apport de la création de la société publique locale au droit des entreprises publiques*, 3 Rev. Dr. Pub. 587 (2011); B. Delaunay, *L'exception in house aux exigences du droit de l'Union européenne en matière de mise en concurrence*, 3 Rev. Dr. Pub. 717 (2011).

⁵ For a comment on the documents issued by EC institutions, with particular reference to the profiles that are more meaningful for the subject being treated, see also D. Edward, M. Hoskins, *Article 90: deregulation and EC law. Reflections arising from the*

As a matter of fact, the Commission itself has expressed its opinion on this issue on several occasions. The first opinion was a Communication on “Services of Public Interest in Europe” dated September 26th 1996. The document distinguished between: 1) services that, provided against or with no consideration, are considered by public authorities to be of general interest and therefore subject to specific public service obligations; and 2) services of general economic interest that, provided against consideration, fulfil missions of general interest and are subsequently subject to specific public service obligations, as well as to European Community rules on the protection and promotion of competition, as long as the latter do not hinder the fulfilment of the specific mission assigned to them.

Specifically, the above-mentioned communication refers to services of public interest as “veritable social rights” because they contribute significantly to social-economic cohesion and to the construction of the European model of society for which these services, aimed at satisfying primary needs, represent a sort of “cement”; “cement” that goes beyond the basic level of material worries by acquiring a symbolic dimension able to both offer stable reference points for the community and enhance the citizens’ feeling of belonging to that same community, hence representing an element of cultural identity for all European countries “even in acts of daily life”.

However, the European Community’s processing of this issue, as we can see from the above mentioned Communication dated 26/09/1966 appears to still be at an early stage, as the Commission, although recognising – as we have just seen – the social function of services of public interest, does not include this dimension in the Community’s field of activity, leaving to the

XVI FIDE conference, 32 Comm. Mark. Law Rev. 159 (1995); K. Van Miert, *Les missions d’ intérêt économique générale et l’article 90 par. 2 du Traité CE dans la politique de la Commission*, 2 Dir. Econ. 277 (1997); R. Cameli, *La categoria giuridica dei servizi sociali tra ordinamento nazionale e ordinamento europeo*, 4 Dir. amm. 903 (2006); G.F. Cartei, *Servizi sociali e regole di concorrenza*, 3-4 Riv. It. Dir. Pubbl. Com. 627 (2007); F.A. Cancilla, *Servizi del welfare e diritti sociali nella prospettiva dell’integrazione europea* (2009) p. 280 et seq.; S. Civitarese Matteucci, *Servizi sanitari, mercato e “modello sociale europeo”*, 1 Mercato, concorrenza, regole 179 (2009); G. Guiglia, *I servizi sociali nel processo di integrazione europea: dalla distinzione alla regolazione*, 3 Jus 457 (2009); V. Molaschi, *I servizi sociali*, in S. Mangiameli (ed.), *I servizi pubblici locali* (2008), 363 ss.

Member States the discretion to identify the missions of general interest that allow them to dodge competition principles (provided that the criterion of proportionality is complied with) and to determine with the same freedom the managerial and organisational framework in charge of providing said services. This usually happens in the Community's indifference for the nature of the subjects that carry out missions of general interest, although combined with a shy attention for anti-competition behaviours⁶.

In conclusion, in this first stage, substantial absence of the European Community dimension in social services was the result of a typical approach by the original EC legal system. This system is based on the priority assigned to economic integration in the belief that political and social integration might also be generated from such economic integration, as stated in article 2 of the EC Treaty. The Treaty has, among others, the purpose of achieving a high rate of employment and social protection however through the creation of a common market together with an economic and monetary union⁷. In other words, the category of social services, in

⁶ T. Prosser, *The limits of competition law markets and public services* (2005); A. Rhys, G.A. Boyne, J. Law, R.M. Walker, *Organizational strategy, external regulation and public service performance*, 1 Pub. Adm. 185 (2008); J. Broadbent, J. Guthrie, *Public sector to public services: 20 years of "contextual" accounting research*, 2 Accounting, Auditing & Accountability Journal 129 (2008); F. Bulmer, *A new model for public services*, in *Economic affairs* (2008).

⁷ With regard to the discussion concerning the social services, see E. Menichetti, *I servizi sociali nell'ordinamento comunitario*, in *Servizi di assistenza e sussidiarietà*, A. Albanese, C. Marzuoli, (ed.) (2003) p. 83 et seq. and also, Id., *I servizi sociali e servizi economici di interesse generale*, in *Solidarietà, mercato e concorrenza nel welfare italiano* S. Sciarra (ed.) (2007) p. 109 et seq.; J. Alber, *A Framework for the Comparative Study of Social Services*, 2 Journ. Eur. Soc. Pol. 131 (1995); J. Buttler, *Towards convergence in European personal Social Services?* 8 Cuad. Trab. Soc., 75 (1995); A. Anttonen, J. Sipilä, *European social care services: is it possible to identify models?*, 6 Journ. Eur. Soc. Pol. 87 (1996); H. Anheier, *Social Services in Europe: Annotated Bibliography*, Frankfurt: Observatory for the Development of Social Services in Europe (2000); A. Héritier, *Market integration and social cohesion: the politics of public services in European regulation*, 5 Journ. Eur. Pub. Pol. 825 (2001); B. Munday, *European social services: A map of characteristics and trends*, Strasbourg, Council of Europe (2003); M. Threlfall, *European Social Integration: Harmonization, Convergence and Single Social Areas*, 2 Journ. Eur. Pub. Pol. 121 (2003); H. Anheier, *Social services in Europe: an annotated bibliography*. Frankfurt, Observatory for the Development of Social Services in Europe (2003); S. Van de Walle, *The impact of public service values on services of general interest reform debates*, 2 Pub. Manag. Rev. 183 (2006); P. Herrmann, A. Brandstaetter, C. O'Connell, *Defining Social Services in Europe: Between the Particular and the General* (2007); B. Enjolras, *Between Market*

the perspective of the original European Community treaties, was identified “by elimination”, that is by exemption from application of the European Community competition rules based on the idea that the right to assistance was not to be guaranteed by the supranational level and, more simply, did not entail the functioning of the EU single market.

In this context, the first documents issued by the Commission on this topic reconnected the exclusion of social rights from the application of European Community rules to both their economic irrelevance and to the nature of providers, as they were mainly driven by social goals rather than in pursue of profits⁸.

Later, however, European Community institutions started to show greater sensitivity and awareness for the issue of social cohesion and inclusion, which has appeared more and more clearly as an objective of the economic integration EC policy⁹.

In this view, we should consider the addition of a new provision to the EC Treaty, by the 1997 *Amsterdam Treaty*, which was adopted under the impulse of the Commission’s aforementioned Communication. Article 16 has acknowledged that “considering the importance of services of general economic interest within the scope of the Union’s shared values as well as their role in promoting social and territorial cohesion, the Community and the Member States, insofar as it pertains to them and within the field of application of the Treaty, will arrange for such services to function based on principles and conditions that allow them to carry out their tasks”.

and Civic Governance Regimes: Civicness in the Governance of Social Services in Europe, 3 Int. Journ. Vol. Nonprofit Org. 274 (2009).

⁸ In this sense see A. Albanese, *Servizi sociali*, in *Trattato di diritto amministrativo europeo*, G. Greco, M.P. Chiti (eds.) (2007), 1907 ss.

⁹ With regard to this, see G. Napolitano, *Towards a European legal order for services of general economic interest*, 11 Eur. Pub. Law 572 (2005), where it says: “Community law ‘unbundles’ general interest linked to services. In this way, it establishes which ones are important and deserve protection at a European level. Only such interests can justify derogation from the European order’s other laws and principles. The European model therefore introduces a profound break with the tradition of many European countries. Services no longer constitute an element of State legitimacy. Nor may they yet freely be used for purpose of social and economic policy other than those related to their own spread. On the other hand, offering services is now a private activity subject to common market and antitrust law rather than to the rules governing the actions of public authorities”.

Furthermore, the *Charter of Fundamental Rights of the European Union*, adopted by the European Council (Nice, 2000) has introduced an entire chapter dedicated to solidarity, which has been recognised binding effects by virtue of article 6 of the new Treaty on European Union, according to the Lisbon Treaty, which has given the Charter the same legal value as Treaties. Article 34 of the Treaty on European Union, states that the European Union, in order to promote social and territorial cohesion, recognises and respects access to services of general economic interest although, once more, in compliance not only with the Treaty that founded the European Community, but also with the provisions of national laws and practices¹⁰.

Urged by Lisbon's European Council to update its previous Communication on "Services of Public Interest in Europe", the Commission, in a subsequent issue dated 19th January 2001, although it maintained the same direction as the previous one and assigned to competent local, regional, or national public authorities, the task of defining, in full transparency, the missions of general interest and the ways to fulfil them. It finally poses "new questions about the boundaries of some services that, in the past, were supplied following mainly non-competition criteria but that presently attract, or might attract, possible competitors" who: (i) are willing to investigate the growing tension between traditional operators and public authorities on the one hand; (ii) support the persistent need to protect the mechanisms for the supply of services of general economic interest from the application of EC laws and, on the other, private sector competitors; (iii) and, *vice versa*, denounce, that the existing agreements would be unfairly unfavourable to the operator in charge, thus taking a position contrary to EC laws¹¹.

In particular, through the document being discussed, the

¹⁰ See N. Boerger, *Solidarity and EC competition law*, 32 Eur. Law Rev. 339 (2007).

¹¹ On this point, see C.D. Ehlermann, *The contribution of EC competition policy to the single market*, 2 Comm. Mark. Law Rev. 257 (1992); N. Belloubet-Frier, *Service public et droit communautaire*, 4 Act. Jur. Dr. Adm. 270 (1994); R. Kovar, *Droit communautaire et service public: esprit d'orthodoxie ou pensée laiciste*, 2-3 Rev. Trim. Dr. Eur. 215 and 493 (1996); D. Caldirola, *La dimensione comunitaria del servizio pubblico ovvero il servizio d'interesse economico generale e il servizio universale*, in L. Ammannati, M.A. Cabiddu, P. De Carli (eds.), *Servizi pubblici, concorrenza, diritti* (2001); T. Prosser, *Competition law and public services: from single market to citizenship rights?*, 11 Eur. Pub. Law 543 (2005).

Commission, by confirming the national freedom to define services of general economic interest, also emphasises the application of the principle of proportionality, according to which “the means used for missions of general interest must not generate distortions which are not indispensable for the exchanges”, thus assuming compliance with the provisions of the EC Treaty, with special reference to the ones referring to competition and the internal market as, in general, these “[are] perfectly compatible with the supply of services of public interest”¹².

Yet, the text being examined does not deny the existence of a category of services of public interest whose functions are mainly social, which do not make profits and do not aim at carrying out any industrial or commercial activity¹³.

To this purpose, the opinion given by the Economic and Social Board on “non-profit private social services in the context of services of public interest in Europe” dated 12th September 2001, deals, for the first time, with the issue of non-profit operators who work in the field of social services in both the healthcare sector and in the sector which is the object of this study, namely social assistance.

This document, starting from the objective to turn the European Union into something more than an economic and monetary construction equipped with its own market, or into a place of freedom, safety and justice, comes to consider the role of *non-profit* subjects, whose virtuous and fundamental function of creating, or reclaiming, the social fabric is emphasised, without limiting their actions to the supply of services, thus developing a concept of network connection and stimulating civil solidarity on a volunteer and consensual basis. Accordingly, it is hoped that the opening of this sector to competition will not dim the peculiarity of the sector-operators but that, on the contrary, it will take place in full compliance with the social and cultural environment where the various activities are performed. This should avoid an indiscriminate extension of the rules typical of commercial

¹² For an approach to this, see M. Monti, *Services of General Interest in Europe*, *Europäische Zeitschrift für Wirtschaftsrecht*, 161 (2001).

¹³ See P. Wang, R. Cavallo Perin, D. Casalini, *Addressing purchasing arrangements between public sector entities—what can the WTO learn from the EU's experience?*, in S. Arrowsmith, R.D. Anderson (eds.), *The WTO Regime on Government Procurement. Challenge and Reform* (2011), 252 ss.

operators to the activities of non-profit operators, though without forgetting that non-profit private bodies also do not refrain from carrying out economically relevant actions connected to their corporate and commercial purpose.

Lastly, the document being examined clearly highlights the issue that is destined to pervade this study, that is, the need to identify a balance point between compliance with competition rules and protection of the specific characteristics of the commercial activities performed within the sector of social services of public interest.

The Green Paper on services of social interest presented by the Commission on 21st May 2003 takes up the abovementioned dichotomy. In fact, the document acknowledges, on the one hand, that for some services of public interest, the market cannot ensure an optimal allocation of resources, and, on the other hand, an awareness of the ongoing evolution in organisational forms through which social services are supplied in Member States. More and more often social services are being assigned to private subjects, thus determining an evolution of the role of public authorities from a managerial position into a regulatory one, in a more, although only potentially, competitive scenario.

Insisting on the idea that the economic or non-economic relevance of certain activities cannot be defined *a priori* and in a static way, the Commission confirms that it is impossible, or inappropriate, to give a single and complete European definition of services of public interest, even if it highlights that EC norms regarding universal services include a number of common elements which reflect the basic notion of public service. Because universal service obligations identify such specific requirements as continuity, quality of service, fee accessibility and protection of users' and consumers' rights, they provide a workable EU definition of public service delivery. In more details, according to the Commission, these common elements define Community values and objectives that have been turned into obligations in the respective norms for achieving objectives of economic efficiency, social or territorial cohesion, and social safety for all citizens which, if necessary, when integrated with more specific obligations related to the characteristics of the different sectors,

may also be applied to social services¹⁴.

The *White Paper on services of public interest* presented by the commission on 12th May 2004, acknowledges the “significant interest aroused by the *Green Paper* among operators of the social services sector”, which are required, by focusing on the single individual in order to ensure citizens a high degree of protection and reinforce social and territorial cohesion, to play a specific role as an integral part of the European model of society since. With this view, the Commission realises the need to overcome the traditional disinterested approach in order to deal, at least to a certain extent, with the problems related to the social services sector. From this latter point of view, although the definition of functions and objectives of public services is left to the competence of the Member States, it is recognised that EC rules can (and must) influence the ways in which the said services are provided and financed: contributing to clarifying the possibility of modernising traditional managerial organisational *formulae* on the one hand, and to preserving, on the other, the peculiarities of this sector, such as solidarity, volunteer services and inclusion of vulnerable categories. In other words, in the aforementioned document the Commission expresses the opinion that it would be useful to develop a systematic approach capable of identifying and recognising the peculiarities of services of public interest in order to clarify the framework within which they can be managed and modernised.

The Commission’s Communication entitled “Implementing Lisbon’s Community program: Social services of public interest in the European Union” of 26th April 2006, definitively marks the shift from the European Community’s *quasi*-indifference toward social services – grounded on the Member States’ reserve on the subject of social policies and on the non-economic nature of the services in question – to the acknowledgement of their importance for the construction of a European citizenship, so as to leading the Commission to specify their characteristics and study

¹⁴ S. Giubboni, *Cittadinanza e mercato nell’Europa sociale*, in *Le scommesse dell’Europa*, G. Bronzini, F. Guarriello and V. Piccone (eds.), 345 (2009); E. Spaventa, *The Constitutional Impact of the Union Citizenship*, in *The Role of the Courts in Developing a European Social Model*, U. Neergaard, R. Nielsen and L. Roseberry (eds.) (2010), 141 ss.

their relationship with the European Community legal system¹⁵.

The Communication now being considered represents a further step towards a more systematic view of the specificity of social services on a European level, and towards a clarification of European Community rules that can be applied to them.

The definition of social services that is relevant for purposes of the aforementioned document, excluding healthcare services, includes services connected to social security as well as those, more interesting for our purpose, concerning other basic services which are provided directly to the citizens and which play a preventive and social cohesion function, providing personalised assistance aimed at facilitating integration in society and guaranteeing the enjoyment of fundamental rights such as dignity and integrity.

In its Communication, the Commission also enucleates the organisational characteristics of social services providers within their mission of general interest. The Commission declares the fact that: 1) their actions are based on solidarity principles and have a global and personalised character, 2) they do not pursue any profits, 3) they include the participation of volunteers, and 4) they are strongly rooted and connected to local cultural traditions. All of this translates into the proximity of the service provider and its beneficiary, so that the ability to understand the need and reliance on the financial participation of third parties is maximised.

That being said, it should be recognised that social services are an expanding sector, both in economic terms and in terms of job creation. As noted by the Commission, the unprecedented tensions that have emerged in relation to such characteristics as universal dimension, quality and, above all, financial sustainability, urged all Member States to start modernisation processes. This modernisation is occurring regardless of territorial specificities, according to general criteria which in the document are defined as follows: the introduction of “*benchmarking*” practices, quality control, and users’ participation in management; de-centralization of the services organization at the local or regional level; outsourcing of public sector tasks to the private sector, with public authorities taking on a regulatory role, to ensure “*controlled competition*” and effective organisation on a

¹⁵ A. Albanese, *Servizi sociali*, cit., *supra* at note 7, 1908-1909.

national, local or regional scale; the development of public/private partnerships and the use of other forms of financing complementary to public financing.

According to the Commission, this context, seen as a more competitive environment, together with the consideration of specific needs of each individual, creates conditions that favour a “social economy”, distinguished by the relevant role of those who provide non-profit services, but without forgetting, in doing so, the need for effectiveness and transparency.

The most meaningful conclusion, for the purposes of this study, drawn by the Commission in the abovementioned Communication, is the one based on the assumption that economic activity refers to service provision that is not necessarily paid by the ultimate beneficiary. If this is how things are, it can be inferred that “almost all of the services supplied in the social sector must be regarded as an economic activity” or, in other words, that “a growing part of social services in the European Union, until now directly managed by public authorities are, or must be, disciplined by Community rules on internal market and competition”, thus outlining an original level of European involvement as a vehicle of modernisation of social services thanks to greater transparency and better efficiency in the organisation of financing operations¹⁶.

Nevertheless, concerns related to the indiscriminate opening of the social services sector to competition have not been silenced, since the European Parliament was induced to adopt the Resolution of March 14th 2007 on social services of public interest in the European Union. The Resolution argues against an approach to the above said services that juxtapose, on the one hand, norms concerning competition, State aid and the internal market and, on the other hand, the concepts of public service of general interest and social cohesion. On the contrary, a positive synergy between economic and social elements should be pursued. From this point of view, concerns have been expressed regarding the attempts to apply to social services of public interest regulations and principles typical of services of general economic

¹⁶ The issue has been investigated successively also in the “*Guide for the quality and efficiency of services of public interest*” dated December 7, 2010 edited by the European Commission, where it is specified how the term “social” applied to an activity is not sufficient *per se* to exclude the economic relevance of such activity.

interest, without considering distinctive features of each sector.

Actually, in parallel with the emergence of social services as activities equipped with economic relevance, the peculiarities of those services that should be preserved have also been defined.

In fact, in the Communication on “Services of public interest: a new European commitment” dated 20th November 2007, while investigating the specific situation of social services more in-depth, the Commission also insists on organisational objectives and principles, emphasising their inclusion in the European Community’s original legal system (together with services of general economic interest), thanks to the Protocol on services of public interest enclosed within the *Treaty of Lisbon*¹⁷. In this sense, it was pointed out that social services are aimed at the individual and intended to satisfy basic human needs, particularly the needs of vulnerable subjects, providing protection from life’s general and specific risks and helping individuals overcome difficulties or personal crises. Such services are also provided to families in the context of changing relationships, helping them as they care for children and the elderly, as well as for the disabled, compensating for any inability of the family to do so, thus becoming crucial for the protection of basic human rights and dignity. It should also be considered that social services play an important role in prevention and social cohesion for the entire population, regardless of their capital or income. Furthermore, these services contribute to non-discrimination, gender mainstreaming, protection of human health and improvement in the level and quality of life, as well as to guaranteeing equal opportunities for all, thus increasing the individual’s ability to fully participate in society.

From the point of view of organisational, implementation and financing modes, the Commission - referring to and further specifying the content of the previous Communications - insists that, in order to satisfy the many needs of individuals, social services must be both global and personalised, conceived and developed in an integrated way, often implying a personal relationship between the receiver and the provider so as to be able to properly consider the users’ diversity. It is also pointed out that

¹⁷ See W. Kowalsky, *ETUC perspective on public services in the light of the new Treaty of Lisbon Transfer*, 2 Eur. Rev. Lab. Res. 351 (2008).

as they respond to the needs of vulnerable users, social services are often characterised by an asymmetric relationship between providers and beneficiaries, which is different from the commercial relationship between supplier and consumer.

Furthermore, given that the services in question are often rooted in local cultural traditions, the Commission recommends the adoption of solutions suited to the specificity of the local situation in order to ensure proximity between providers and users, at the same time, providing equal accessibility to the service throughout the territory. The Commission also deems necessary the supposition that providers need broad autonomy that allows them to respond to varied and evolving social needs. Finally, it is acknowledged that these services are usually motivated by the principle of solidarity and strongly depend on public financing, aimed at guaranteeing equal accessibility regardless of capital or income, within the scope of which non-profit operators and volunteers often play an important role as they express civic ability and contribute not only to social cohesion of local communities, but also to inter-generational solidarity.

On the other hand, the Commission has also emphasised that the modernisation process that concerns the social services supply system, in relation to changes in the structural framework – affected by the progressive ageing of the population combined with a context of economic straits – have imposed the adoption of new organisational patterns, and a progressive increase in social services referring to the application of EC rules, with regards to their acquired economic relevance. To this purpose, in fact, it is pointed out that in order to consider a certain service as an economic activity within the application of rules on internal markets, it must be provided against remuneration, regardless of whether such remuneration is paid directly by the beneficiary or by a public authority (as often occurs with social assistance services). As a result, it also seems irrelevant whether the provider aims to generate profit or not. Moreover, it is underlined that the economic nature of a service does not depend on the legal *status* of the provider nor on the nature of the service itself, but rather on the service supply and the organisational and financing method of a tangible activity. This means that a single individual can carry out economic activities as well as activities that are economically irrelevant, remaining, as a result, subject to competition rules for

the relevant part of his or her range of actions.

Therefore, through the inclusion of many, though not all, social services in the EC environment – after they had been excluded altogether from this contamination – the Commission has offered to “guarantee common rules whilst respecting diversity”, thinking that, according to what has been stated before, the objectives for the development of accessible and affordable high-quality services of general economic interest on the one hand, and services connected to the open and competitive internal market on the other, are compatible. Better still, these two aspects may be complementary, provided that the possibility of maintaining specific provisions to ensure a balance, through the proportional application of the protection clause contained in article 86, paragraph 2 of the EC Treaty, is maintained.

Specifically, the Commission invites national authorities to clarify the correspondence between the charges and the obligations connected to missions of public interest and market access limitations deemed necessary to allow service providers to function.

Also, the organisational modes of the most frequently provided social services are examined, namely: 1) proxy, meaning the decision to assign the social mission of public interest to an external *partner*, in which case at least transparency principles, equal treatment, and proportionality, in addition to more tangible obligations set by the rules on public tenders are to be complied with; 2) institutionalised private-public partnership, that is, the management of such services by a mixed company; 3) use of a public financial compensation that is intended to cover expenses resulting from the mission and that would not be borne by an organisation operating exclusively on the basis of economic criteria; and, last but not least, 4) market regulation, which can legitimately imply the requirement to possess proper authorisation to provide social services, provided that this measure is based on objective, non-discriminatory criteria, communicated in advance, and also that the measure is proportioned, and that the option to refer to an objective and impartial body is recognised.

Leaving behind the normative trend arising from non-binding documents issued by EC institutions, with no real prescriptive value, and entering the field of binding rules

expressed by the (derived) EC norms, we find a higher degree of caution and signs of persistent uncertainty. An example of this is given by the directive related to services in the internal market (2006/123/EC), dated 12th December 2006 (implemented in Italy through legislative decree (d.lgs.) on 26th March 2010 (no. 59), which, although it aims at achieving “an internal market for services, with the right balance between market openness and preserving public services and social and consumer rights” does not contribute (in a decisive way) to clarifying the applicable rules for those activities that are the main object of this paper.

In fact, the directive expressly excludes from its field of application services of public interest (article 2, paragraph 2, letter a) as well as the social services referred to council houses, assistance to children and support to families and individuals who are temporarily or permanently in need, either provided by the State, or by lenders appointed by the State or by charitable associations recognised as such by the State (article 2, paragraph 2, letter j).

Yet, the directive does not specify what is meant by services of public interest, and simply leaves it up to the reader to infer this concept, *a contrario*, through the concept of general economic interest, which refers to services provided against economic considerations (without further explanations given, instead, as we have previously seen, in different places, where it was clarified that for purposes of economic relevance of a certain activity, the remuneration does not have to necessarily be paid directly by the beneficiary). Furthermore, the 27th section of the directive, referring to services essentially related to social assistance, uses a not so reassuring conditional when it states that the directive “should not” be applied since they are essential services which guarantee the basic rights of human dignity and integrity, representing an expression of the principles of social cohesion and solidarity.

From this standpoint, the formulation of the directive seems to represent a step backward compared to the acquisitions contained in documents issued by European Community institutions and, as we will see below, in the rulings of the Court of Justice. As mentioned before, such rulings state that the economic relevance of a certain activity, and therefore its subjection or non-subjection to community rules, does not depend

on the nature of the services provided, but rather on the tangible characteristics according to which the activity is performed.

Differently, it would have been desirable for the directive to state that the social services in question are excluded from its scope only to the extent in which, due to their specific organisational and managerial configuration, they are not provided against actual remuneration (direct, from the beneficiaries, or indirect, from public authorities), thus taking into account the new organisational schemes currently in use in the field being investigated, which have expanded the area of their economic relevance to the social domain¹⁸.

3. Social Services and European Community Regulations in the Judiciary System of the Court of Justice

3.1. The Organisation of Social Services amid Competition, Solidarity, and the Economic-Financial Balance of National Systems

After trying to frame the phenomenon of social rights within the European Community legal system, and having acknowledged that the most innovative acquisitions are contained in acts issued by European Community institutions which are not directly prescriptive and that, instead, delving deeper into the more literally prescriptive field, the EC's positions become more covert and shy in taking sovereignty away from the States. Because the one being discussed is a delicate matter, it would be appropriate to look for some hints that are useful for the purposes of this paper also in the Court of Justice's jurisprudence, whose rulings, issued within the exercise of its institutional function of even-handedly interpreting the EC rules, as it is known, are laws that apply for all intents and purposes¹⁹.

As we will illustrate below, the approach adopted by the EC judges in their creative activity of interpreting the law appears extremely important for our purposes, also given the aforementioned shyness, both original and acquired, in their standardisation activity, that affects national social protection

¹⁸ See F.A. Cancilla, cit., supra at note 5, 290 ss.

¹⁹ On this, please see F.A. Cancilla, cit., supra at note 5, 191 ss.; S. Gobbato, *Diritto comunitario della concorrenza e servizi di interesse generale di carattere sociale. Note a margine della giurisprudenza della Corte di giustizia*, 4 Dir. Un. Eu., 798 (2005).

systems, especially in matters concerning the organisational profile, in the name of protection and promotion of competition or, in other terms, in the name of the extension, at least to a certain extent, of the related EC rules also to the sector being examined.

From this point of view, we should point out that, to date, the attention of the EC judges has been mainly aimed at issues basically ascribable to health issues or labour doctrines, rarely taking a position in relation to the sector that is the focus of our observations, that is, social assistance in the strict sense of the term, wherein the human element in the supply of the service acquires special value. Yet, it is possible to find certain useful elements in the Court's jurisprudence, with special reference to the core issue inherent to the margins of application to the social sector of EC rules on competition. From this point of view, as we will illustrate, we can easily find, in the rulings of the EC judges, the main thread of this dissertation, that is, that the tension generated during the organisational moment of social services (in the broader sense of the word) between the opposing needs of opening to competition – with the aim of improving efficiency and cost-effectiveness – and the protection of the peculiarities that characterise the activities being examined, with reference to a two-fold reading key related, on the one hand, to the vocation of solidarity that pervades this sector and, on the other, to the need to preserve the economic balance of the national systems of social protection.

In other words, it is clear by now, also from the perspective that we are about to take, that the European Community is abandoning the sense of disinterest for the phenomenon of social services – given their importance, not only economic but also related to the European model of society – although continuing to deal with in the relevant scenario, special circumstances that allow legitimate exceptions to the full expression of the basic freedoms that underlie the EC construction. What is important, however, is that notwithstanding the complexity of this topic, yet to be completely defined, the rule to be adopted as customary is not the irrelevance of this matter for the European Community's purposes, but quite the opposite, unless there are exceptions that appear to be justified in light of the concept of proportionality and of the need to preserve principles of equal dignity, all the above, while respecting the principles of promotion and protection of

competition in a view of subsidiary collaboration between EC institutions and national sovereignty.

3.2. Irrelevance of non-profit nature of providers, and the concepts of Enterprise and Economic Activity. The Reimbursement Issue

One of the most interesting aspects investigated by EC judges for the purpose of this study is the relevance of the operators' *non-profit* nature in terms of the need to use, for the assignment of social services, public procurement procedures, in compliance with EC rules, with the subsequent verification of the specific circumstances referred to the national framework of each Member State, whose existence justifies, on the other hand, possible exemption from the application of the rules enacted on the European level in relation to the promotion of suitable competition²⁰.

In a first ruling, the Court of Justice stated that the European Community legal system is not opposed to a Member State allowing only private operators who do not pursue profits to participate in implementing a social assistance system through special agreements that entitle them to reimbursement from the State of costs incurred for health-related social assistance services²¹.

²⁰ For an approach on this issue, see B. Gidron, R.M. Kramer, L.M. Salamón, *Government and the third sector: emerging relationships in welfare states* (1992); J. Kendall, H.K. Anheier, *The third sector and the European Union policy process: an initial evaluation*, 6 *Journ. Eur. Pub. Pol.* 283 (1999); J. Kendall, *The third sector and the development of European public policy: a framework for analysis?* Civil Society Working Paper series, 19. Centre for Civil Society, London School of Economics and Political Science (2001).

²¹ EC Court of Justice, 17 June 1997, in C-70/95, *Sodemare*, 3 *Riv. It. Dir. Pubbl. Com.* 683 (1998), with a note by A. Cacace, *Associazioni non profit e concessione di pubblici servizi. Note critiche ad una sentenza della Corte di giustizia*. See also M. Fuchs, *Free Movement of Services and Social Services: Quo Vadis?* 8 *Eur. Law. Rev.* 536 (2002); K. Lenaerts, T. Heremans, *Contours of a European Social Union in the Case-Law of the European Court of Justice*, 2 *Eur. const. law rev.* 101 (2006); L. Hancher, W. Sauter, *One step beyond? From Sodemare to Docmorris: The EU's Freedom of Establishment Case Law Concerning Healthcare*, 1 *Comm. Mark. Law Rev.* 117 (2010).

The ruling of EC judges currently being examined originates from the situation of a for-profit company based in Luxembourg that established several for-profit firms in Italy with the purpose of managing facilities for the elderly. The company complained about the inaccessibility of the Italian social security system due to the fact that it is based on special agreements with *non-profit* subjects.

In the end, the Court found that the condition of the provider being a non-profit organisation was related to the characteristics of the social assistance system established by an Italian regulation aimed at: 1) promoting and preserving health, by integrating health and social assistance services, and 2) taking actions in favour of non self-sufficient subjects who do not have a family, or whose family members are unable to take care of them, by implementing or favouring their integration in suitable European Community families or environments. More specifically, according to the judges' view, this kind of social assistance system, whose implementation is basically assigned to the State, is based on solidarity which translates into the truth that it is primarily intended for the assistance of those who are in need because of insufficient family income, total or partial lack of autonomy or alienation and, only secondarily, for the assistance of other individuals who are capable to bear, proportionally to their income, the related costs which are calculated at fixed fees (due to the limited capacity of facilities along with the restricted availability of people willing to assist).

The Court of Justice has concluded that a Member State has the power, within its competence in this matter, to confirm that the admission of private operators as providers of social assistance services necessarily implies the condition that they are non-profit, as this characteristic is highly consistent with the exclusively social purposes typical of the system. It would also ensure that such operators are not influenced by the need to gain benefits but are, instead, focused mainly on the pursuit of the social purposes themselves. Moreover, this decision was made belying the conclusions expressed by the Advocate General, which might have been viewed by the judges as being excessively invasive of the competences jealously claimed by the Member States.

In this regard, the conclusions made by the Advocate General stated that the condition of privilege for *non-profit*

organisations would not have any valid justification, as it has not been shown that these subjects provide better services than others and that the limitation to access of non-profit subjects, all of them present in the territory, would affect the European Community's freedom to provide services and the right to establishment. Thus, the conclusion drawn by the Advocate General found no correspondence in the ruling. According to such conclusion, the European Community legal system requires compliance with the provision of the Treaty by the national social protection systems whenever, regardless of the fact that they pursue social purposes, they affect economic activities through modes that do not pertain to the fulfilment of social objectives or whenever the restrictive measures of competition are disproportionate with respect to the goal to be achieved²².

Nevertheless, looking closely at the ruling, it can be said that the European Community's compatibility of the preference granted to *non-profit* subjects is not due, *a priori*, to the structural and ontological peculiarities typical of such operators. Accordingly, they can be recognised, in general, as holding a privileged position in the field of social assistance, though that privileged position is associated with specific characteristics of the reference social system focused on the solidarity principle. Moreover, the Court's position was also based on the consideration that, in the case examined, limiting access to non-profit subjects only has not influenced the internal market, given that the agreements with these operators, in the system where the controversy originated, only entitled them to reimbursements associated with social-health services which, furthermore, do not belong to the European Community's concept of service, since they are not provided in exchange for real payment.

With a critical approach towards the judges' conclusions, it was found that the social assistance system being referred to, as stated by the National Law, is based on the concept of production of services to the extent that the responsible subjects have been defined as "businesses" (*i.e.*, "local health business"), evoking competition concepts such as efficiency and effectiveness, with the result that it would be difficult to grasp the meaning of a statement that says that the assignment of social assistance

²² On this issue, please see again F.A. Cancilla, *cit.*, *supra* at note 5, 241-242.

activities to third parties – only because it involves health-related services – would dodge market rules, and therefore rules of public tenders, since the activity can basically qualify as service subcontracting²³.

On a subsequent occasion, the EC judges returned to the issue of health transportation services that were assigned directly, without following a public procurement procedure, to certain non-profit associations. In this specific case, the Court confirmed its position, already claimed, taking another step towards the application of competition rules to the social domain²⁴.

In particular, according to the first point of view, it was emphasised that the absence of profit-seeking does not exclude volunteers' associations from carrying out an economic activity and creating companies as described in the provisions of the Treaty on competition. Meanwhile, according to the second point of view, the EC judges have further studied the issue of reimbursements given to operators by public authorities. To this purpose, while in the previous jurisprudence examined above, the fact of sums being received as reimbursement had excluded the classification of the related activity as being performed in exchange for payment. In the ruling in question, the Court, after considering that the onerous character of a contract refers to the counter-service provided by the public authority interested in fulfilling the supply of the services that are the object of the contract, delves into the specific characteristics of the reimbursement in the specific case. This analysis showed that if the work carried out by people engaged in health-related transportation was not remunerated, it resulted in the amount of the payments budgeted by the involved public authorities being

²³ A. Cacace, cit. *supra* at note 5, 693.

²⁴ EC Court of justice, 29 November 2007, in C-119/06, *Commissione c. Repubblica italiana*. See also C.H. Bovis, *Financing services of general interest in the EU: how do public procurement and state aids interact to demarcate between market forces and protection?*, 1 Eur. Law Journ. 79 (2005); A. Albanese, *L'affidamento di servizi socio-sanitari alle organizzazioni di volontariato e il diritto comunitario: la Corte di giustizia manda un monito agli enti pubblici italiani*, 6 Riv. Dir. Pubbl. Com. 1453 (2008); A. Di Matteo, *Sull'affidamento diretto di servizi di trasporto sanitario ad associazioni di volontariato*, 2 Rass. Avv. St., 162 (2008); C.H. Bovis, *Developing public procurement regulation: jurisprudence and its influence on law making*, 43 Comm. Mark. Law Rev., 461 (2006); V. Hatzopoulos, *Public procurement and state aid in national health care systems*, in *Health Systems Governance in Europe*, E. Mossialos (ed.), 379 (2010).

greater than the simple reimbursement of the expenses incurred to provide the health transportation services in question, because such amounts were previously fixed in lump sums based on tables annexed to a framework agreement. As a result, according to the Court, the stipulated agreement produces a contract of services delivered against compensation, which is consequently subject to EC rules (of course, in the case that it exceeds the relative relevance threshold related to economic value).

From this point of view it should be observed that according to the Court of Justice's jurisprudence, the concept of "remuneration", decisive for the purpose of configuring a certain activity as a service in the scope of article 50 of the EC Treaty, refers to compensation for the supply performed²⁵ that can be paid indifferently by the receiver of the service or by a third party, such as a public authority, without any consequence in terms of classification of the category. This last aspect has been highlighted in a case decided by the Court relative to the Dutch health insurance fund. The Dutch national system is founded on the criterion of supply "in kind", which guarantees its members the availability of free healthcare services through structures based in the Netherlands that have stipulated a special agreement²⁶. That being said, in their decision on a case where some patients had gone to a different Member State to receive health care without obtaining previous authorisation to do so, but who nonetheless were asking their National healthcare system to reimburse them for their expenses, the EC judges decided that authorisation can be refused for lack of a real medical necessity only when an identical treatment, or an equivalently effective one, can be promptly obtained at an institute that has an agreement with the patient's healthcare fund, so that in the national territory a sufficient, balanced and permanent offer of hospital care is maintained, thus ensuring the financial stability of the insurance system. Yet, as far

²⁵ EC Court of Justice, 27 September 1988, in C-263/86, *Humbel*. E. Hennis, *Access to Education in the European Communities*, 3 *Leid. Journ. Int. Law* 35 (1990).

²⁶ EC Court of Justice, 12 July 2001, in C-157/99, *Smits e Peerbooms*. On this, see also EC Court of Justice, 13 May 2003, in C-385/1999, *Muller Faurè e Van Riet*. See also, Gareth Davies, *Health and Efficiency: Community Law and National Health Systems in the Light of Müller-Fauré*, 1 *Mod. Law Rev.* 94 (2004); E. Spaventa, *Public services and European law: looking for boundaries*, 5 *Cambridge yearbook of European legal studies* 271 (2004); G. Chavrier, *Etablissement public de santé, logique économique et droit de la concurrence*, mars-avril *Rev. Dr. Séc. Soc.* 274 (2006).

as the profile being the object of our interest, the Court, in its argumentative process, has judged as irrelevant, for the classification of hospital health treatments as actual services as stated by the Treaty, the circumstance that these are financed directly by health insurance funds, based on pre-established fees and special agreements. The Court also stated that, on one hand, the original European Community law system does not prescribe that the service must be paid for by those who directly receive it and that, on the other hand, payments made by the health fund within an agreement between the latter and the providers of health care, though on a lump-sum basis, certainly represent remuneration for hospital services and have an undoubtedly retributive character for the beneficiary hospital which performs an economic activity that must be identified, therefore, by the freedom of service supply stated by the Treaty, although tempered by the legitimacy of subordinating such activity to the achievement of a preventive authorisation as indicated above to guarantee the good functioning of the national health system in the patient's home country²⁷.

For the purposes of this study, some interesting elements may be found in environments that are not immediately referable to assistance but are nonetheless connected with social services in the widest meaning of the term. With regards to healthcare systems based on an ordinary reimbursement mechanism, we can find positions taken by the Court of Justice whereby, even if the national prerogative to organise its own system of social protection is not denied, the sector of healthcare is not excluded from the application of EC rules, particularly with reference to the non-discrimination principle, the freedom to circulate and to provide services.

From the point of view described above, EC judges claimed that the Luxembourg laws are detrimental to the mentioned principles because they deny reimbursement of medical expenses incurred in another Member States without previous authorisation, which, according to the Court, would induce

²⁷ On this, see also EC Court of Justice, SEZ. III, 10 March 2011, in C-274/09, *Stadler*, that says that in case of a contract on the supply of services, the circumstance that the contractual counterpart is not remunerated directly by the adjudging administration, but is entitled to receive its consideration from a third party, is sufficient to integrate the concept of "remuneration".

Luxembourg citizens to only use their own national structures²⁸, in the same way the refusal of reimbursement of expenses borne in another Member State to buy goods of health-related value has been judged prejudicial to the free circulation of goods. In both cases, this view is based on the assumption that reimbursement should be given in compliance with the pre-established fees valid in Luxembourg, so as to not risk altering the financial balance of healthcare systems.

In brief, the Court recognises that, as it appears more clearly below, the financial stability of the national social protection systems can also, in principle, justify restrictions upon the patients' options to receive services abroad, since a hypothetical crisis would be detrimental to the entire community. However, according to a proposed reflection, in general terms, at the beginning of this jurisprudential analysis, a Member State can rightfully claim the above argument only by demonstrating the concreteness and authenticity of the risk, since it is not possible, *vice versa*, to state that any deviation from the national healthcare plan can provoke a serious danger to the economic stability of the system as a whole²⁹.

This approach, adopted for healthcare issues³⁰, might as well be applied to the field of social assistance, which could be considered as not excluded *a priori* from the application of European Community norms aimed at protecting and promoting competition. It would then be necessary to justify exceptions to the norms in sight of the defence of equally relevant values and principles (such as the economic balance of the reference system).

3.3. Derogations to the Application of General Rules on Competition. The Necessary Economic-financial Balance of the Management Systems of Services of General Economic Interest

²⁸ EC Court of Justice, 28 April 1998, in C-158/96, *Kohll*. D.S. Martinsen, *The Europeanization of Welfare-The Domestic Impact of Intra-European Social Security*, 5 Journ. Comm. Mark. Stud., 1027 (2005); A. Kaczorowska, *A Review of the Creation by the European Court of Justice of the Right to Effective and Speedy Medical Treatment and its Outcomes*, 3 Eur. Law Journ., 345 (2006).

²⁹ F.A. Cancilla, cit., *supra* at note 5, 227-228.

³⁰ For more details on this issue see V. Molaschi, *Le disuguaglianze sostenibili nella sanità*, in F. Astone, M. Caldarera, F. Manganaro, A. Romano Tassone, F. Saitta (eds.), *Le disuguaglianze sostenibili nei sistemi autonomistici multilivello* (2006), 3 ss.

A further jurisprudential thread worthy of consideration concerns the possibility, stated in article 106 TFUE, to limit or exempt from application of competition rules, subjects appointed to provide a service of general economic interest if the rules would hinder the fulfilment of the mission to which they have been assigned.

This rule, at first, was placed at the heart of a reserve of national sovereignty on public services, and based on this, the definition of missions of general interest corresponding to national public interests – considered to be prevailing with respect to those put under the care of Community institutions – was thought to be assigned to the specific competence of each Member State³¹.

At a later stage, due to the repeatedly mentioned phenomenon of overcoming the European Community's total lack of interest for national decisions concerning the institution and organisation of public services, the interpretation of the abovementioned article 86 was that the application of norms on competition represents the rule that has been set in view of the achievement of the fundamental objective to create a single European market. This rule also proves valid for services of general economic interest, while the system of derogations to free competition appears to be an exception, justified only in that it allows the fulfilment of the specific mission of public interest that has been assigned to the company. In particular, the Court of Justice has strongly considered the possibility of derogating as it is described in article 86 of the EC Treaty, claiming that the application of free competition rules could be disregarded only after demonstrating that a different solution would have caused, unavoidably, the impossibility to accomplish the public service mission, judging as non-sufficient, for this purpose, the circumstance that the application of the rules on competition might make it more difficult to carry out the mission of public interest³².

³¹ On this, please see EC Court of Justice, 30 April 1974, in C-155/73, that recognized an unquestionable profile of discretion to Member States with reference to the definition of missions of public interest, as well as to the decisions concerning the organization and the legal status of the related services.

³² EC Court of Justice, 13 December 1991, in C-18/88, *Regie des telegraphes et de telephones*; EC Court of Justice, 19 March 1991, in C-202/88, *Repubblica francese c.*

Later, in conjunction with the opening of the European Community legal system to issues of a social nature and as already pointed out, interests for major public services have started to appear and not only in relation to the protection of free competition principles, as pertaining to the European Community, but also for their growing importance for the functioning of the European economic system as well as, above all, for their primary importance in relation to the satisfaction of fundamental collective needs that underlie the European model of society³³. Thus, the Court of Justice also began to consider non-economic motivations, paving the way for an approach that it may also adopt in the field of assistance services, wherein the supply of purely social services is often combined with the performance of activities of economic relevance that, as such, should be subject to rules on competition. Unless, in line with the innovative foundation being described, the exclusive attribution of “profitable” activities proves to be necessary in order to compensate for the prescription of precise public service obligations, in order to ensure the economic balance of the system³⁴.

The leading case within this doctrine is represented by the monopoly of the Belgian postal service³⁵, in which the Court had the opportunity to point out that such services respond to a fundamental need of the community, through the obligation of ensuring transportation and distribution of mail all over the country at standardised fees with equal quality conditions,

Commissione. P. Bauby, J.C. Boual, *Pour une citoyenneté européenne: quels services publics?* (1994); A. Verhoeven, *Privatisation and EC Law: Is the European Commission “Neutral” with Respect to Public Versus Private Ownership of Companies?* 4 *Int. Comp. Law Quart.* 861 (1996); L. Flynn, *European union regulation of the telecommunications industry*, 1 *Int. Rev. Law, Computers & Technology*, 9 (1996); J.L. Clergerie, *Europe: L’Union européenne et les services publics*, 305 *Rev. Adm.* 639 (1998).

³³ E. Scotti, *Il pubblico servizio tra tradizione nazionale e prospettive europee* (2003), 163.

³⁴ See P. Wang, R. Cavallo Perin, D. Casalini, *Addressing purchasing arrangements between public sector entities—what can the WTO learn from the EU's experience?*, in S. Arrowsmith, R.D. Anderson (eds.), *The WTO Regime on Government Procurement. Challenge and Reform* (2011), 252 ss.

³⁵ EC Court of Justice, 19 May 1993, in C-320/91, *Corbeau c. Regie de postes*. T. von Danwitz, *Die Liberalisierung der Postmärkte in Europa*, *Der Staat des Grundgesetzes – Kontinuität und Wandel*, 857 (2004); D. Hurstel, *Intérêt général et gestion privée: partenaires incompatibles?*, 13 *Pol. Manag. Pub.* 142 (1995); see also, W. Consult, *The Evolution of the Regulatory Model for European Postal Services* (2005), 46 ss.

regardless of whether or not the service costs are covered by the price paid by users. This standardisation system requires the existence of a legal monopoly. In the absence of such a monopoly, a so-called “cream skimming” effect would arise. This effect, based merely on economic considerations, implies enucleating within the service both: a) a profitable activity subjected to the rules of competition, and b) a non-profitable activity, identified with a general economic service, that would legitimate a monopoly regime. Yet, according to what has been found by the Court in the aforementioned case, the subject that has the duty of providing the service to all users in conditions of equity regardless of territorial or other factors, must be given the possibility to compensate for lower profits, if not losses, generated by this sector, with income generated by remunerative activities proceeding in parallel with the same service. Under these conditions, the opening of the profitable segment to the market alone would impede such compensation, hindering the fulfilment of the service of public interest. Such an action would lead to the abandonment of the principle of indispensability for the justification of a derogation to the rules of free competition in favour of a need-based criterion aimed at ensuring not only the survival of the company, but also its economic-financial balance.

A similar approach has been followed by a following ruling of the Court³⁶ concerning an issue that is of great interest to our study. On that occasion, the judges were called upon to consider the European Community compatibility of one law of a German *Land* that assigned the task of authorising non-profit healthcare organisations to a public authority in order to provide patient transportation, both in emergencies and in normal situations, provided that they were able to guarantee a permanent service. The norm also allowed the public authority to deny the authorisation of transporting ordinary patients to other operators in case it jeopardises the economic sustainability of the emergency

³⁶ EC Court of Justice, 25 October 2001, in C-475/99, *Ambulanz Glockner*. On this issue, see A. Argentati, *Diritti speciali ed esclusivi e regole comunitarie di concorrenza* 4 *Giorn. Dir. Amm.*, 399 (2002); F. Ferraro, *Efficienza dei servizi di interesse economico generale*, 1 *Dir. Pubbl. Comp. Eu.*, 376 (2002); T. Prosser, *Competition Law and Public Services: From Single Market to Citizenship Rights?*, 4 *Eur. Pub. Law*, 543 (2005); J.W. van de Gronden, *Financing Health Care in EU Law: Do the European State Aid Rules Write Out an Effective Prescription for Integrating Competition Law with Health Care?*, 1 *Comp. Law Rev.*, 5 (2009).

service. Based on this norm, the German *Land* involved had refused authorisation to provide the service of ordinary transportation to a commercial company that had applied for it, claiming that this would have caused a prejudice to the emergency transportation service provided by non-profit organisations.

The Court involved in this issue maintained the observation that, within the EC rules on competition, the notion of “enterprise” includes any organisation that performs an economic activity, regardless of its legal status or the type of financing it receives, and that “economic activity” includes any activity that offers goods or services to a certain market³⁷. The court came in abstract terms to the conclusion, respectively, that the non-profit vocation does not prevent organisations like those involved in the case from being considered according to EC rules on competition and that the subjection to public service obligations does not impede, *per se*, consideration of the supply of services like those described as an economic activity. This conclusion was based on the perspective that compliance with such obligations was not found to be decisive in making the services supplied by a given organisation less competitive than those offered by other operators not bound by the same limits³⁸.

In short, the Court clarified that the non-profit nature of an organisation is not incompatible with its qualification in terms of enterprise, and that there is no incompatibility between the existence of a market for a certain service and the payment of the related performance by public subjects separate from the service users³⁹.

Even so, the EC judges began considering that the organisation involved could certainly claim to be appointed for a service of public interest – that is, the obligation to ensure a

³⁷ Also EC Court of Justice, 12 September 2000, in C-180/98 and 184/98, *Pavlov*. E. Ales, *Occupational Accidents from an EU Perspective: Is There a Place for the Principle of Freedom of Choice?*, 1 Eur. Law Journ., 110 (2005).

³⁸ Meaning that the social purpose of an organization is not *per se* sufficient to exclude the economic nature of its activity *a priori* and that the absence of profit seeking, either, cannot assume this value, see also EC Court of Justice, 16 November 1995, in C-244/94, *Fédération française des sociétés d'assurance*. C. Deliyianni-Dimitrakou, *Négociation collective et règles communautaires en matière de concurrence*, 3 Rev. Int. Dr. Comp 795 (2006); E. Theurl, *Der Sozialstaat an der Jahrtausendwende: Analysen und Perspektiven* (2008); J.W. van de Gronden, *Social Services of General Interest and EU Law* (2011), 123 ss.

³⁹ On this point See A. Albanese, *Servizi sociali*, cit., *supra* at note 8, 1915.

permanent service of emergency transportation for sick or injured people throughout the national territory, at the same fees and equal conditions, regardless of individual situations or economic conditions, and to question themselves on the applicability to the specific case of article 86, paragraph 2 of the above mentioned EC Treaty⁴⁰. From this standpoint, the Court gave its opinion in compliance with previous jurisprudence, which requires an assessment whether competition needs to be restricted in order to allow the holder of an exclusive right to carry out its function of public interest. Economically acceptable conditions might indeed imply the possibility of compensation between the sectors of profitable activities and those of less profitable ones, thus justifying a restriction of the competition in the first sector.

In the end, the EC judges found that the extension of exclusive rights of healthcare organisations to manage the non-emergency transportation (profitable in itself) allows them to carry out the service of public interest of emergency transportation (not profitable in itself because it is subject to specific public service obligations) under conditions of economic balance, also considering the difficulty sometimes inherent in separating the two activities that have common characteristics. On the other hand, opening up to competition has been considered, in the case decided by the Court, as a potential danger with respect to the guarantee of quality and reliability of the service according to specific obligations of universality and uniformity required in emergencies, regardless of profitability.

In essence, from the above-described rulings it can be once again inferred a case-law trend with respect to social services, based on a case-by-case approach whenever an assessment is to be made before application of the economic relevance criterion, without forgetting to measure the actual incidence on the market or to consider potential peculiarities connected to the specific mission of public interest assigned by the national norm, as well as to the need to guarantee adequate performances.

3.4. The Fulfilment of a Mission of Public Interest and the

⁴⁰ On this issue see also EC Court of Justice, 19 May 1993, in C-320/91, cit., *supra* at note 35.

Concepts of State Aid and Abuse of a Dominant Position. The Criterion of Tangible Activity Performed

Another parameter assumed by the Court as a confrontation ground between extending competition rules to the social sector, and protecting the specific prerogatives associated with the supply of services in this sector is that of State aid and abuse of a dominant position.

Following an approach similar to the one mentioned above, also from the point of view being examined, the EC judges have taken into account the need to favour, in certain cases, the social needs that lie behind the fulfilment of the mission of public interest with respect to the protection of competition, evaluating the legitimacy of derogatory provisions of the Treaty with reference to the above context.

In more details, it has been observed that the financial advantages granted by a State to a company that is required to supply a public service do not represent an “aid”, but can be viewed as “compensation” for the service provided, if the entity of such advantages does not exceed the costs associated with the public service obligations⁴¹. In other words, the State’s intervention does not fall within the scope of State aid legislation if it is carried out as compensation for the duty to fulfil the public service obligation. This is because the beneficiary companies, in this case, do not actually receive a financial advantage suited to giving them a favourable competitive position on the market⁴².

⁴¹ EC Court of Justice, 22 November 2001, in C-53/00, *Ferring*. K.P. Purnhagen, *Services of General Economic Interests in Competition Law: From Procureur de la République/Adhuc Until la Poste - The Raise and Fall of the State Aid Approach and its Consequences*, 10 Eur. Law Rep., 337 (2009).

⁴² EC Court of Justice, 27 November 2003, in C-34/01, *Enirisorse*; EC Court of Justice, 24 July 2003, in C-280/00, *Altmark*. On this, see R. Cavallo Perin, B. Gagliardi, *Doveri, obblighi e obbligazioni sanitarie e di servizio sociale*, in *I diritti sociali come diritti della personalità*, R. Cavallo Perin, L. Lenti, G. Racca, A. Rossi (eds.), 22 (2010); F. De Cecco, *Politiche sociali e divieto di aiuto di Stato*, in *Solidarietà, mercato e concorrenza nel welfare italiano*, cit., *supra* at note 6, 75 ss.; N. Travers, *Public service obligations and State Aid: is all really clear after Altmark?*, 3 Eur. St. Aid Law 387 (2003); P. Nicolaides, *Compensation for Public Service Obligations: The Floodgates of State Aid?*, 11 Eur. Comp. Law Rev. 561 (2003); A. Sinnaeve, *State Financing of public service: the Court’s Dilemma in the Altmark Case*, 3 Eur. St. Aid Law 358 (2003); B. Rapp-Jong, *State Financing of Public Services – The Commission’s New Approach*, 2 Eur. St. Aid Law 205 (2004); J.L. Buendía Sierra, *An Analysis of Article 86(2) EC*, in M.S. Rydelski (ed.), *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade* (2006).

Yet, in relation to banking foundations operating in sectors of public and social interest, we need to make distinctions between the activities performed by these entities⁴³. In fact, according to the Court, a legal body configured as a banking foundation cannot be qualified as a “company” for the purposes of the Treaty, if its activities are limited to paying contributions to non-profit organisations. In this case, its operations have an exclusively social nature that is not performed in a context of market competition with other operators. In other words, in performing this activity, a banking foundation is behaving as a charitable organisation and not as an enterprise. On the other hand, again in the reconstruction offered by the Luxembourg judges, when a banking foundation, acting directly in sectors of public interest and social utility, uses the authorisation received from the national lawmakers to carry out financial, commercial, property, and real estate transactions which are necessary and adequate to achieve its stated goals, it can offer goods or services on the market in competition with other operators in sectors such as scientific research, education, art, or health. In this hypothesis, according to the Court, this kind of subject must be considered as an enterprise because it performs an economic activity, despite the fact that its offering of goods and services is not powered by a profit-seeking reason, because the same offering competes with offerings of operators who pursue profits instead, with the subsequent and rightful application of European Community rules on State aid.

Social security is an area examined by the Court, in which it seems to be particularly clear that we need to investigate the specific and practical activities carried out by a certain subject,

⁴³ EC Court of Justice, 10 January 2006, in C-222/04, *Cassa di risparmio di Firenze s.p.a.* In the sense that a specific subject can be engaged, on the one hand, in non-economic administrative activities and, on the other, in purely commercial activities. Please also see EC Court of Justice, 24 October 2002, in C-82/01, *Aéroports de Paris*. T. Eilmansberger, *How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses*, 42 *Comm. Mark. Law Rev.*, 139 (2005); M. Sánchez Rydelski, *The EC state aid regime: distortive effects of state aid on competition and Trade*, 83 (2006); D. Geradin, N. Petit, *Price discrimination under ec competition law: another antitrust doctrine in search of limiting principles?*, 3 *Journ. Com. Law Ec.*, 479 (2006); A. Moreira Mateus, T. Moreira, *Competition law and economics: advances in competition policy enforcement in EU and North America* (2010), 392 ss.

regardless of its nature⁴⁴.

In this regard, a rule emerged which states that if the indicators related to the activity performed point to a prevalence of the solidarity element with respect to other economic factors, then, according to the EC judges, the activity does not belong to the concept of enterprise, and this non-inclusion has consequences in terms of applicable norms.

According to reasoning above, the non-entrepreneurial nature of two French health insurance funds has been highlighted, based on the consideration that they aimed to guarantee health insurance coverage to all workers in a category, regardless of their economic or health conditions, given that employee contributions were proportional to the employee incomes, with exemptions for lower class workers, and that the price of the performance was not influenced by the amount of the private contributions⁴⁵.

Similarly, following the same practical and case-based approach, the economic nature of the exclusive management of Italian insurance for workplace accidents managed by INAIL was excluded⁴⁶, based on the consideration that this social security system aims mainly at satisfying solidarity principles defined by the Court through the following elements: 1) the insurance system is financed through contributions whose rates are not systematically proportional to the insured risk; 2) the contributions are calculated based not only on the risk connected to the business activity involved, but are also on the income of the insured individuals; 3) the amount paid for the performance,

⁴⁴ On this, see G. Ricci, L. Di Via, *Monopoli previdenziali e diritto comune antitrust*, in *Solidarietà, mercato e concorrenza nel welfare italiano*, cit., *supra* at note 6, 39 ss.; S. Giubboni, *Solidarietà e concorrenza: "conflitto" o "concorso"?*, in *Mercato concorrenza regole* (2004), 75 ss.

⁴⁵ EC Court of Justice, 17 February 1993, C-159/91 and 160/91, *Poucet e Pistre*. A. Supiot, *Vers un ordre social international?* 11 *L'Économie politique* 10 (2001); G. Coron, *Le prisme communautaire en matière de retraites: la diffusion à travers le droit européen de la théorie des piliers*, *Retraite et société*, 6 (2007); G. Ricci, L. Di Via, *Monopoli previdenziali e diritto comune antitrust*, in *Solidarietà, mercato e concorrenza nel welfare italiano*, S. Sciarra (ed.) (2007), 39 ss.

⁴⁶ EC Court of Justice, 22 January 2002, in C-218/2000, *Cisal*, 2 *Foro Amm. CdS* 327 (2002), with a note by F. De Leonardis, *La Corte di giustizia e il principio di solidarietà nei regimi previdenziali*. On the same subject see also O. Bonardi, *Solidarietà versus concorrenza: la Corte di giustizia si pronuncia a favore del monopolio INAIL*, 2 *Riv. It. Dir. Lav.*, 462 (2002); V. Ferrara, *Il rapporto tra le nozioni di impresa ed ente pubblico nella giurisprudenza comunitaria: una riflessione sulla base della decisione della Corte di giustizia nel caso INAIL-CISAL-Battistello*, 4 *Riv. It. Dir. Pubbl. Com.*, 802 (2002).

conversely, is not necessarily proportional to the person's income; 4) the lack of a direct link between the contributions paid and the service supplied implies a solidarity between the better paid workers and those who, considering their low income, would be disadvantaged if this direct link did in fact exist; 5) the activities carried out by INAIL, assigned by law with the management of the above-described system, are subject to State control, and the amounts of its performance fees and contributions are, in the end, determined by the State; 6) the services must be supplied independently from the contributions paid and from the financial results of the investments made by INAIL; and, finally, 7) the mandatory registration that characterises this system is indispensable for the financial stability of the system itself and for the implementation of the solidarity principle. Meanwhile, if the activities of a public body are found to have the typical features of a private business, its non-profit nature and social purposes would not prevent this activity from being subject to the rules on competition⁴⁷.

In this context lies the decision of the Court which, taking as a reference the Dutch social security fund, has brought back, at least in theory, to the notion of enterprise, relevant for the purposes of applying EC laws, a social security fund reserved for trade association members with obligatory membership whose functioning is based on the principle of capitalisation, where the services supplied by the fund to each retired member depend on the financial results of investments made with the contributions paid by each member, as occurs in private insurance companies⁴⁸.

⁴⁷ EC Court of Justice, 16 November 1995, in C-244/94, *Fédération française des sociétés d'assurance*, where the economic nature of the activity carried out by a French public organization in charge of the management of a facultative social security fund was claimed, based on the principle of capitalization, (that says that the amount of services provided depends on the amount of contributions paid), and this brought the community judges to assimilate this activity to the typical private insurance service, with subsequent dominance of the economic element with respect to the solidaristic one.

⁴⁸ EC Court of Justice, 21 September 1999, in C-67/96, *Albany International*, with reference to profiles that are of particular interest to our work, see: A. Andreoni, *Contratto collettivo, fondo complementare e diritto della concorrenza: le virtù maieutiche della Corte di giustizia (riflessioni sul caso Albany)*, 4 Riv. Giur. Lav. Prev. Soc., 981 (2000); M. Pallini, *Il rapporto problematico tra diritto della concorrenza e autonomia collettiva nell'ordinamento comunitario e nazionale*, 2 Riv. It. Dir. Lav., 225 (2000). On this, see also EC Court of Justice, 12 September 2000, in C-180/98 and 184/98, *Pavlov*; EC Court of Justice, 21 September 2000, in C-222/98, *Van der Woude*. See also, L. Idot, *Droit social et droit de la concurrence: confrontation ou cohabitation*

Although they supported the economic nature of the activity carried out by the fund, which should expose it to market rules, the EC judges did not forget to consider that the pursuit of relevant social functions, like those related to social security, can justify the attribution of a monopolistic position, to exclude the existence of an illegitimate situation of an abuse of power. Furthermore, the Court did not limit itself to affirming a principle, but further performed an analysis of the practical case in search of specific needs to derogate the ordinary EC rules on competition, realising that, from that point of view, if the companies involved were not required to subscribe to the social security fund indicated by the national collective contract, then some of them, namely those whose staff are not exposed to particular risks, could look for (and find) more advantageous insurance conditions with private companies. This circumstance may cause a dangerous “leakage” from the system of those with simpler situations, while those with the most complicated situations, exposed to greater risks, would remain concentrated in the program which would, in the judges’ opinion, presumably result in increased premiums, with the subsequent risk of irregular contributions from companies and the subsequent potential prejudice for the financial stability of the fund and, therefore, the proper fulfilment of the social function involved.

In conclusion, it can be inferred that, based on the Court’s jurisprudence, the adoption of the capitalistic method in a social security fund, in principle, implies the existence of a market, real or potential, that makes the activity performed look like an enterprise. However, the provision of numerous obligations for solidarity issues, coupled with the need to maintain a certain economic balance in the fulfilment of a social function, can justify the attribution of exclusive and special rights that place the funds in a different position from that of private companies supplying

(à propos de quelques développements récents), 11 Europe, 4 (1999); B Suárez Corujo, *Derecho social versus derecho de la competencia: querencia neoliberal de la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas. A propósito de la STJCE 21 de septiembre de 1999, caso Albany* Borja Suárez Corujo, 32 Rev. Min. Trab. Inmigr., 217 (2001); A.C.L. Davies, *The Right to Strike Versus Freedom of Establishment in EC Law: The Battle Commences*, 1 Ind. Law Journ., 75 (2006); C. Semmelmann, *The Future Role of the Non-Competition Goals in the Interpretation of Article 81 EC*, 1 Glob. Antit. Rev., 15 (2008).

similar services⁴⁹.

With reference to a decision on the legitimacy of the exclusive system established in Germany in favour of public social security funds, the Court has more recently and more firmly emphasised the strictly derogatory nature, with respect to “general / common rules” on the protection of competition, of measures similar to those examined; measures, which were adopted by national authorities whose organisational decisions relating to the social sector have a better chance for unionisation within the European Community⁵⁰. In this specific context, in fact, the social meaning instead of the economic one, has been recognised for the described social security funds, so as to exclude their entrepreneurial character; this view is based on the usual indicators that show the solidarity nature of the system (indicators given by: a) financing through contributions whose percentage is not systematically proportional to the covered risk, b) the fact that the value of the supplied service is not necessarily proportioned to the insured subject’s wages and c) the observation that the activity in question is carried out under the control and protection of the State within precise legal provisions).

The Court has clarified that a new national legal system which, like the one examined above, establishes a system of mandatory insurance against workplace accidents and occupational diseases pursuing a social goal through an implementation system of the solidarity principle and under the State’s control, can imply, in theory, a restriction to the free supply of services, because it hinders or makes less attractive, or even blocks, directly or indirectly, the exercise of such freedom by the providers of insurance services based in other Member States. However, such regulation can be justified by imperative reasons of public interest aimed at ensuring the financial stability of a social security sector, as has been found to occur in the real world, where the obligation to subscribe and ensuring the grouping in risk communities of all the enterprises for which such system is

⁴⁹ F.A. Cancilla, cit., *supra* at note 5, 207.

⁵⁰ EC Court of Justice, 5 March 2009, in C-250/07, *Kattner*. L. Azoulai, *The Court of Justice and the Social Market Economy: the Emergence of an Ideal and the Condition for its Realization*, 45 *Comm. Mark. Law Rev.*, 1342 (2008); M. Fuchs, *Monopoli dell’assicurazione contro gli infortuni in Germania e libera prestazione di servizi in Europa*, 4 *Giorn. Dir. Lav. Rel. Ind.*, 715 (2009).

applied, allows the solidarity principle to be implemented.

In summary, in the reconstruction offered by the Court, the Treaty provisions do not contradict a set of norms as described above, provided that, and here we find some emphasis, this system does not go beyond what is needed to achieve the objective of guaranteeing the financial stability of a social security sector in circumstances whose verification, though declared as belonging to the national judge, has been the object of the Court's consideration in the ruling.

It is understandable, then, why the Court, on the said occasion, more than in previous cases, adopted a strict construction on legitimate derogations to competition, based on verification of the need for protection of a primary public interest (namely, the economic-financial balance of the national social security system), outside of which, instead, EU regulation on the promotion and protection of competition must be re-expanded⁵¹.

Therefore, solidarity is conceived as a strictly interpreted exception to the principles of free competition as claimed by the Court and emphasised in the last ruling examined. If, on the other hand, one considers the need to exclude certain sectors from the application of market rules, as soon as an entity abandons the narrowly-defined space within the boundaries of indispensability, it could not be considered in the same way with respect to the principles of competition and the specific needs that characterise services to the individual⁵². This concept was illustrated much more clearly in the documents of the previously examined *soft law*. From this standpoint, this sort of consideration in giving a clear alternative between sectors governed by free market rules, and in the exceptional situations where this occurs, would not allow adequate contemplation of the social services production and supply mechanisms in existence. Such consideration also avoids outlining and recognising the special role played by tertiary sector subjects, which would be strangled by the attitude of indifference

⁵¹ For a comment on the ruling examined above see also M. Lottini, *La concezione "statica" e la concezione "dinamica" dell'attività economica: una recente sentenza della Corte di giustizia in materia di servizi sociali*, 6 Riv. It. Dir. Pubbl. Com., 1551 (2009); S. Giubboni, *Previdenza sociale e libertà di mercato in Europa dopo il caso Kattner. Una breve introduzione*, 124 Giorn. Dir. Lav. Rel. Ind., 707 (2009).

⁵² On this, see S. Giubboni, *Solidarietà e concorrenza: conflitto o concorso?*, cit., supra at note 34, 87 ss.

previously highlighted by the Court.

Thus, we would support the re-emergence of the repeatedly mentioned risk of relegating the management and organisation of solidarity functions to a merely derogatory space with respect to the promotion of fundamental freedoms initially included in the original EC legal system, without taking into due account the fact that the most recent evolution has led to inclusion into this domain of issues of a social nature which should consequently be subjected to greater balance compared to other values which are not (no longer) super-ordinated to them.

3.5. Social Protection of Workers with Respect to the Freedom to Provide Services and the Right of Establishment

There is an additional jurisprudence issue that, although it does not pertain to the main focus of this study (which is dedicated to social services in the strict sense of the word), seems to be able to provide some useful elements to understand the phenomenon of balancing between fundamental freedoms at the basis of the EU foundation and the need of protection of national interests related to social protection in the EU legal system. Further, this issue seems to confirm the (temporary) conclusions expressed above concerning the Community scenario and the so-called detachment of labour as regulated by Directive 96/71/EC, which refers to the temporary activity of a worker in the territory of a Member State other than the one he or she normally works in.

In particular, the profile examined and specified by the EC judges concerning this issue, relevant to our present work, addresses the juridical treatment to be applied to workers going from one Member State to another in relation to the norms of the host country⁵³.

⁵³ For a complete overview of the issue, see B. Bercusson, *The Trade Union Movement and the European Union: Judgment Day*, 3 Eur. Law Journ., 283 (2007); S. Sciarra, *Servizi nel mercato interno e nuove dimensioni della solidarietà*, in *Solidarietà, mercato e concorrenza nel welfare italiano*, cit., supra at note 6, 13 ss.; N. Vascello, *Libertà di stabilimento e limiti all'autotutela collettiva di rango comunitario*, 2 Dir. Rel. Ind., 589 (2008); M. Colucci, *L'Unione europea in un delicato equilibrio fra libertà economiche e diritti sindacali nei casi Laval e Viking: quando il fine non giustifica i mezzi*, ivi, 239; A. Lo Faro, *Diritti sociali e libertà economiche del mercato interno: considerazioni minime in margine ai casi Laval e Viking*, 1 Lav. Dir., 63 (2008); S. Sciarra, *Viking e Laval: diritti collettivi e mercato nel recente dibattito europeo*, ivi, 245; A. Dashwood,

On the first occasion, the Court of Justice examined the case of a Finnish ferry-boat worker who decided to change the flag on one of his boats, registering it in Estonia, through an Estonian-controlled company with the aim of reducing the crew's labour cost thanks to the subsequent possibility of applying Estonian standard salaries, which are lower than Finnish ones, in order to be able to compete with Estonian ferries that were offering, at lower prices, the same maritime route (between the Finnish and Estonian capital cities). In reaction to this, the Finnish Union of maritime workers started a strike, asking that, even in case of a flag change, the crew continue to be employed under the conditions set out by Finnish laws and that the collective contract remain in force. Following this initiative, the Court of Justice, upon the action of the ship-owner company, concluded that a collective action such as the one described above has the effect of discouraging, if not cancelling, the ship-owners' ability to exercise their freedom of establishment, because it prevents the latter, as well as its Estonian-controlled company, from benefitting, in the host country, from the same conditions applied to other economic operators in that same State⁵⁴.

In a subsequent circumstance, the Court was forced to take a stand in a situation where a Latvian company had placed some workers in Sweden to carry out some construction projects through a subsidiary company operating in Sweden. The lack of an agreement being stipulated concerning the Swedish builders' national collective contract (which contains specific norms for the

Viking and Laval: Issues of Horizontal Direct Effect, 10 *The Cambridge Yearbook of European Legal Studies*, 525 (2008); A.C.L. Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 2 *Ind. Law Journ.*, 126 (2008); O. Edstom, *The free Movement of services, Industrial Action and the Swedish Industrial Relation Model – the Legal structure and actors' acting in the Laval Case in Law and Society*, P. Wahlgren, (ed.), 432 (2008); K. *Damages claims against trade unions after Viking and Laval*, 1 *Eur. Law Rev.* 147 (2009); R. Eklund, *Free business movement and the right to strike in the European Community: two views - A Swedish Perspective on Laval*, 4 *Comp. Labor Law Policy Journ.*, 569 (2008); R. O'Donoghue, B. Carr, *Dealing with Laval and Viking: From Theory to Practice*, 11 *Cambridge yearbook of European legal studies*, 159 (2009); F. Dorssemont, *The right to take collective action versus fundamental economic freedoms in the aftermath of Laval and Viking: foes are forever!*, *European Union internal market and labour law*, M. De Vos, (ed.), Intersentia, 45; S. Monzani, *Distacco infracomunitario di manodopera e appalti pubblici*, 9 *Amm. It.* 1130 (2010); S. Deakin, *La concorrenza fra ordinamenti dopo Laval*, 3 *Lav. Dir.*, 467 (2011).

⁵⁴ EC Court of Justice, 11 December 2007, in C-438/05, *Viking*.

various aspects of the jobs that define specific economic commitments for the employers) induced the Swedish union to block the activities at the worksite. On this issue, the Judges have clarified that Member States are not allowed to subordinate the services provided in their territories to comply with working conditions that are different from those enjoyed by workers in their Member State of origin, although the imperative minimum protection regulations should be observed⁵⁵.

Even more specifically, the Court held that an additional economic charge, in this case represented by the workers being granted the right to receive the minimum wage in force, which is higher than the minimum wage in the workers' country or origin. According to the Court, the situation would be likely to impede, hinder, or make the supplier's performance less attractive in the host country, thus representing an illegitimate restriction to the freedom to supply services that cannot be justified, according to the Court, not even under the objective of worker protection⁵⁶.

Finally, in the same context lies the ruling with which the Court of Justice has clarified that the possibility of imposing upon domestic enterprises and other Member States' enterprises special working and occupational conditions, when doing so involves public policy provisions, "represents an exception to the basic principle of the freedom to supply services, in its restrictive sense, and whose relevance cannot be determined unilaterally by the Member States without any control of the European Community's institutions"⁵⁷. Based on this principle, the Court judged certain

⁵⁵ EC Court of Justice, Grande Sezione, 18 December 2007, in C-341/05, *Laval*.

⁵⁶ EC Court of Justice, section II, 3 April 2008, in C-346/06, *Ruffert*. B. Veneziani, *La Corte di Giustizia e il trauma del cavallo di Troia (Corte di Giustizia Ce, 3 aprile 2008, causa C-346/2006)*, 2 Riv. Giur. Lav. Prev. Soc., 301 (2008); P. Chaumette, *Les actions collectives syndicales dans le maillage des libertés communautaires des entreprises*, 4 Dr. soc., 210 (2008); G. Orlandini, *Viking, Laval e Ruffert: i riflessi sul diritto di sciopero e sull'autonomia collettiva nell'ordinamento italiano, Il conflitto sbilanciato. Libertà economiche e autonomia collettiva tra ordinamento comunitario e ordinamenti nazionali*, A. Vimercati (ed.) (2009).

⁵⁷ EC Court of Justice, 19 June 2008, in C-319/06, *Commissione c. Granducato del Lussemburgo*, 4 Dir. Rel. Ind., 1223 (2008), with a note by D. Venturi, *L'ordine pubblico e la disciplina dei controlli di vigilanza nello Stato ospitante: limiti ed effetti sulla libera circolazione dei servizi*. For doctrinal comments on the pending references, see also S. Orlandini, *Un possibile equilibrio tra concorrenza leale e tutela dei lavoratori. I divieti di discriminazione*, 1 Lav. Dir., 125 (2008); C. Joerges, F. Rödl, *Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval*, 1 Eur. Law Journ., 1

provisions of a Luxembourg law to be incompatible with the EC legal system: the law set different requirements upon companies that place foreign workers in their territory in the name of preserving social peace”, and qualified the provisions as norms of “public order”. These provisions were subsequently judged capable of “threatening, in consideration of the inherent restrictions, the exercise of the freedom to supply services by those companies that intend to place workers in Luxembourg”.

In conclusion, it seems clear that, also in this field, which is nonetheless related to the social dimension, there is a significant acknowledgement by EC judges of the basic freedoms sanctified in the Treaty. Once a minimum level of worker protection has been guaranteed and achieved, these freedoms have been judged to be prevailing with respect to the further demands of a social nature. In other words, in the Court of Justice’s jurisprudence on the issue being investigated, we can see a confirmation of the predominance of the freedom of establishment and freedom to supply services, although in a relative and not absolute way, since limited exceptions, after strict verifications of appropriateness and proportionality carried out directly by the EC judges, have been admitted⁵⁸.

Therefore, the application of EC laws on competition is once again seen as the rule in the social sector as well. Otherwise, any other solution represents an exception requiring a precise and strict justification.

4. Conclusions: the emergence of the concept of “social services of general economic interest”

In conclusion, the analysis carried out so far unquestionably

(2009); C. Barnard, *UK and Posted Workers: The Effect of Commission v Luxembourg on the Territorial Application of British Labour Law Case C-319/06 Commission v Luxembourg*, Judgment 19 June 2008, 1 *Ind. Law Journ.*, 122 (2009); S. Prechal, S. de Vries, *Seamless web of judicial protection in the internal market?*, 34 *Eur. Law Rev.*, 5 (2009); F. Angelini, *L’Europa sociale affidata alla Corte di Giustizia CE: “sbilanciamento giudiziale” versus “omogeneità costituzionale”*, in *Scritti in onore di Vincenzo Atripaldi* (2010).

⁵⁸ A. Pizzoferrato, *Libertà di concorrenza e diritti sociali nell’ordinamento Ue*, 10 *Riv. It. Dir. Lav.*, 543 (2010). For more details on the relationship between competition rules and national labour law systems see S. Giubboni, *Diritti sociali e mercato* (2009), 16 ss.

confirms the assumption of interest by the European Union legal system toward social rights. This in particular takes place under a dual profile consistent with the birth and development process of the EC's intervention in national policies: the first aspect is associated with the organisational supply and management modes of said services, in which scope we consider the involvement of the basic freedoms set out in the Treaty on the subject of protection and promotion of the competition; the second aspect, on the other hand, pertains to the human and solidarity aspect that naturally and inevitably denotes the services referable to the sector being examined, in a view of cohesion and social inclusion on a European scale that must complete the process of purely economic integration. In fact, economic integration by itself does not seem capable of determining the construction of a veritable European citizenship, perceived and acknowledged as such, not only formally, but also in the conscience of the populations involved.

To this end, in the framework of the European Community legal system, this study presented various positions, more or less prudent depending on the institution they come from, confirming an evolutionary process that is still ongoing with respect to the initial position of indifference by the EC legal system for the sector in question, which was left exclusively to the decision of the Member States. From this standpoint, the more mature position concerning the complexity and dual nature of social services is the one that emerges from the soft law instruments adopted by the Commission. These documents identify, on the one hand, the need to modernise the systems used to manage and supply services to the individual, on the other hand, the need to maintain the specific needs of the single individual, for the purpose of safeguarding basic human rights and human dignity, was kept in mind. In a different way, the derived European Community legal system has so far not been able to satisfactorily settle the issue, probably a result of the residual resistance by the Member States to turn over their sovereignty in such a delicate sphere, while the work of the Court of Justice seems to be, to a certain extent, biased in favour of traditional requests for free competition and to the advantage of solidarity needs, still seen in terms of a strictly interpreted exception to the unfolding of traditional basic freedoms.

Nevertheless, apart from the different approaches followed,

a gradual and common awareness seems to be emerging from the various European regulatory levels of the need to confirm a new category of services positioned at the boundary between the concepts already considered by the European community: we are talking about a category that may be defined as “social services of general economic interest”.

Specifically, this last definition refers to the need to adapt, within the scope of the sector in question, the competition approach typical of the initial European Community construction with a more mature, and consequently, aware view of the solidarity and “human” aspect that has to characterize the social protection system, especially in the field of assistance, without this resulting in useless, distortive and non-transparent mechanisms that would ultimately produce undoubted inefficiency in achieving these objectives related to the protection of social rights.

To this end, in the writer’s opinion we need to find suitable intermediate forms of combination and balancing between the aforementioned opposing needs, through a weighted dosing of the application of competition rules that are desirable in view of the implementation of efficiency values, transparency, equal treatment, pluralism, and freedom of choice, to a sector that does not appear to be slavishly referable to strict market logics, but which nonetheless can continue to follow the traditional purely journalistic approach, given increasing proof of the services provided in the presently studied sector being on the public expense budget (necessarily decreasing in the last period) and, more generally, depending on the economic and occupational context.

This result can be achieved, for example, devising, within public procurement procedures, selection criteria of individuals to whom to assign the management of social services that take into account different and additional “social” parameters compared to mere economic indicators⁵⁹, for example by enhancing the value of volunteering or cooperation-based organizations, or in any event of subjects not operating for profit, however making sure that the existence of said characteristics in the candidate managers does not lead to any form of solicitation of the competition (which, for example, may only be possible with reference to competitors

⁵⁹ On this, see cfr. A. Albanese, *Servizi sociali*, cit., *supra* at note 7, 1920.

possessing certain characteristics capable of ensuring a suitable approach with respect to the services to be supplied).

In conclusion, we are talking about promoting competition also in the sector of social services, but in terms regulated by the public authority, as the representative of the people's sovereignty, and within a framework that ensures the peculiarities of this sector in order to safeguard the basic values of the individual. In other terms, we need to find a balance capable of achieving what was defined by the Commission as a "social economy", where the needs of effectiveness and efficiency, increasingly important in the field of social services as well, are combined with the needs of a persona, human and solidarity approach, and not merely market-related and entrepreneurial. Specifically, the first ones will have to refer to the organizational apparatus, called to achieve an efficient allocation of resources, whilst the second ones refer to the moment in which the service is supplied, to be performed by considering and respecting the user's personal situation and his or her own specific needs, which cannot be standardized or type-approved in an approach that is the same for everyone, as for other services of a general economic interest that do not pertain to rights directly ascribable to the personal sphere and to human dignity.