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Sources of Law and Legal Protection

Triestine Lectures

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Foreword

In Spring 2012 a series of lectures was held at the Faculty of Law of the University of Trieste, focusing on selected relevant aspects related to the various legal subjects that are normally taught in the ordinary courses of our Faculty (Constitutional Law, History of Law, European and Comparative Law, Private International Law, Italian Private Law, Criminal Law). The lectures were mostly given in foreign languages by Italian and foreign colleagues, in particular young academics.

Later it was decided to collect and publish some of the lectures in a volume: *Sources of Law and Legal Protection. Triestine Lectures*, edited by Professors of our Faculty who invited the speakers and organized the event, adding a limited number of contributions delivered at two different conferences.

This volume will be the first of a series designed to collect teaching materials, mostly in English and German, to be distributed in the academia. The internationalization and globalization pose a challange to law: also university education should strive to master it.

The contributions reveal a clear scientific approach in dealing with the various subjects. The purpose of this book is to create a channel for the circulation of writings by young academics. Therefore it was considered appropriate to establish a scientific committee of external referees, as a means to guarantee the high quality of the individual contributions.

Trieste, 12th November 2012

Maria Giovanna Cubeddu

Transnationalisierung und nationale Verfassungsordnung

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ABSTRACT

The Author analyses the topic of the influence of transnationalization of law on democracy, the latter considered as a form of political self-determination founded on equality of rights. It is argued which are the consequences on the form, the dimensions and the measure of self-determination when binding decisions are devolved to large political communities and adopted by agreement of many of their leaders. In such cases, it is interesting considering the advantages or disadvantages for democracy or, simply, for self-determination. It is a matter of special interest optimizing the cost-benefit ratio of self-determination of transnationalization of law.

KEYWORDS

TRANSNATIONALIZATION OF LAW. – DEMOCRACY. – POLITICAL SELF-DETERMINATION. – EQUALITY OF RIGHTS. – POLITICAL COMMUNITIES.

Demokratie bedeutet politische Selbstbestimmung auf der Grundlage der Gleichberechtigung - Selbstbestimmung (auch) im Bereich dessen, was nicht individuell von jedem für sich, sondern kollektiv zu entscheiden ist. Wenn die Zuständigkeit für allgemeinverbindliche Entscheidungen, insbesondere die Zuständigkeit für die Rechtsetzung, von der Ebene kleinerer Kollektive auf die Ebene größerer politischer Kollektive verlagert wird - also etwa von der kommunalen oder regionalen auf die staatliche Ebene oder von der staatlichen Ebene auf die der Europäischen Union, und wenn die Rechtsetzung faktisch zunehmend durch Vereinbarungen *zwischen* Vertretern *vieler* politischer Kollektive determiniert wird, dann hat das Folgen für die Formen, die Dimensionen und das Maß an möglicher Selbstbestimmung. Man kann von Demokratienutzen und Demokratiekosten solcher Entwicklungen sprechen, oder einfach von Selbstbestimmungsnutzen und Selbstbestimmungskosten. Diese beiden Seiten der Sache muss man sehen. Es stellt sich dann die Frage, wie sich das Verhältnis von Selbstbestimmungskosten und Selbstbestimmungsnutzen der Transnationalisierung des Rechts optimieren lässt.

Der Prozess der Transnationalisierung des Rechts - der Verlagerung von Rechtsetzungszuständigkeiten auf die supranationale Ebene der Europäischen Union und der Prägung des Rechts durch internationale Verträge - ist weit vorangeschritten. Die Schätzungen des Anteils, zu dem das nationale Recht durch Unionsrecht determiniert ist, reichen bis zu 80%[1]. Hinzu kommt eine immer weiter wachsende Anzahl internationaler Verträge, die das Recht der Mitgliedstaaten der Europäischen Union prägen, sei es unmittelbar oder (auch) mittelbar dadurch, dass das Unionsrecht seinerseits wiederum zu einem erheblichen Teil durch internationale Verträge determiniert ist.

Es ist absehbar, dass dieser Prozess der Transnationalisierung des Rechts weiter voranschreiten wird. Recht ist einerseits schon Voraussetzung, andererseits aber auch Folge der Herausbildung von Märkten. Der Herausbildung grenzüberschreitender und globaler Märkte folgt daher unweigerlich die Transnationalisierung des Rechts. Der Bedarf an europäischer und interantionaler Regulierung, den die Finanzmärkte immer deutlicher hervorbringen, ist dafür das aktuellste Beispiel.

Nichts illustriert den Zusammenhang zwischen Markt und Rechtsbedarf so nachdrücklich wie die Geschichte der Europäischen Union. Sie verdankt ihre Existenz als politische Union diesem Zusammenhang. Am Anfang dieser Geschichte standen in den fünfziger Jahren Pläne zur Gründung einer europäischen politischen Union. Nachdem diese Pläne auch in ihrer Schwundstufe, als Pläne zur Gründung einer Europäischen Verteidigungsgemeinschaft, gescheitert waren,

1 S. z.B. Hoppe, EuZW 2009, 168 ff. Dass die Schätzungen unterschiedlich ausfallen, liegt nicht nur daran, dass die Größe der zu vergleichenden Rechtsmassen sie dem Überblick entzieht, sondern auch daran, dass „Prozent des Rechts" keine wohlbestimmte Größe ist; man müsste sich zunächst einmal darüber verständigen, in was für Einheiten die zu vergleichenden Rechtsquantitäten zu messen sind.

verlegte man sich darauf, den Anfang mit der wirtschaftlichen Integration zu machen. Damit verband sich die Erwartung, dass dies die politische Integration über kurz oder lang unweigerlich nach sich ziehen würde[2].

Dieses Kalkül hat sich als richtig erwiesen. Heute haben wir eine europäische politische Union, die den größten Teil unseres nationalen Rechts bestimmt oder zumindest wesentlich mitbestimmt. Ein Teil der Mitgliedstaaten dieser Union hat selbst die Währung vergemeinschaftet. Die Diskussion darüber, ob und gegebenenfalls welche weiteren politischen Zentralisierungsschritte das zur notwendigen Folge hat, ist noch nicht abgeschlossen.

Die Vereinheitlichung des Rechts auf Unionsebene betrifft natürlich auch die nationalen Verfassungsordnungen. Es betrifft sie zunächst ganz direkt, weil das Unionsrecht jeder Rangstufe Anwendungsvorrang vor dem mitgliedstaatlichen Recht jeder Rangstufe beansprucht, so dass auf nationaler Ebene Verfassungsänderungen in Anpassung an Vorgaben des europäischen Rechts erforderlich werden können und erforderlich geworden sind (in Deutschland z.B. die Öffnung des Wehrdienstes an der Waffe für Frauen[3] und die Öffnung des Kommunalwahlrechts für Unionsbürger[4], aber auch Änderungen in den verfassungsrechtlichen Vorgaben für wichtige Einrichtungen des Bundes wie die Post[5]). Die wichtigsten Änderungen der nationalen Verfassung im Zusammenhang mit der Entwicklung der Union liegen natürlich nicht in solchen punktuellen inhaltlichen Veränderungen, sondern in den Vorschriften, die den Transfer von Hoheitsrechten auf die Union ermöglicht und damit die Bedingungen kollektiver Selbstbestimmung, deren Ordnung die wesentliche Aufgabe der Verfassung ist, fundamental verändert haben.

Für den Regulierungsbedarf der *globalen* Märkte behilft man sich einstweilen weitgehend mit Koordination über völkerrechtliche Verträge (wobei die Grenzen zwischen „supranationalen", eine verselbständigte Hoheitsgewalt auf übernationaler Ebene etablierenden und rein vertraglichen Arrangements fließend sind). Aber auch das verändert den Modus der Selbstbestimmung.

Diese Transnationalisierung des Rechts und der Rechtserzeugungsprozesse hat offensichtliche Nutzen, die man durchaus auch als Selbstbestimmungsnutzen verstehen kann: Sie ermöglicht Entscheidungen, die auf nationaler Ebene, von jedem Staat für sich allein, entweder überhaupt nicht oder jedenfalls nicht mit irgendeiner Aussicht auf Erfolg getroffen werden könnten. Wenn wir zum Beispiel einen wirksamen Klimaschutz wollen oder einen wirksamen Schutz von Arbeitnehmern gegen einen wirtschaftlichen Wettbewerb, der auf dem Ge-

2 Vgl. die Darstellung in BVerfGE 123, 267 <272-274>, m.w.N.

3 Ersetzung des früheren Art. 12a IV 2 GG, wonach Frauen auf keinen Fall Dienst mit der Waffe *leisten* dürfen, durch die Bestimmung, dass sie hierzu auf keinen Fall *verpflichtet werden* dürfen.

4 Art. 28 I 3 GG.

5 Art. 87 f. GG.

biet der Ausbeutung von Arbeitskräften ausgetragen wird, dann geht das nur mit Hilfe transnationalen Rechts.

Den Selbstbestimmungsnutzen stehen aber auch Selbstbestimmungs*kosten* oder, anders ausgedrückt, Demokratiekosten gegenüber. Ich will an dieser Stelle nicht im Detail analysieren, worin diese Kosten liegen und wie sie zustandekommen. Wenn man das genau machen wollte, müsste man zwischen den ganz unterschiedlichen Prozeduren der völkervertraglichen und der supranationalen Rechtsetzung sorgfältig unterscheiden.

Für beide Fälle gilt jedenfalls, dass wir es mit einer zwangsläufig höheren Exekutivlastigkeit der Entscheidungsprozesse zu tun haben, also mit einer Stärkung der Machtposition der Exekutive im Verhältnis zu den Parlamenten. Die wesentlich erhöhte Komplexität der Entscheidungsprozesse, die mit der Transnationalisierung dieser Prozesse verbunden ist, erschwert außerdem ganz erheblich die für repräsentativdemokratische Zusammenhänge essentielle Zuschreibung von Verantwortlichkeiten.

Hinzu kommt schließlich noch ein Faktor, der in der Demokratietheorie nach meiner Kenntnis heute keine große Rolle mehr spielt (bei Platon war er präsent), nämlich die schlichte Größe der Kollektive, die unter den Hut eines gemeinsamen Rechts gebracht werden sollen. Natürlich ist es einerseits richtig, die Bundesrepublik Deutschland nicht deshalb für weniger demokratisch zu halten als Malta, weil sie ungefähr 200 mal so viele Einwohner hat. Andererseits wäre es falsch, die Bedeutung der Kollektivgrößen für das Maß an erfahrbarer Selbstbestimmung im Kollektiv einfach zu negieren. Die Ausssichten für jeden einzelnen, sich und seine Interessen in den Entscheidungen des Kollektivs zur Geltung zu bringen, sinken mit zunehmender Größe des Kollektivs. Das fängt schon bei der Chance, einem Belang überhaupt politisches Gehör zu verschaffen, an. Gregor Gysi, ein prominenter linker Politiker in Deutschland, mit großem Talent, wichtige Zusammenhänge verständlich auf den Punkt zu bringen, hat das Problem einmal in einer Fernsehtalkshow an einem Beispiel illustriert, ungefähr so: *Beim Stadtbezirksvorsteher kriegst Du noch vergleichsweise leicht einen Termin. Damit Du einen beim Oberbürgermeister kriegst, wirst Du schon gute Gründe anführen und länger warten müssen. Dass der Ministerpräsident Deines Bundeslandes dich empfängt, ist wenig wahrscheinlich, eine Audienz bei Frau Merkel absolut unwahrscheinlich, und den Plan, Dein Anliegen Herrn Barroso vorzutragen, kannst Du gleich vergessen.* In der Wirtschaftswissenschaft spricht man von positiven Skaleneffekten oder größenbedingten Einsparungen (*economies of scale*), um die mit der Steigerung von Produktionsmengen - der Größe der Produktion - üblicherweise eintretende Effizienzsteigerung (sinkende Grenzkosten) zu bezeichnen. In der Demokratietheorie sollte man vielleicht von einem oberhalb gewisser Größenordnungen einsetzenden umgekehrten Skaleneffekt sprechen.

Die Selbstbestimmungskosten der Transnationalisierung des Rechts und der umgekehrte Skaleneffekt, der dabei eine Rolle spielt, lassen sich auf einfache Weise verdeutlichen. Man muss sich nur fragen, ob die langfristigen politischen

Konsequenzen der *Global*isierung der Märkte, wie sie im Rahmen der Welthandelsorganisation (WTO) vorangetrieben wird, den politischen Konsequenzen gleichen werden, die die Gründungsväter der Europäischen Wirtschaftsgemeinschaft ganz richtig als Folge der *Europä*isierung des Marktes vorhergesehen haben. Ich kenne niemanden, der auf diese Frage mit Begeisterung antwortet: „Ja, und das wäre doch auch wunderbar - ich kann mir nichts Besseres vorstellen!". In diesem Schauder steckt das Wissen von den Selbstbestimmungskosten der Transnationalisierung politischer Entscheidungsprozesse und Entscheidungskompetenzen, der man mit dieser Frage ins Auge sieht. Es ist wohl derselbe Schauder, der schon Kant veranlasst hat, den *ewigen Frieden* nicht in der Idee eines Weltstaates zu suchen.[6]

In dem Maße, in dem die Rechtsproduktion selbst oder die ihr zugrundeliegenden entscheidenden politischen Aushandlungsprozesse sich auf transnationale Ebenen verlagern, wächst naturgemäß die Wertschätzung der Möglichkeit, Normierungsentscheidungen noch „bei sich zuhause" treffen zu können. Überhaupt nimmt nach dem allgemeinen Gesetz, dass Knappheit wertsteigernd wirkt, im Zuge der Globalisierung die Wertschätzung des verbliebenen spezifisch Nationalen, Regionalen und Lokalen zu.

Die Vermutung liegt nicht fern, dass die Regionalisierungstendenz und die Tendenz zur Stärkung der kommunalen Selbstverwaltung, die in Europa, gegenläufig zur Europäisierung und Globalisierung, seit einigen Jahrzehnten zu beobachten ist, unter anderem ein Ausdruck dieser Präferenzverschiebung sind.

Jedenfalls gehört zu den Erscheinungsformen dieses Wertewandels eine zunehmende Skepsis gegenüber weiteren Delegationen „nach oben", und eine wachsende Empfindlichkeit gegen Kompetenzanmaßungen seitens internationaler und supranationaler Organe, einschließlich einer Verschiebung der Maßstäbe für das, was überhaupt als Kompetenzanmaßung begriffen wird. Diese Empfindlichkeit wird sicher in unterschiedlichen Mitgliedstaaten der Europäischen Union unterschiedlich ausgeprägt sein. Aber unabhängig vom Grad ihrer Ausprägung würde ich vermuten, dass die Tendenz überall in dieselbe Richtung geht.

Besonders stark ausgeprägt ist diese zunehmende Tendenz in einigen der östlicheren EU-Mitgliedstaaten. Es ist vermutlich kein Zufall, dass ein dortiges Gericht, das Verfassungsgericht der tschechischen Republik, das erste ist, das es gewagt hat, eine Entscheidung des Europäischen Gerichtshofs (EuGH) für

6 „Die Idee des Völkerrechts setzt die Absonderung vieler voneinander unabhängiger benachbarter Staaten voraus, und, obgleich ein solcher Zustand an sich schon ein Zustand des Krieges ist (wenn nicht eine föderative Vereinigung derselben dem Ausbruch der Feindseligkeiten vorbeugt): so ist doch selbst dieser, nach der Vernunftsidee, besser als die Zusammenschmelzung derselben, durch eine die andere überwachsende, und in eine universale Monarchie übergehende Macht; weil die Gesetze mit dem vergrößten Umfange der Regierung immer mehr an ihrem Nachdruck einbüßen, und ein seelenloser Despotism, nachdem er die Keime des Guten ausgerottet hat, zuletzt doch in Anarchie verfällt." (Kant, Zum ewigen Frieden, Bd. XI der von W. Weischedel hsrg. Werkausgabe, Frankfurt 1968, S. 193 (225)).

kompetenzüberschreitend („*ultra vires*“) zu erklären und ihm deshalb den Gehorsam zu verweigern.[7]

In Deutschland hat es eine solche Entscheidung bislang nicht gegeben. Aber die tendenziell zunehmende Sensibilität in Kompetenzfragen ist durchaus auch bei uns spürbar. Eine kritische Diskussion über die Rechtsprechung des Europäischen Gerichtshofs hat sich in den zurückliegenden Jahren in Deutschland besonders an der Entscheidung des EuGH im Fall *Mangold* festgemacht. In einer großen deutschen Zeitung erschien z.B. ein Artikel des ehemaligen Bundespräsidenten Roman Herzog und eines Mitautors, der sich wohl vor allem an das Bundesverfassungsgericht richtete und den Titel trug: „Stoppt den Europäischen Gerichtshof“[8] in dem es hieß, der EuGH entziehe mit immer erstaunlicheren Begründungen den Mitgliedstaaten ureigene Kompetenzen. Dieser Artikel setzte beim Mangold-Urteil an.

Ob der EuGH hier das Gemeinschaftsrecht richtig ausgelegt hat, darüber kann man sicher streiten. Sicher ist aber auch, dass es sich um Auslegungen handelt, über die 15 Jahre früher nicht ansatzweise dieselbe Aufregung entstanden sein würde.

Der EuGH hat mit dem Mangold-Urteil im Jahr 2005 eine gesetzliche Bestimmung des deutschen Rechts für gemeinschaftsrechtswidrig erklärt, die es – mit dem Ziel einer Verbesserung der Arbeitsmarktchancen der betreffenden Gruppe – erlaubte, Menschen über 52 befristet einzustellen. Diese Regelung, so der EuGH, sei unvereinbar mit einer EG-Richtlinie (RL 78/2000/EG), die u.a. Diskriminierungen aufgrund des Alters verbietet, und mit einem solche Diskriminierungen ebenfalls verbietenden allgemeinen Grundsatz des Unionsrechts. Im fraglichen Zeitpunkt war allerdings die Umsetzungsfrist für die fragliche Richtlinie noch nicht abgelaufen und die Grundrechte-Charta, die ein ausdrückliches Verbot der Altersdiskriminierung enthält (Art. 21Abs. 1 GrCh), war noch nicht in Kraft. Der EuGH soll deshalb, so die zahlreichen Kritiker dieser Entscheidung, den mit der Umsetzungsfrist eingeräumten Spielraum der Mitgliedstaaten missachtet und ein zum relevanten Zeitpunkt noch nicht existierendes Grundrecht erfunden haben. Außerdem wird ihm vorgeworfen, er habe – während Grundrechte an sich das Verhältnis zwischen Individuum und öffentlicher Gewalt betreffen - eine unmittelbare Wirkung des angenommenen Grundrechts zwischen Privaten (sogenannte horizontale Wirkung) konstruiert.

Das klingt erschreckend. Bei näherer Betrachtung nimmt sich die Sache aber, jedenfalls gemessen an tradierten Beurteilungsstandards, nicht ganz so furchtbar aus[9].

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7 Pl. Us 5/12 vom 31. Januar 2012 (Auf den Internetseiten des Verfassungsgerichts der Tschechischen Republik verfügbar).

8 FAZ vom 8.9.2008.

9 Es ist ständige Rechtsprechung des EuGH, dass Richtlinien es auch schon vor Ablauf der jeweiligen Umsetzungsfrist den Mitgliedstaaten verbieten, Regelungen zu treffen, die die künftige Wirksamkeit der Richtlinie behindern würden. Obwohl das nirgends explizit im Europäischen

Es geht mir hier nicht um die Rechtfertigung der konkreten Entscheidung, die nicht sehr sorgfältig begründet ist und die sachliche Rechtfertigung der fraglichen deutschen Regelung in einer äußerst kleinteiligen, typisierungsaversen Weise überprüft hat. Erst recht geht es mir nicht darum, die Rechtsprechung des EuGH im Allgemeinen vor Kritik in Schutz zu nehmen. Die Rechtsprechung des EuGH gerade in Kompetenz- und Kompetenzausübungsfragen kritisch zu begleiten, ist unbedingt notwendig.

Was die Mangold-Rechtsprechung des EuGH angeht, ist aber nicht, wie man angesichts der Heftigkeit vieler Reaktionen vermuten könnte, eine sensationelle Anmaßung das eigentlich Bemerkenswerte, sondern die veränderte Empfindlichkeit gegen Einschränkungen des nationalen Handlungsspielraums, die sich in den Reaktionen auf ‚Mangold' zeigt. Diese erhöhte Empfindlichkeit ist rational, ganz unabhängig von der Frage, ob ‚Mangold' dafür das geeignetste Objekt war.

Mit dem zunehmenden Sinn für die Selbstbestimmungskosten, und damit für wünschenswerte *Grenzen* der Transnationalisierung des Rechts wächst der Sinn dafür, dass wir uns in einem Dilemma - einem Demokratiedilemma - befinden. Denn einerseits bedauern wir die Selbstbestimmungskosten der Trans-

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Primärrecht steht, hat diese seit langem akzeptierte Rechtsprechung nie einen Kritiksturm entfesselt, der auch nur entfernt mit dem durch die Mangold-Entscheidung ausgelösten zu vergleichen wäre. Man kann darüber diskutieren, ob in „Mangold" der Sache nach überhaupt eine Fortentwicklung dieser Rechtsprechung zu sehen ist. Wenn ja, dann wäre sie jedenfalls naheliegend, denn der Sinn von Umsetzungsfristen ist es, den Mitgliedstaaten Zeit für das Sich-Hinbewegen auf den geforderten Rechtszustand einzuräumen, nicht dagegen Spielraum für Rechtsänderungen in die gegenteilige Richtung. Was die angebliche Erfindung eines Grundrechts angeht, entspricht es der ständigen und gerade von deutscher Seite mit viel Beifall aufgenommenen Rechtsprechung des EuGH, die in der gemeinsamen Verfassungstradition der Mitgliedstaaten verankerten Grundrechte auch als gemeinschaftsrechtliche anzuerkennen. Das Bundesverfassungsgericht hat 1986 (in seiner Solange-II-Entscheidung) diese Rechtsprechung des EuGH durch Zurücknahme seiner eigenen grundrechtsbezogenen Kontrollkompetenzen im Bereich des gemeinschaftsrechtlich determinierten Rechts honoriert. Soweit die Kritiker monieren, dass hinsichtlich der Altersdiskriminierung von einer gemeinsamen Verfassungstradition der Mitgliedstaaten keine Rede sein könne, weil nur zwei der zum Zeitpunkt der Mangold-Entscheidung geltenden mitgliedstaatlichen Verfassungen ein ausdrückliches derartiges Verbot enthielten, vernachlässigen sie, dass schon der allgemeine Gleichbehandlungsgrundsatz unzweifelhaft zur gemeinsamen Verfassungstradition der Mitgliedstaaten gehört. Schon dieser allgemeine Grundsatz verbietet ganz unstreitig sachlich ungerechtfertigte Ungleichbehandlungen auch insoweit, als sie an das Alter anknüpfen. Mehr als ein solches Verbot hat der EuGH nicht postuliert. Von einem Diskriminierungsschutz der verschärften, die Sachlichkeit von Differenzierungen weitestgehend ausschließenden Art, wie er in Deutschland in den speziellen Diskriminierungsverboten der Art. 3 Abs. 2 und 3 GG gesehen wird, kann keine Rede sein; die Möglichkeit sachlicher Gründe für eine altersspezifische Befristungsregeln hat der EuGH ausdrücklich konzediert und nur die vorhandene Regelung als insoweit zu pauschal und über das Regelungsziel hinausschießend angesehen. Und was schließlich die angebliche unmittelbare Drittwirkung angeht, ist daran zu erinnern, dass der EuGH nicht unmittelbar das Verhalten Privater, sondern eine Rechtsnorm und damit einen Akt öffentlicher Gewalt beurteilt hat. Dabei ist er zwar nicht seiner bisherigen Rechtsprechung zur Horizontalwirkung von Richtlinien gefolgt, aber dass allein die Linie der bisherigen Rechtsprechung sich im Rahmen methodisch vertretbarer Auslegung des Primärrechts hielte, wird man nicht sagen können.

nationalisierung des Rechts. Zugleich ist es aber offensichtlich, dass gerade auch im Interesse wirksamer demokratischer Selbstbestimmung der Prozess der Transnationalisierung weitergehen muss und wird, dass wir in vielen Bereichen weitere Harmonisierung und Koordination benötigen. Der Regulierungsbedarf bei den Finanzmärkten ist dafür nur das offensichtlichste Beispiel.

Das Prinzip, das zwar keinen *Aus*weg *aus* diesem Dilemma bietet, aber doch auf *Optimierung in* diesem Dilemma zielt, ist schon erfunden und auf europäischer Ebene sogar zum Rechtsprinzip erhoben: das Subsidiaritätsprinzip. Es ist *das* Prinzip, das einzige, unter dem die Transnationalisierung des Rechts sich ohne Schaden für die Demokratie und die Substanz der nationalen Verfassungsordnungen in der notwendigen Weise intensivieren kann. Jeder Freund der Europäischen Integration müsste es auf seine Fahnen schreiben, weil es eine Bedingung für die Akzeptabilität und für die faktische Akzeptanz weiterer Einigungsschritte in Europa ist.

Thomas von Danwitz, der derzeitige deutsche Richter am EuGH, hat die Idee der Subsidiarität einmal als einen Grundsatz „jeder wohlgestalteten Kompetenzordnung" bezeichnet[10]. Dem kann man nur zustimmen. Es geht hier nicht bloß um die inhaltliche Angemessenheit staatlicher Regulierung, die beeinträchtigt sein kann, wenn Regelungen in unnötig großer Distanz von lokalen, regionalen oder nationalen Besonderheiten getroffen werden, sondern vor allem um Schonung des demokratischen Selbstbestimmungsrechts der kleineren politischen Einheit.

Man kann den Subsidiaritätsgrundsatz als rechtspolitisches Prinzip betrachten, dem man bei der Allokation von Kompetenzen in einer föderalen Verfassung oder einem supranationalen Mehrebenensystem entsprechen sollte. Etwas anderes ist der Subsidiaritätsgrundsatz als Rechtsprinzip. Es fungiert in einer bestehenden Ordnung mit bereits allozierten Kompetenzen als Maßgabe für die Befugnis ihrer Inanspruchnahme.

In dieser Bedeutung ist das Subsidiaritätsprinzip umso unentbehrlicher, je weiter die Transnationalisierung fortgeschritten ist. Der EU lassen sich immer weniger Sachbereiche *in toto* kompetenziell vorenthalten. Umso wichtiger wird die feinjustierte Schonung mitgliedstaatlicher Selbstbestimmung durch das Subsidiaritätsprinzip.

Leider ist nichts schwieriger als die praktische Effektivierung dieses Prinzips.

Eine erste Problemursache liegt schon darin, dass der selbstbestimmungsorientierte Sinn des Subsidiaritätsgrundsatzes, wie überhaupt die eigenständige Bedeutung und Selbstbestimmungsrelevanz der Frage, auf welcher Ebene eines politischen Mehrebenensystems Kompetenzen anzusiedeln sind und wie weit die Befugnis zu ihrer Ausübung reicht, häufig gar nicht verstanden wird.

In Deutschland lässt sich das in jeder Diskussion über Fragen der innerdeutschen föderalen Kompetenzordnung sehr schön beobachten. Der verbreitetste Zugriff auf die Frage, welche Kompetenzen vernünftigerweise auf welche Ebene

10 v. Danwitz, Subsidiaritätskontrolle in der Europäischen Union, in: FS Sellner, 2010, S. 27 ff. (27).

gehören, wie die bestehende Kompetenzordnung auszulegen ist und ob eine gegebene Kompetenz auch ausgeübt werden sollte, ist immer der *opportunistische*: Man wünscht sich die Kompetenz dorthin, wo man am ehesten erwartet, dass die Kompetenzausübung gemäß den eigenen inhaltlichen Präferenzen ausfällt. So wünschten sich zum Beispiel die Kriminologen und auch die meisten Journalisten, von denen Beiträge zu diesem Thema in den Zeitungen erschienen, dass die Kompetenz für den Strafvollzug beim Bund verbleibt, denn es gab da Länder wie das finstere Bayern, denen man nicht die liberale Strafvollzugspolitik zutraute, die man selbst für richtig hielt.

Verbreitet trifft man auch auf den *unitaristischen* Standpunkt: Hier legt man Wert darauf, dass jedenfalls eine einheitliche Regelung getroffen wird. Man möchte zum Beispiel in der Frage, ob und unter welchen Voraussetzungen in Gaststätten geraucht werden darf, keinen „Flickenteppich", so heißt es dann, und der kann natürlich nur durch eine Regelung auf der zentraleren Ebene vermieden werden.

Der unitaristische Standpunkt ist von dem opportunistischen nicht leicht zu unterscheiden, denn oft ist er selbst von Opportunismus getragen.

Die vernünftige Organisation eines Mehrebenensystems lässt sich auf keinen dieser Standpunkte gründen. Der Unitarist hat für dezentrale Regelungskompetenzen ohnehin nichts übrig, und der Opportunist wird mit der Kompetenzallokation, die er gerade präferiert, nur so lange zufrieden sein, wie die tagespolitischen Verhältnisse sich nicht ändern. Sobald einer von diesen finsteren Bayern Bundeskanzler wird, muss er sich freuen, dass die Gesetzgebungskompetenz für den Strafvollzug zu den Ländern gewandert und der Bayer somit gehindert ist, mit seinen Bundestagskumpanen die finstere bayerische Strafvollzugspolitik auch auf Nordrhein-Westfalen zu übertragen.

In Kompetenzangelegenheiten, und so auch bei der Anwendung des Subsidiaritätsgrundsatzes, muss die Frage, auf welcher Ebene vernünftigerweise die Regelungsbefugnis liegt, von der Frage, welche Regelungsinhalte man selbst oder die legiferierenden Akteure gern hätten, strikt unterschieden werden. Diese Unterscheidung ist *in concreto* schon intellektuell eine nicht immer ganz leichte Übung. Jedenfalls begegnet man immer wieder dem Kurzschluss von der Annahme, eine bestimmte Regelung sei richtig auf die Annahme, es könne nicht falsch sein, sie auf möglichst hoher Ebene zu treffen. Leider ist zudem auch noch die Formulierung, in die man auf europäischer Ebene den Subsidiaritätsgrundsatz gegossen hat, dabei nicht besonders hilfreich.

Der EU-Vertrag statuiert den Subsidiaritätsgrundsatz als eine Kompetenz*ausübungs*regel, nach der die Union nur tätig werden darf, „sofern und soweit die Ziele der in Betracht gezogenen Maßnahmen von den Mitgliedstaaten weder auf zentraler noch auf regionaler oder lokaler Ebene ausreichend verwirklicht werden können, sondern vielmehr wegen ihres Umfangs oder ihrer Wirkungen auf Unionsebene besser zu verwirklichen sind" (Art. 5 Abs. 2 EUV).

Die Befugnis zur Ausübung einer Unionskompetenz hat danach zwei Voraussetzungen.

Erstens: Das ins Auge gefasste Regelungsziel *kann nicht ausreichend* auf niedrigerer Systemebene verwirklich werden. Das ist das so genannte Negativkriterium oder Nicht-ausreichend-Kriterium. Zweitens muss, kumulativ, das so genannte Positivkriterium oder Besser-Kriterium erfüllt, nämlich das Regelungsziel wegen des Umfangs oder der Wirkungen der Maßnahme *besser* auf Unionsebene realisierbar sein.

Auf den ersten Blick könnte man meinen, dass das erste Kriterium im zweiten enthalten ist, so dass ihm keine selbstständige Bedeutung zukommt: Wenn ein Regelungsziel besser auf Unionsebene verwirklicht werden kann, dann scheint das ja auf den ersten Blick zu implizieren, dass es auf mitgliedstaatlicher Ebene eben nicht so gut – und damit, so könnte man meinen, auch nicht ausreichend – verwirklicht werden kann.

Beachtet man deshalb nur noch das Positivkriterium, dann bleibt allerdings von der begrenzenden Funktion des Subsidiaritätsgrundsatzes nichts mehr übrig.

Denn dass die Union Ziele, die sie sich einmal vorgesetzt hat, am besten verwirklichen kann, indem sie die dazu notwendigen Regelungen selbst erlässt, versteht sich einigermaßen von selbst. Wenn sie das nicht tut, macht jeder Mitgliedstaat, was er für richtig hält, und es wird in der Regel nichts dafür sprechen, dass dabei genau das herauskommt, was die Union gerade anstrebt. Wenn z.B. die Union sich die Bekämpfung von Straftaten durch eine mindestens sechsmonatige Vorratsspeicherung von Telekommunikationsdaten zum Ziel setzt, dann kann dieses Ziel mit Sicherheit besser auf Unionsebene erreicht werden als dadurch, dass man den Mitgliedstaaten die Möglichkeit lässt, in dieser Frage je für sich zu entscheiden. Denn wenn man die Sache den Mitgliedstaaten überlässt, wird es mit Sicherheit den einen oder anderen geben, der eine solche Speicherpflicht nicht oder nur für drei Monate vorschreibt, und dann wäre das Ziel ja nicht so gut erreicht wie durch eine Norm auf Unionsebene[11]. Jedenfalls mit diesem Argument lässt sich hier eine unionsrechtliche Regelung nicht begründen.

Nach diesem Muster ließe sich auch ein unionsrechtliches Verbot des Alkoholkonsums in öffentlichen Parkanlagen vor dem Subsidiaritätsgrundsatz rechtfertigen. Wenn eine so verstandene Zielverwirklichungsüberlegenheit des EU-Rechts das einzige wäre, was der Subsidiaritätsgrundsatz verlangt, wäre er völlig

11 Hinsichtlich der Vorratsdatenspeicherungsrichtlinie der EG (RL 2006/24/EG – Vorratsspeicherung von Daten, die bei der Bereitstellung elektronischer Kommunikationsdienste erzeugt oder verarbeitet werden) hat der EuGH über die Frage der Vereinbarkeit mit dem Subsidiaritätsgrundsatz nicht entschieden. Eine von Irland mit Unterstützung der slowakischen Republik angestrengte Nichtigkeitsklage betraf die Frage, ob das Normenwerk rechtmäßigerweise auf die Binnenmarktkompetenz nach Art. 95 EGV gestützt worden war oder ob es wegen primär strafrechtlicher Zwecksetzung nur auf der Grundlage des EU-Vertrages (Art. 31 Abs. 1 Buchst. c und 34 Abs. 2 Buchst. b EUV) hätte erlassen werden dürfen. Nur diese Frage hat der EuGH (durch Urteil vom 10. Februar 2009 in der Rechtssache C.-301/06) beantwortet – dahingehend, dass auch die Binnenmarktkompetenz habe genutzt werden dürfen, um unterschiedliche nationale Regelungen mit – angesichts der hohen Kosten der vorgeschriebenen Speichermaßnahmen - entsprechend unterschiedlichen Belastungen für die betroffenen Unternehmen zu vermeiden.

inhaltsleer und nicht mehr das, was er sein soll. Er soll eine Barriere sein gegen den unitaristischen Fehlschluss, der da lautet: Wenn eine Maßnahme gut, richtig und wichtig ist, dann ist es auch gut, richtig und wichtig, sie möglichst zentral, im größtmöglichen politischen Kollektiv, zu treffen, weil ja nur so verhindert werden kann, dass in irgendeinem der zugehörigen kleineren politischen Kollektive das Gute, Richtige und Wichtige womöglich unterbleibt. Wo dieser Schluss als zulässig gilt, da ist es mit jeder dezentralen demokratischen Selbstbestimmung vorbei.[12]

Tatsächlich ist natürlich Art. 5 III EUV so nicht gemeint; die Ineinssetzung von Positiv- und Negativkriterium ist unrichtig.

Das wichtigste Element des Respekts vor der demokratischen Selbstbestimmung der Mitgliedstaaten steckt in dem ersten, dem negativen Kriterium, nach dem die Union nur tätig werden darf, wenn die Ziele der in Betracht gezogenen Maßnahmen von den Mitgliedstaaten nicht ausreichend verwirklicht werden können.

Hier muss das Wort „können" ernst genommen werden. Danach genügt es eben *nicht*, dass ein Ziel der Union deshalb nicht verwirklicht wird, weil die Mitgliedstaaten, oder einige von ihnen, auf nationaler Ebene nicht die Regelungen treffen *wollen*, die aus der Sicht des Unionsgesetzgebers sinnvoll und notwendig sind, um das Ziel der in Betracht gezogenen Maßnahmen zu erreichen.

Zusätzlich hat man das Subsidiaritätsprinzip, wie bekannt, durch ein sogenanntes „Frühwarnsystem" und durch ein Klagerecht der mitgliedstaatlichen Parlamente zu stärken versucht. Das Frühwarnsystem besteht darin, dass gegen Entwürfe für Gesetzgebungsakte der Union die Parlamente der Mitgliedstaaten binnen acht Wochen den Einwand der Subsidiaritätswidrigkeit erheben können[13]. Das führt aber nur zu Berücksichtigungs- und Prüfungspflichten der Gesetzgebungsorgane und, wenn der Einwand nichts fruchtet, zu einem Klagerecht der nationalen Parlamente und des Ausschusses der Regionen, Nichtigkeitsklage vor dem EuGH zu erheben[14].

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12 Meines Erachtens ist zudem die Analyse von *Takis Tridimas* richtig, dass das Prinzip der Subsidiarität „comes into play at an earlier stage than proportionality", weil die Subsidiarität die Frage betrifft, ob überhaupt auf Gemeinschaftsebene gehandelt werden muss, während das Verhältnismäßigkeitsprinzip erst ins Spiel kommt, wenn diese Frage positiv beantwortet ist; vgl. Takis Tridimas, The General Principles of EU Law, 2nd. ed., 2006, S. 176. Hier zeigt sich, dass, obwohl der Unionsvertrag beide Prinzipien gleichermaßen als Kompetenzausübungsregeln eingeordnet hat, der Subsidiaritätsgrundsatz dem üblichen Verständnis einer Kompetenzregel als einer Regel, die bestimmt, *ob* ein Akteur in einer bestimmten Materie tätig werden darf, näher steht als der Verhältnismäßigkeitsgrundsatz, der das *Wie* betrifft (auch wenn zuzugestehen ist, dass diese Unterscheidung Abgrenzungsschwierigkeiten bereitet, weil von der Definition des Bezugsobjekts abhängt, ob die Frage nach der Zulässigkeit einer Regelung als Ob-Frage oder als Wie-Frage dasteht). Daraus ergibt sich die Frage, ob es korrekt sein kann, dass der Gerichthof häufig die Frage, ob eine Maßnahme mit dem Grundsatz der Subsidiarität vereinbar ist, erst nach der Klärung und positiven Beantwortung der Verhältnismäßigkeitsfrage prüft - eine Reihenfolge, die zugleich die häufig unzureichende inhaltliche Unterscheidung beider Prinzipien begünstigt.

13 Art. 6 des Protokolls über die Grundsätze der Subsidiarität und der Verhältnismäßigkeit.

14 Werden die Einwände mit einem Drittel bzw. – in bestimmten für besonders sensibel erachteten Angelegenheiten – einem Viertel der insgesamt den Parlamenten zugeteilten Stimmen erho-

Die Funktion des Frühwarnsystems besteht also primär in der Organisation von Kommunikation über den Subsidiaritätsgrundsatz. Das Klagerecht, das die Einwände mit einem gewissen - angesichts der bisherigen Rechtsprechung des EuGH allerdings begrenzten - Drohpotential unterfüttert, ist allerdings durch ein hohes Quorum (der Einwand muss in der Regel von einem Drittel der Parlamentsstimmen erhoben sein) begrenzt; die dafür notwendige Koordination wird durch eine Einwendungsfrist von nur acht Wochen sehr erschwert. Was die Wirkkraft des Frühwarnsystems in seiner gegenwärtigen Form angeht, ist daher Skepsis angebracht.[15]

Am ehesten sollte man auf den Europäischen Gerichtshof hoffen, zumal hier *de lege lata* auch die naheliegendste Ressource für die Stärkung des Frühwarnsystems liegt. Nur wenn die nationalen Parlamente mit ihren Einwänden im Vorfeld einer wirksamen Gerichtskontrolle agieren, werden sie die Kommission zu wirksamem Nachdenken veranlassen können.

Der Gerichtshof hat zwar im Prinzip anerkannt, dass es sich bei dem Subsidiaritätsgrundsatz um eine justiziable Rechtsnorm handelt. Es sieht aber bislang nicht so aus, als sei das mehr als ein Lippenbekenntnis. Als Hüter des Selbstbestimmungsrechts der Mitgliedstaaten tritt er bislang nicht auf, und es ist bislang auch nicht erkennbar, dass er sich durch das Subsidiaritätsprinzip wirklich in diese Rolle gesetzt sähe.

Der Präsident des EuGH, Wassilios Skouris, hat einmal geschrieben: „Das Verhältnismäßigkeitsprinzip verlangt, dass staatliche Eingriffe in die Freiheitssphäre des Einzelnen nicht weiter gehen dürfen als dies notwendig ist, um ein legitimes, im Gemeinwohl liegendes Ziel zu erreichen. … In strukturell ähnlicher Weise schützt das Subsidiaritätsprinzip des Art. 5 EGV die Mitgliedstaaten davor, dass die Gemeinschaft in ihre Kompetenzen eingreift und Aufgaben an sich zieht, die auf mitgliedstaatlicher Ebene in hinreichender Weise oder sogar besser erledigt werden können.“[16] Das trifft das Wesentliche und hilft, den Sub-

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ben, dann muss das initiierende Organ, in aller Regel die Kommission, den Vorschlag überprüfen und einen begründeten Beschluss fassen, der allerdings auch dahin lauten kann, dass an dem beanstandeten Entwurf festgehalten wird. Etwas weiterreichende Verhinderungsmöglichkeiten bestehen in Angelegenheiten, die dem ordentlichen Gesetzgebungsverfahren unterliegen, für den Fall, dass ein Entwurf mit der Mehrheit der Parlamentsstimmen beanstandet wird. Auch in diesem Fall wird die Weiterverfolgung des Gesetzgebungsprojekts aber nur gestoppt, wenn der Rat mit einer Mehrheit von 55 % seiner Mitglieder oder das Parlament mit der Mehrheit der abgegebenen Stimmen befinden, dass der Vorschlag mit dem Subsidiaritätsprinzip nicht in Einklang steht. Zum Ganzen s. im Einzelnen Art. 6-8 des Protokolls über die Grundsätze der Subsidiarität und der Verhältnismäßigkeit. Speziell zum Klagerecht Art. 8 des Protokolls über die Grundsätze der Subsidiarität und der Verhältnismäßigkeit i.V.m. Art. 263 AEUV (ex-Art. 230 EGV).

15 Vgl. auch Papier, Das Subsidiaritätsprinzip als Bremse des schleichenden Zentralismus in Europa? Vortrag, Tübingen, 28. November 2006 (www), S. 14; ohne große Erwartungen auch Ritzer/Ruttloff, EuR 2006, 116 (131 ff.); etwas optimistischer Koch/Kullas, Subsidiarität nach Lissabon - Scharfes Schwert oder stumpfe Klinge? Centrum für Europäische Politik, März 2011 (www).

16 Skouris, Das Subsidiaritätsprinzip und seine Bedeutung in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften, in: FS für Luzius Wildhaber, 2007, S. 1547 ff. (1557 f.).

sidiaritätsgrundsatz als wesentlichen Baustein einer auf Selbstbestimmung zielenden Ordnung zu identifizieren:

So wie der Grundsatz der Verhältnismäßigkeit als das zentrale materielle Element des Grundrechtsschutzes die individuelle Selbstbestimmung – traditionell Freiheit genannt – dagegen schützt, unnötig beschränkt zu werden durch Regelungen, die eine politische Entität, dem das Individuum angehört, in Ausübung ihres kollektiven Selbstimmungsrechts verfügt, so schützt der Grundsatz der Subsidiarität die Selbstbestimmungsansprüche der kleineren politischen Entitäten (hier: der Mitgliedstaaten) gegen unnötige Beschränkungen durch die Ausübung der Selbstbestimmungsrechte der größeren politischen Einheit (hier: der EU), der sie angehören.

Verhältnismäßigkeit und Subsidiarität haben insofern eine gleichartige Funktion, und die jeweils erforderliche Abwägung sollte gleichen Grundsätzen folgen. Aber sie haben ihre Funktion nicht am selben Ort und dürfen daher auch nicht einfach vermischt werden. Mit der Feststellung, dass ein normatives Rauchverbot in Gaststätten im Hinblick auf die Grundrechte der davon negativ Betroffenen verhältnismäßig ist, ist die Frage, ob über ein solches Verbot in Brüssel, Berlin, München oder Oberammergau entschieden werden sollte, noch nicht beantwortet.

Das Bundesverfassungsgericht hat in seinem Lissabon-Urteil deutlich gemacht, dass es sich hinsichtlich der Wahrung des unionsrechtlichen Subsidiaritätsgrundsatzes eine Reserve-Kontrollkompetenz vorbehält, als Bestandteil einer sogenannten ultra-vires-Kontrolle: „Wenn Rechtsschutz auf Unionsebene nicht zu erlangen ist, prüft das Bundesverfassungsgericht, ob Rechtsakte der europäischen Organe und Einrichtungen sich unter Wahrung des gemeinschafts- und unionsrechtlichen Subsidiaritätsprinzips… in den Grenzen der ihnen im Wege der begrenzten Einzelermächtigung eingeräumten Hoheitsrechte halten …“[17]

Die ultra-vires-Kontrolle sichert die Grenze der grundgesetzlichen Integrationsermächtigung, die darin liegt, dass die Bundesrepublik Deutschland der Union nach Art. 23 I GG nur einzelne Hoheitsrechte, nicht aber das Recht zur Verfügung über den Bestand an eigenen Hoheitsrechten – und damit die staatliche Souveränität als solche – übertragen darf, und auch dies nur mit der Maßgabe, dass dabei der Subsidiaritätsgrundsatz eingehalten wird.

Neben der Absicherung der deutschen Eigenstaatlichkeit liegt darin auch ein verfassungsrechtlicher Flankenschutz für den unionsrechtlichen Subsidiaritätsgrundsatz.

Die institutionelle Stärkung, die dieser Grundsatz dadurch erfährt, bleibt aber zwangsläufig schwach. Der EuGH kennt die vorbehaltene Reservekompetenz und das damit verbundene Risiko eines Konflikts mit den Gerichten, in dem seine Autorität in Frage gestellt wird. Er weiß aber natürlich auch, dass und warum das Bundesverfassungsgericht bemüht sein muss, es zu einem solchen

17 BVerfGE 123, 267 <353 f.> (die Weglassungen betreffen Zitate).

Konflikt nach Möglichkeit nicht kommen zu lassen. Die kürzlich ergangene Honeywell-Entscheidung des Bundesverfassungsgerichts hat klargestellt, dass das Gericht die vorbehaltene ultra-vires-Kontrolle nicht im Sinne einer allgemeinen Fehlerkontrolle – auch nicht in Kompetenzfragen[18] – ausüben wird[19].

Anders als mit großer Zurückhaltung kann die vorbehaltene Reserve-Kontrollkompetenz in der Tat nicht ohne ruinöse Folgen ausgeübt werden. Damit bleibt aber natürlich auch die präventive Wirksamkeit dieser Reservekompetenz als institutionelle Stütze des unionsrechtlichen Subsidiaritätsgrundsatzes begrenzt.

Institutionelle Arrangements, die für eine bessere Absicherung des Subsidiaritätsgrundsatzes auf der Ebene der EU sorgen könnten, sind schwer auszudenken. Es ist eine gesonderte, gemischte - aus Vertretern der europäischen und der nationalen Ebene zusammengesetzte - Gerichtsbarkeit für Kompetenzstreitigkeiten vorgeschlagen worden, die mit Hilfe von Vorkehrungen zur Vermeidung einer Fraternisierung der Richter mit der EU und Stärkung ihrer Loyalität zum Herkunftsstaat einen besseren Subsidiaritätswächter als der EuGH abgeben soll[20]. Ich fürchte, dass ein solches Konstrukt schon aufgrund von Koordinationsproblemen und internen Frontstellungen, die sich hier zwangsläufig ergeben, nicht gedeihlich funktionieren kann[21].

Wenn es aus anderen Gründen zu erneuten Vertragsänderungen kommt, sollte man an eine schärfere und klarere Ausformulierung des Subsidiaritätsgrundsatzes und an eine Senkung des Quorums beim Frühwarnsystem denken. In Deutschland hat sich eine Verfassungsänderung, die dem Subsidiaritätsgrundsatz im Verhältnis zwischen Bund und Ländern Nachdruck verleihen sollte, als wirksamer Ansporn zu einer intensiveren verfassungsgerichtlichen Kontrolle erwiesen[22]. Auch die mit dem Vertrag von Lissabon eingeführte Möglichkeit von Volksbegehren auf EU-Ebene (Europäische Bürgerinitiative, Art. 11 Abs. 4 EUV) hat das Potential, zu einem Instrument der Wahrung des Subsidiaritätsgrundsatzes zu werden. Diesen Grundsatz ernstzunehmen, entschieden seine Beachtung und seine institutionelle Stärkung einzufordern, und damit auch auf der fortdauernden Bedeutung der nationalen Verfassungsordnung zu bestehen, ist weder ein Ausdruck des Nationalismus noch Ausdruck eines prinzipiellen Euroskeptizismus. Ganz im Gegenteil. Es geht hier um ein zentrales Prinzip der Demokratie in Mehrebenensystemen und um eine wesentliche Bedingung

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18 Wie Kompetenzverstöße sich von bloßen Fehlern unterscheiden lassen, ist ohnehin unklar.

19 BVerfGE 126, 286.

20 Broß, VerwArch 2001, 425 (429). S. auch, für Überlegungen zu einem mit nationalen Parlamentsabgeordneten, EP-Abgeordneten und Mitgliedern des Ausschusses der Regionen zusammengesetzten Subsidiaritätsausschuss, der als Schlichtungsorgan im Gesetzgebungsverfahren tätig werden solle, Calliess, EuGRZ 2003, 181 (195); Koenig, JZ 2003, 167 (169 f.), m.w.N.

21 Kritisch auch Everling, EuZW 2002, 357 ff; Mayer, Kompetenzüberschreitung und Letztentscheidung, 2000.

22 S. dazu - auch mit Blick auf die europäische Ebene - Calliess, EuGRZ 2003, 181 (187 ff.).

dafür, dass die transnationalen Systeme und Ordnungsleistungen, auf die wir dringend angewiesen sind, die Stärke gewinnen und bei den Bürgern die Akzeptanz finden, die notwendig sind, damit wir unsere Lebensbedingungen auch unter den Bedingungen der Globalisierung wirksam politisch gestalten können.

What is the English Constitution? The Answer of John James Park in the Crucial Year 1832*§

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Summary

1. Constitutional developments from the Glorious Revolution to the Act of Settlement. – 2. The affirmation of the role of Prime Minister and of rule by Cabinet. – 3. Towards the crucial year. – 4. The long, eventful road to the *Representation of the People Act*. – 5. *The Dogmas of the Constitution*.

Abstract

From the 1688 revolution to the beginning of 19th century, the English constitution underwent a deep transformation. While the divine right of Kings and the royal prerogative

* Both form and contents of the lectures delivered in Trieste in March 2012 are here echoed to a reasonable extent (*Triestine Lectures*, Faculty of Law, field: *History and Technique of European Codes and Constitutions*). Footnotes are thus limited to references to actual quotations and to an essential bibliography.
This paper is the forerunner of a forthcoming book that will include the Italian translation of J. J. Park's work *The Dogmas of the Constitution*, along with its examination. As such, it was thought of, planned, discussed and revised together by both contributors. However, as the needs of each individual CV are involved as well, it is necessary to point out that the first and second paragraph come under Ugo Bruschi's authorship, whereas the third, fourth and fifth paragraph under Davide Rossi's.

§ This paper has been submitted to an external referee.

waned, the role of Prime Minister and rule by Cabinet became paramount; a two-party system gradually imposed itself in the new-born "Great Britain". But this essential change went nearly unobserved by political thinkers and jurists of the time, with the notable exception of J.J. Park, who published The Dogmas of the Constitution, *a sharp denunciation of the gap between theoretical and actual constitution, in 1832, the year of the Great Reform Act.*

Keywords

British Constitution - Constitutional Theory - Glorious Revolution - Great Reform Act - J. J. Park - Prime Minister - Rule by Cabinet

> *'If constitutional change has been gradual in Britain, it has certainly not been in a straight line of even progression. A cynic might describe it as long periods of lethargy interspersed with sudden bouts of energy'*[1]

1 – Constitutional developments from the Glorious Revolution to the Act of Settlement

In 1688 the Glorious Revolution was a turning point not just in the political history of England, but in the development of the Constitution as well. Having imposed on the fiercely anti-Catholic majority of his subjects a policy strongly bent on the rehabilitation of Catholics and a drive towards absolutism clearly reminiscent of the unlucky attempt of his father, the executed Charles I, King James II had to face a strong opposition in the country, and eventually gave up any attempt to defend his crown on the field. The Glorious Revolution (so called because bloodshed was avoided in England, although not in Ireland and in Scotland) ended with the King fleeing into exile and throwing the Great Seal of the Realm in the Thames (so it was said, at least), whereas William III of Orange (1650-1702; King of England 1689-1702) was called to the throne, and reigned along with Queen Mary Stuart, James's daughter. The new ruler was a strong Protestant prince with a keen military talent and had been called to England by an appeal of political and religious leaders of the country, after the birth of a Catholic heir to James II in June had brought the crisis to a head. William's strength depended both on the military force he deployed (mainly Dutch veterans) and on the fact that he was soon to become the only practical alternative to a civil war. Hardly anybody who had experienced the chaos generated by the fight between King and Parliament half a century earlier was likely to choose a new, violent

1 Lord Holme of Cheltenham, *The Changing British Constitution: Checks and Balances*, in Torre-Volpe (Eds.) *La Costituzione Britannica / The British Constitution*. Atti del convegno dell'Associazione di Diritto Pubblico Comparato ed Europeo. Bari, Università degli Studi, 29-30 maggio 2003, I-II, Giappichelli, Torino, 2005 (*Diritto Pubblico Comparato ed Europeo. Convegni*, V), pp. 567-573, at p. 567.

struggle. Nonetheless, William had to accept a compromise. After a conflict that had begun during the reign of Elizabeth I, and had reached tragic results during the reign of the Stuarts, parliamentary forces were not ready to assign the crown to a King who had not accepted clear legal restrictions to the power he was to wield. It must not be forgotten that the decision to forego the rights of James II and assign the throne to a new prince whose dynastic rights were weak was not an easy one, and led to a fracture in the front itself that had stood against the Stuart King. The interpretation of the flight of the King as an act that had left the throne 'vacant' (and not simply an abdication, that would have implied an heir) was not self-evident: the risk of turning hereditary into elective monarchy was clearly perceived. It is therefore unsurprising that in the following years attempts of the Jacobite forces to regain the crown were not without a certain backing in the country, and played also a role in the dialectics between the new-born parties, Whigs and Tories. These parties (curiously enough, their names were in the beginning terms of abuse…) had originated a few years before, during the 'Exclusion Crisis' (1678-1681), i.e. the attempt to exclude James, at the time Duke of York and heir presumptive, who had converted to Catholicism in 1669, from the succession of his brother, Charles II. The long crisis had ended with the dissolution of Parliament in March 1681, and James – who had been sent to Scotland for a few years – came back to London with his right to the throne untouched. At this juncture, the Tories had lined up with the King, whereas the Whigs had shared the feeling of suspect and fear at the prospective of a Catholic monarch that was widespread in the country. Generally speaking, the Tories envisaged a commanding monarchy and feared the return of a powerful parliamentary authority, while the Whigs aimed to a limitation of the prerogative powers of the monarch that had to be counterbalanced by a strong Parliament.

At the beginning of 1689, with James II exiled in France and William and his army in London, the 'Convention Parliament' had to face a rather complex constitutional dilemma. In the House of Lords there was a certain opposition against choosing the Prince of Orange as King; even most of the bishops whose resistance to James's Declaration of Indulgence had precipitated the crisis sided against this alteration to the established laws of succession, on the ground that such an option would be as illegal as the royal acts they had opposed beforehand. In the House of Commons, the Whig majority maintained that the King had broken the covenant with the people, thus neglecting his duties, and leaving the throne vacant. The idea of a vacant throne was not, anyhow, compatible with the traditional theory of hereditary succession, expressed in the old formula, *the King never dies*. This implies that at the death of the monarch, his/her heir immediately and automatically succeeds: if it was the Parliament's task to decide who was to ascend to the throne, an elective monarchy was virtually established. Such an idea was therefore opposed by moderates, who also disliked the concept of a contract between King and Nation. William and Mary refused the proposal to reign as regents while James lived, and afterwards as his heirs (the new-born Prince of

Wales had clearly been easily forgotten). In the end, the offer of the crown to William was a compromise not deprived of ambiguity: the Tories could call James's flight 'abdication' and his physical absence 'vacancy of the throne', whereas the Whigs could hint at the breach in the fundamental law of the country and to the infringement, on the King's part, of the covenant between him and his people. Anyhow, one thing was clear: no one was ready to be responsible for an explicitly revolutionary settlement.

The ascension to the throne of William and Mary, however, marked the beginning of a new era in the relations between Crown and Parliament: oddly enough at the beginning of the reign, neither the King nor the Parliament had any legitimacy without the other.[2] The new regime is usually described (but some historians disagree) in terms of a constitutional monarchy, although not of a parliamentary monarchy. As a matter of fact, the interpretation of the Glorious Revolution and the Bill of Rights as the beginning of parliamentary sovereignty was largely indebted to the Victorian constitutional theorist and jurist Albert Venn Dicey and should be abandoned as it overstates the implications of the 1688 settlement. The long struggle between King and Parliament, ended in 1689, had been concerned with the limits of sovereignty, and therefore it was highly unlikely that, after having imposed limits on the authority of the King, the new settlement would not vest any limit to the authority of Parliament: the risk of a potentially boundless power was clearly felt, and feared. In 1689 the supreme legislative power, despotically wielded by Stuart kings, had been transferred to the *King in Parliament*, that is to say the combination of the powers of the Crown and of the assembly in Westminster. After kings, parliaments and army had all endeavoured to monopolize power in the previous decades, although unsuccessfully, compromise seemed the only possible solution. It is therefore extremely unlikely that a boundless power would be granted to Parliament. More than in terms of parliamentary sovereignty, the new system can be described in terms of a parliamentary-based government. What was offered to William and Mary 'was therefore an expressly (and no longer impliedly) limited Crown'.[3]

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2 'The Convention Parliament was no Parliament. […] Historically, Parliament was an agency of the crown, summoned by the sovereign, or at least in his name, as with the Parliaments which had forced out Edward II and Richard II. The Convention Parliament of 1689 had not been summoned in any king's name, but by an alien. It bore no resemblance to the Convention of 1660, which had merely asked the legal ruler to return to his own. But the Convention Parliament of 1689, without legal status, legislated the alien who had summoned it into king; and he then assented to a measure transforming the Convention into a regular Parliament. For legal purists all this was impossible' (Lovell, *English Constitutional and Legal History. A Survey*, OUP, New York, 1962, pp. 394-395). On the ensuing paradox, see Wicks, *The Evolution of a Constitution. Eight Key Moments in British Constitutional History*, Hart Publishing, Oxford and Portland (Oregon), 2006, p. 15: 'In a revolution fought to preserve, rather than overthrow, the law, this was a curious basis for settlement, but 300 years of Crown and government rest upon this strange turn of events'.

3 Ibid, p. 11. It is to be admitted, though, that there is some evidence also for a reconstruction of the events as an affirmation of parliamentary sovereignty, especially with reference to the arbitrary dynastic change decided by the assembly at Westminster both in 1689 and with the

With the Declaration (= "*An Act declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne*", 13th February 1689) and later the Bill of Rights, the role of Parliament and Rule of Law[4] were nonetheless recognized by King and Queen. The Rule of Law binds the sovereign, whose power can no longer be called absolute; there is a new cooperation in the exercise of power: *King in Parliament* as to the legislature, *King in Council* as to the executive and *King in His Court* as to the judiciary. As a result of the Bill, the powers of the sovereign were limited, and the rights of Parliament were set out. They included rules for freedom of speech in the House ('*the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament*'), along with conditions for regular elections to Parliament ('*election of members of Parliament ought to be free*') and the right to petition the King without fear of retribution. These issues had been a reason for disagreement between Crown and Parliament since the first parliaments of Queen Elizabeth I. In the context of the 1688 crisis, parliamentary forces realized that this was an excellent occasion to state the limits of the royal prerogative while testifying what rights belonged to MPs. The Crown had also to respect laws approved by the Parliament, without neglecting or suspending them ('*the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parliament is illegal; the pretended power of dispensing with laws or the execution of laws by regall authority as it hath been assumed and exercised of late is illegal*'). Every royal interference with the law was banned: even though the sovereign is still the fount of justice, he cannot unilaterally establish new courts or act as a judge. The Bill of Rights also warranted that no taxation could be established by royal prerogative: the agreement of Parliament became thus necessary for the implementation of new taxes. Cruel and unusual sanctions were prohibited, and the right to bear arms was granted to non-Catholics. A further bugbear of the previous decades, a permanent army under control of a powerful leader, was excluded as well: '*the raising or keeping a standing Army within the Kingdome in time of peace unlesse it be with consent of Parliament*' was banned; actually, though,

Act of Settlement in 1701. Goldsworthy, *The Sovereignty of Parliament. History and Philosophy*, Clarendon, Oxford, 1999, pp. 142 ff. claims that at times the power of *King* (or *Queen*) *in Parliament* was described as absolute, i.e. not subject to any *legal* remedy, even though it was not unlimited. See also ibid., pp. 190-191, for a further possible distinction between 'legality' and 'constitutionality', and their relation to the limits of sovereignty. As a matter of fact, the solutions to the constitutional crisis in 1688 and to the impending one foreshadowed by the upcoming death of Queen Ann without an heir apparent were always the result of difficult compromise. This fact probably allows for very different interpretations of their outcome. It is not at all surprising that in 1689 *Some Observations Concerning the Regulating of Elections to Parliament*, by Anthony Ashley-Cooper, 1st Earl of Shaftesbury and one of the founders of the Whigs, appeared posthumously, displaying a sharp opening: '*the Parliament of England is that supreme and absolute power, which gives life and motion to the English government*' (quoted in Browning (ed.), *English Historical Documents 1660-1714*, Routledge, London – New York, 1996, p. 211). Nonetheless, one cannot help wondering how many agreed, at court, between High Churchmen, between MPs, and even in the country as a whole?

4 Rule of Law had long been symbolised by *Magna Charta*, especially chapters 39-40.

permanent armies under the control of the King remained part of the political scene well into the Georgian era. Finally, with a decision that was later reinforced by the Act of Settlement, Catholics – and consorts of Catholics – were excluded from the succession to the crown: '*all and every person and persons that is, are or shall be reconciled to or shall hold communion with the see or church of Rome or shall professe the popish religion or shall marry a papist shall be excluded and be for ever uncapeable to inherit possesse or enjoy the Crowne and government of this realme*'.

It is remarkable that, although a success for parliamentary forces, the Bill of Rights cannot altogether be considered as a sort of imposition on the new King, nor the sign of any acceptance, on his part, of the contract theories of government. The Declaration of Rights before the Bill had in truth echoed the one issued by William of Orange before landing to England with his army: in that masterpiece of propaganda[5] not only had William claimed his wife's rights to the succession of James II, even calling in doubt the authentic birth of James's new-born Catholic son, but, quite more poignantly, he had avowed that the aim of his journey to England was the defence of the ancient rights of the English people. These rights were perceived as a part of Common Law tradition against the Stuart's attempt to create despotism, even though they were actually creations of more than a century's struggle between Crown and Parliament. Once incorporated first in the Declaration and then (in a slightly different version) in the Bill of Rights, such privileges could not be denied by William, who had exhibited them just a few weeks before (30th September 1688). In answer to the so-called 'invitation' of the peers who were opposing James II, he had claimed that his expedition to England was 'intended for no other design, but to have a free and lawful Parliament assembled as soon as possible'. Having been recognized as a traditional restraint on the power of the Crown, which existed before James II and whose denial had brought forth the King's fall, the rights granted by the Bill could not be deemed an imposition on William, nor the acknowledgement of a contractual origin of his power.[6]

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5 William's manifesto had a crucial impact: not only was it issued in around 60,000 copies ('in an age in which even the best-selling political pamphlets were rarely printed in more than 2,000 or 3,000 copies'), but secret on its exact content was strictly guarded until the very last moment: cf. Israel, *The Dutch Role in the Glorious Revolution*, in Israel (ed.), *The Anglo-Dutch Moment. Essays on the Glorious Revolution and Its World Impact*, CUP, Cambridge, 1991, pp. 105-162, at pp. 121-122.

6 The Prince of Orange had come to England with the purpose of obtaining English assistance for the United Provinces in their fight against France. In order to achieve this aim, William was ready to grant some limitation to the power of the Crown; in the interim between his landing at Torbay and his coronation he was tireless in his assertion that the new constitutional settlement that was taking shape was consistent with his Declaration. Cf. Israel, *General Introduction*, in *The Anglo-Dutch Moment*, pp. 1-43, at pp. 17-19.

Most historians deny that the Declaration and the Bill of Rights amounted to a set of conditions that William had eventually to accept: a different position is held by Schwoerer, *The Bill of Rights: Epitome of the Revolution of 1688-89*, in Pocock (ed.), *Three British Revolutions: 1641, 1688, 1776*, PUP, Princeton New Jersey, 1980, pp. 224-243, who maintains that the Bill was a radical document

Although it marks a border between Parliament's legislative power and the prerogative of the Crown, the Bill does not include the catalogue of rights a 21st century jurist would probably expect to find in such an important part of the English Constitution. As a matter of fact, this was not the aim of the Bill: it was meant to explicitly state the limitations on monarchic power. As such, it had first a political value, and only later a juridical one. Nor did it claim to be anything new: apparently the Bill was restoring an important legacy of the past, the ancient constitution (the adjective had at the time rather prevalent positive undertones) attacked by James II. The Bill provides a new settlement of power between Crown and Parliament:[7] individual rights emerge just as far as they are mirrored in their dialectic.

Although some limits to his power had been clearly declared, the King retained nonetheless the royal prerogative, i.e.:

- he was head of State and of Anglican Church;
- he appointed members of the Privy Council, high ranks of the Army, Navy, Church and civil service;
- he granted honours and gave titles and privileges;
- he was in charge of diplomacy, he issued declarations of war and peace, and formed international treaties;
- he summoned, prorogued and dissolved Parliament, he created peerages;
- he could refuse the royal assent to bills approved by the Parliament, thus preventing them to become law (= veto).

It is impossible to deny that he was still a *governing King*.

Anyhow, the real sanction of the revolution settlement was the new financial system put in place after the Glorious Revolution. It created a strong dependence of the monarch on the support of Parliament, in order to have enough supplies to carry out his policy. After 1688 it can be said (in Trevelyan's words), 'No King after James II has ever been in a financial position even to attempt to break the law or quarrel seriously with the House of Commons'.[8] It was largely because of the practical need to secure finances that Parliament (although in theory still called by the monarch) was continually in session. A difficult, lingering problem was thus solved: among the causes of the fight between Crown and Parliament earlier in the century had figured the reluctance of the tax-payers to contribute to the

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expressing the position of those that aimed to change not just the King, but kingship as well, although 'in sum, more was hoped for than was achieved in the Bill of Rights; more was achieved than has been always appreciated' (ibid., p. 237).

7 A century afterwards Thomas Paine will censure this aspect of the Bill, dismissing it as *'but a bargain which the parts of government made with each other to divide profits, power and prestige'*: *The Rights of Man*, Penguin, Harmondsworth, 1969 [1792], p. 215.

8 Trevelyan, *The English Revolution 1688-89*, OUP, London, 1938, p. 180.

cost of unpopular policies, and their political ability through Parliament to refuse supplies. Given the new political context created by the Glorious Revolution, this contrast was finally solved, thanks to a psychological rallying of the 'middling' sort, gentry and nobility behind the Crown and its policies. This result was achieved after 1689, in the early stage of the wars against France; the consequent financial revolution solved the long-lasting financial problems of the Crown. The new system was based on a severe land tax, the beginning of an excise tax and the foundation of the Bank of England. But this new settlement was built on the concession of parliamentary control over both policies and resources to enforce them. Having thus created a strong need of the King for the cooperation of Parliament, it became quite unnecessary to enact that Parliament ought to be held frequently. In 1694, anyhow, the *Triennial Act* required general elections to be held at least every three years: it 'was the first statutory restriction upon the royal prerogative of dissolving Parliament and must be regarded as a significant curtailment of royal power'.[9] Between the tactics used by Parliament to control the executive, the practice of 'tacking' must be mentioned, too: it was usually used as a last resort, and it meant an attempt by Parliament to attach to money Bills clauses relating to other issues, in order to grant them the royal assent. One has to bear in mind, though, that if the Houses had the possibility to exercise a certain control over the monarch, the Crown had the opportunity to limit parliamentary authority thanks to the division between Whigs and Tories. As a matter of fact, in the political game, the measures proposed by the Crown could usually count on the support of one of the two parties, and a keen display of royal influence or of strategy could lead the monarch to command a majority in the House of Commons. The practice of balanced ministries usually followed by William and – more often than not – by his successor, was a step in the same direction.

Whereas William III was jealous of his prerogative, under the reign of Queen Ann I (1665-1714; Queen of England and later of Great Britain 1702-1714) a cabinet system received strong impulse. One should not forget, in this perspective, the importance of the Act of Settlement, passed in 1701, during the reign of William III: it stated that Catholic monarchs, and those married to Catholics as well, were excluded from the throne. Furthermore, the law required that not merely must the sovereign be a Protestant, but he must also be a member of the Church of England (unlike William III). It also stated that, on the death of William III, the throne would pass to Mary's sister, Ann. After her death, it would be the turn of Sophie of Hanover, grand-daughter of James I, and of her descendants. The perspective of the installation of a foreign house on the throne of England probably led Parliament to envisage limits to their authority, especially as far as foreign policy was concerned; independence of the judiciary was granted as well, providing that judges could not

9 O'Gorman, *The Long Eighteenth Century. British Political and Social History 1688-1832*, Arnold, London, 1997 (*The Arnold History of Britain*), p. 37.

be removed without the assent of Parliament.[10] It must also be remarked that the Act of Settlement put an end to the issues that had been left open by the Glorious Revolution. Whereas in 1688 the Convention Parliament had not dared to affirm its right to call a new house to the throne and had chosen a shortcut, pretending to believe in the abdication of James II and apparently forgetting the existence of a Catholic heir, in 1701 the Parliament's right to choose the King was virtually established: rightful succession relented in front of political necessity. Whatever remained of the old panoply of the divine right of kings was soon to disappear. Already in 1696, incidentally, the formula of the Oath of Association passed by Parliament had included the definition of William III as lawful King that had been carefully avoided in 1689.[11] At the beginning of the 18th century a new constitutional system was definitely born, whose legacy is still of vital importance nowadays.[12]

2 – The affirmation of the role of Prime Minister and of rule by Cabinet

During the reign of Ann the role of Whigs and Tories acquired importance, as the Queen, unlike William III, was not able to use the rivalry between the two parties

10 This newly-established independence of the judiciary must not be overestimated, though. Until 1761 the sovereign guarded the right to dismiss judges when ascending the throne, and even though such a prerogative was exercised only seldom, it implied that influence of the Crown was still going on. Furthermore, wages were usually late, and until 1799 pensions depended exclusively on the King's will. Moreover, even if the Crown had lost most power to damage judges, it was still possible to cajole them, by granting them honours, appointing them (or their relatives and friends) to posts, even creating them peers. This explains the scepticism with regard to the actual independence of judges that can be traced in 18th century sources. Cf. Lemmings, *Professors of the Law. Barristers and English Legal Culture in the Eighteenth Century*, OUP, Oxford, 2000, pp. 270-274.

11 'The Act of Settlement [...] was the final ratification of the Revolution of 1688, and in its pronouncements on the succession it frankly ignored the comforting illusion of "legality" which some people still cherished. These people said that after all Mary II was the "true" heir of James II and that William III was king because he was her husband, which was not impossible logic and had the precedent of Philip I and Mary I. The theory became a little more strained with Ann. [...] However, to move the succession to Sophia in 1701 could not be justified on such grounds; it was an outright assertion that Parliament was free to decide the matter as it thought best' (Lovell, *English Constitutional and Legal History*, p. 396). It is noteworthy, though, that the dual monarchy of William and Mary was totally unprecedented: their equal share in the dignity of the title – albeit the exercise of royal power resided, during his lifetime, with the King alone – implied a position quite more authoritative than the one granted to Philip in the 1550s: cf. Morrill, *the Sensible Revolution*, in *The Anglo-Dutch Moment*, pp. 73-104, at p. 84

12 'The Bill of Rights, the Habeas Corpus Act (1679), [...] and the legal guarantee of an independent judiciary, which was enshrined in the Act of Settlement (1701) demonstrate the important contribution that Parliament made to establish the modern rule of law within the English constitutional system. [...] The rule of law and the guarantees regarding an independent judiciary, serving as the precondition of effective legal protection [...] are based without doubt on the legal sovereignty of the King in Parliament': Pernthaler, *The English Roots of European and Global Constitution*, in *La Costituzione Britannica / The British Constitution*, pp. 521-530, p. 528.

in order to affirm the Crown's policy. The figure of the Prime Minister (although the position of Prime Minister had no official recognition yet) gained a greater significance, too. This was one of the most remarkable features of the time, as far as the constitutional system was concerned, along with the growing importance of the Whig party. The most important event of Ann's reign was the birth of the Kingdom of Great Britain, after the *Act for the Union with Scotland* in 1707. The two kingdoms were unified as far as international legal personality, flag, great seal, army, navy, currency, taxation, units of measurement and political institutions were concerned, whereas the legal and the educational system of Scotland were preserved. The independence of the two churches in their government, discipline and worship was recognized as well. The Act of Union generated tension in the population, especially in Scotland where it was at times seen as an incorporation of the kingdom of Scotland in the kingdom of England. However, in 1707 a new entity was doubtlessly created, as it is confirmed by the beginning of new institutions. A new Parliament was born through the union of Scottish and English parliaments, although the unification was sometimes felt as an annexation, since the new Parliament was still based in Westminster Palace and it fulfilled the functions of the previous English one.[13] The outcome can also be read as the birth *de jure* of a new Parliament, whereas *de facto* it was still the old Parliament – with the integration of a few Scottish MPs – which was going on. The 1707 events can strengthen the opinion that the 1689 settlement did not imply an unlimited parliamentary sovereignty (or, at any rate, that such sovereignty came to an end in 1707), as not only did the *Act of Union* include explicit limitations to the powers of the Houses (e.g. as far as Scottish legal and ecclesiastic system was concerned), but also it did not imply, as a whole, any such authority.

It was with the House of Hanover, though, that the 'Whig supremacy' (1714-1760) began and that juridical and political realities grew increasingly separate. The Whigs indeed did give their support to the new dynasty, whereas the Tories had eventually to accept the new kings, but were never able to support unambiguously George I (1660-1727; King of Great Britain and King of Ireland 1714-1727) and George II (1683-1760; King 1727-1760). The position of the Tories became awkward, as they traditionally lined up with the King and the royal prerogative. The adhesion of a minority of Tories to the Jacobite rebellion of 1715 was also used by the Whigs to discredit their opponents. Meanwhile, in May 1716 the *Septennial Act* unilaterally extended the life of an elected Parliament from three to seven years, thus also strengthening the pre-eminence of the Whigs, who had largely won the 1715 general election. The act was amended in 1911, reducing the maximum term of Parliament to five years.

13 Also the fact that the number of MPs granted to Scotland was inferior to the one corresponding to the population of the two countries increased this sensation. On the other hand, it must be remarked that as far as tax payment was concerned, the number of Scottish MPs was quite superior to the one Scotland was entitled to, and in 1707 this was a rather more important parameter. Previous negotiations show that the final solution was a compromise.

The role of the Prime Minister was not altogether new. Royal favourites had been granted a position of leadership in the government of the country since the reign of Elizabeth I at the latest, and George Villiers, later Duke of Buckingham, had been *de facto* King in the last years of James I's and at the beginning of Charles I's reign, until his nearly absolute (and sometimes whimsical) rule was stopped by Felton's dagger in 1628. Later on, the Lord Treasurers and other eminent members of the Privy Council had enjoyed great autonomy from the King and played a role similar to that of the Prime Minister, until their fall – a fall that sometimes did not just cost them their office, but their wealth or their life as well. In the 18th century, though, the situation changed. Whereas clever politicians like Cecil and royal favourites like Buckingham had been trusted to the highest degree by Kings or Queens, and had often been attacked by the House of Commons or, at any rate, had to face its potential, if not always concrete, hostility, the new figure of the Prime Minister had to deal both with the Crown and with the Houses of Parliament, and his power was founded in both relationships. It must be noted that with the first kings of the house of Hanover the political role played by the Crown declined, as the monarchs were a bit of aliens in the British society (George I even spoke only little English) and therefore hardly envisaged personal political aims (with the relevant exception of foreign policy, especially as far as Hanover was concerned). The long lasting (and sometimes knotty) dialectics between King and Parliament of the previous century was thus transformed in subtler dialectic between the leader of the Cabinet, who enjoyed the confidence of a nearly absent King but relished in his own independence, and the Houses. A minister was no more just a counsellor – although a very influential one – of the monarch, but was undergoing a transformation: he became the man to whom the actual policy of the country was entrusted.

Words can sometimes tell an interesting story: as remarked above, the terms used to identify the two parties playing an essential role in British eighteenth-century constitutional history, Whig and Tory, were originally insults, and also 'Prime Minister' was long used derogatorily, implying unjustified royal favouritism. The first important leaders of the Cabinet, such as Godolphin and Harley during the reign of Queen Ann, had to defend themselves against the accusation of being a 'Prime Minister', as this was a non-existing office in the British constitution. After all, the first use of this title in an official act occurred two centuries later, in the *Chequers Estate Act* (1917), when the officer '*now popularly known as Prime Minister*' was allowed the use of a state-owned country house. One cannot help wondering that after such a long time in which Prime Ministers had been the heart of British government, the corresponding title was still deemed just depending on general use.

Even Sir Robert Walpole (1676-1745; *de facto* 'Prime Minister' 1721-1742), who actually created the role of Prime Minister, denied this title. When he was attacked on the ground that he was wielding a power and an office not accounted for in the constitution, he replied that, on the contrary, as one of the King's coun-

cil he had just one voice.[14] Regardless of what he said, anyway, a very relevant change occurred with Walpole: he created a new position and changed the balance of the constitution. Before him, every minister was appointed by the King and was individually responsible to him; with Walpole the leader of the Cabinet shouldered responsibility for the government as a whole. His power was rooted in the position he held in the Cabinet, and in his control over the House of Commons. Walpole united the Treasury – of which he was head – with the political leadership in the Commons. He was First Lord of the Treasurer and Chancellor of the Exchequer as well, thus displaying a strong authority over financial policy as a whole. His decision to sit within the House of Commons allowed him to have ascendancy over its members in every possible way, bribery (or, at any rate, a very unscrupulous use of patronage)[15] and propaganda not excluded. Walpole enjoyed a double confidence, both of the House and of the Crown. Moreover, he was leader of the dominant party, the Whigs, thus assuring a stronger control over Parliament. Walpole was a great leader of the House:[16] not only was he very good at manoeuvring MPs, he was also very often present during debates and using his oratory skills to win the day. In the long run, this state of affairs will lead to the birth of the party system as well.

The role of Prime Minister developed as a constitutional convention that emerged as necessary in the new settlement created in 1689. On the one hand, the increase of routine government business made it impossible for the monarch to exercise personal control, thus implying the assistance of a cabinet. Furthermore, the executive responsibilities of the Crown depended for their enforcement on parliamentary supplies, and therefore the need of an influential liaison between monarch and Parliament was deeply felt. A Prime Minister was just what was called for: the King needed a strong parliamentary leader in his closet, a man who could command a strong majority in the House of Commons. Otherwise, the risks of being unable to implement policies in face of a reluctant Parliament were too high: in order to rule Parliament, the head of the executive needed to sustain majority support in the Commons. Support of the King, although still crucial, was not sufficient to retain power. On the other hand, support of

14 It is a bit of a paradox that the role of Walpole as Prime Minister was especially emphasized by the opposition (especially contemporary press).

15 The use of patronage was made easier by the progressive control of the Prime Minister over the granting of many honours that previously belonged to royal prerogative. Unlike his 19th century successors, Walpole did not use patronage in order to control his fellow cabinet or party members, but especially to win the support – or, at least, the neutrality – of political opponents: personal and public interest therefore overlapped.

16 The following Prime Ministers did not always share Walpole's decision: as late as 1902 Prime Minister Lord Salisbury chose to sit in the House of Lords (obviously no Prime Minister ever thought to follow his example after the *Parliament Act* in 1911). It is noteworthy, though, that when in 1767 even a remarkable statesman as Pitt the Elder decided to accept the earldom of Chatham and to go to the Lords, his choice fatally weakened the Cabinet (cf. O'Gorman, *The Long Eighteenth Century*, p. 206).

the King was still essential, and the House of Commons needed a reliable interlocutor with the Crown. The double role played by the Prime Minister provided an answer and also led to a reduced freedom of choice for the King, who had to appoint a political leader who could command an important parliamentary majority, regardless of his own personal preferences. It is premature to say that the monarch had to choose the leader of the party which was returned to Parliament with a majority of seats after a general election, as in the 18th century ministers could not count on a reliable party support and had to create their own majorities; nonetheless, it was a step in that direction. When in the late Nineteenth century the emergence of strong disciplined political parties enabled the Cabinet to dominate the House of Commons and become the beneficiary of the sovereignty of Parliament, the Prime Ministers of the time were reaping what had been sown by their ingenious 18th century predecessors. It must be mentioned, though, that the new position of Prime Minister did not always have a smooth course, as their leadership depended more on their personal achievements than on party accomplishments: whereas eminent figures such as Walpole and Henry Pelham managed to perform the new office with remarkable skill, their successors could not sustain the same position.[17]

The personal character of Walpole's rule was also emphasized by his rivals and by contemporary opposition press. It was Henry St. John, Viscount Bolingbroke (1688-1751), Walpole's main competitor, who, deeply disliking his regime, described that period in terms of an antithesis between a 'court' and a 'country' party. As a matter of fact, this distinction was not new: an ideological and political contraposition between court and country has indeed been recently alleged between the possible causes of the English civil war. Its roots were at least dating back to the beginning of the Stuart era, if not to the last years of Elizabeth's reign. In Bolingbroke's interpretation, anyhow, this dichotomy had a different value, being more concerned with a moral attitude than with the structure of society. Furthermore, whereas in its antecedents the word 'country' was related to the world of counties, i.e. of local, and sometimes rural authorities, Bolingbroke used it as a reference to the Country as a whole, to the superior interests of Great Britain. The 'court party' was, according to Bolingbroke, a faction, more than a party, whose members were ready, for selfish reasons, to submit the Parliament to the predominance of the Crown. Such a choice would eventually lead to the ruin of the post-1688 order: the balance of the constitution, achieved with the Glorious Revolution, could be destroyed by a growing predominance of the Crown, or – even worse – by a deprivation of Parliament's authority, through preponderance of a personal rule and of selfish interests. One must bear in mind that the Whig supremacy was also marked by a strong decline of the Tories, who played an extremely limited role in the political life of the Country. They were cut

17 In the long run, anyhow, even an authoritarian King like George III – who tried to impose ministers of his liking – could not overlook the stature gained by the figure of Prime Minister.

out from office and were a permanent minority in the House of Commons, also due to the nature of the franchise and to the distribution of borough seats that hindered their possibility of success in the infrequent elections. In Bolingbroke's opinion, therefore, the 'country party' was not exactly a party, but a sort of summoning to every honest man, in order to save the Country. In this effort, attention was paid to a larger involvement of the people, more than to the broad base of support commanded by the Tories in rural England: concern for public opinion was therefore not forgotten. Among the political differences between Bolingbroke's and Walpole's followers, the discussion on the value of the King's influence was primary. The role, once played by the royal prerogative, was now performed by the royal influence, which was usually expressed in granting honours and rewards to MPs. According to Bolingbroke, such a behaviour verged on corruption. It created dependence of the House of Commons on the Crown – and thus on the Cabinet – and could therefore bring to an end the well-balanced British constitution. On the contrary, Walpole's followers maintained that the influence of the Crown was necessary both in order to preserve the traditional balance in the constitution and to avoid the risks of too strict a separation between the branches of the legislature.

Two very important constitutional principles of the time being *'The King can do no wrong'* and *'The King cannot act alone'*, countersignature of royal deeds became necessary. Likewise, ministers or undersecretaries had to be present, for instance, whenever the King met foreign diplomatists. Countersignature had existed before, but during Walpole's rule the ensuing accountability of ministers – that was previously only juridical – became political as well. However, even though many powers and prerogatives shifted from the Crown to the Cabinet, they were formally still part of the royal prerogative. Furthermore, the King played a key role in the executive and until 1781 he sat in the Cabinet as well. The shifting of such powers was due to constitutional conventions, but the executive power still wielded by the monarch acted as a counterbalance to the importance of Prime Ministers. A further factor restraining the Prime Minister's supremacy was that the Cabinet was not yet deemed to be collectively responsible for its policy. When in 1742 Walpole fell from power, only three Ministers shared the same fate. As a matter of fact, the idea of cabinet solidarity was hardly born: its members were usually appointed individually, not as a group, and they surely did not come into office on an agreed programme. Ministers were expected to agree just on certain issues, such as foreign policy, defence and finance.[18]

It was only during the reign of George III (1738-1820; King 1760-1820) that the fall of a Prime Minister led to the fall of the Cabinet. The King was, and still is, a controversial figure. He was the first Hanoverian King born in England,

18 'Mid-eighteenth-century governments did not exist to carry programmes of legislation': Derry, *Politics in the Age of Fox, Pitt and Liverpool: Continuity and Transformation*, Macmillan, London, 1990 (*British History in Perspective*), p. 10.

who spoke English as first language and was genuinely devoted to the Church of England; moreover at the time of his ascension to the throne, the political situation looked propitious. Satisfaction was not to last long, though. Judgement on George III's rule largely depends on a 'Whig' or a 'Tory' interpretation: according to the former, the King sought to increase the power of the Crown and threatened both the independence of Parliament and the constitutional balance; those who defend his behaviour maintain that he was simply exercising the powers granted by royal prerogative, powers that at the time were still in the King's availability. As a matter of fact, both interpretations 'rest in a static view of the political context' and forget that, during the half century of George's reign, the British Constitution underwent a substantial evolution: the behaviour of the King in the 1760s should be judged accordingly.[19] During his reign, both the executive and the role of Parliament expanded enormously, the function of an active opposition was acknowledged, public opinion grew in importance, Whig and Tory parties experienced essential transformations and – according to some historians, at least – a two-party system emerged. George III tended to a stronger government than his predecessors and embarked on direct action towards the House of Commons, not forgetting, in his own turn, a dubious use of the resources of patronage, which he sometimes denied to a Cabinet that was not of his liking.[20] The intense use of royal patronage in order to command a sustained majority in both chambers drew much criticism at the time, and crown influence was often attacked on the ground that it undermined the independence of Parliament, thus threatening the ancient liberties of English people. This blame is still sometimes echoed by historians, but it appears to have been overestimated. At any rate, the Crown's influence significantly declined during George's reign: both the number of placemen in the House of Commons and the strength of the Crown party in the House of Lords waned.

Surely the King played an active role in the formation of every ministry formed during his reign, even though the freedom of his choice was sometimes cornered by circumstances. At any rate, if the King's favour was still necessary for a successful ministry, it was not sufficient: the continued support of both Crown and Commons was essential. A Prime Minister who could not count on sufficient parliamentary support was doomed to failure, as the King's favourite, Lord Bute, had experienced in 1762. A dynamic survey of George III's reign shows, besides, how his influence over appointed ministers declined over time. At the beginning of his reign, he was surely a King with a policy, who summoned ministers in his closet to discuss (or even suggest) government action, and who attended Cabinet meetings. Gradually, also due to his declining health, the King stopped attending Cabinet meetings, or discussing beforehand with ministers affairs of state. It be-

19 Cf. Dickinson, *George III and Parliament* (2011) 30 *Parliamentary History*, pp. 395-413 (quotation at p. 397).

20 E.g. to the Fox-North coalition in 1782 (cf. Derry, *Politics in the Age of Fox*, p. 42).

came frequent for the Cabinet to reach a decision without the monarch's advice and then report it to the King for approval. On the other hand, the monarch's repugnance for certain reforms could seriously hinder or even bring to a close the action of the Cabinet in that field (e.g. parliamentary reform). It is noteworthy how twice, during George III's reign, recourse to the royal veto was contemplated. The exercise of veto had been discontinued since 1708, but the King considered its use both against Fox's India Bill in 1783 and against the Catholic Relief Bill in 1807. He relented, though: in 1783 he forced repeal of the Bill on the Lords by circulating a letter that branded as his enemy those who would vote in favour of the measure, while in 1807 the Cabinet eventually abandoned the Bill. In the analysis of constitutional development, this hint is open to a double reading: the fact that the King thought to exercise it, shows that veto was not forgotten (and that George III was conscious of the extension of his prerogative); on the other hand, the fact that the monarch found a different way to express his displeasure and sink the unwelcome Bill, can be evidence that he was not ready to risk a serious constitutional crisis.

In 1782 Lord North (1732-1792) – Prime Minister since 1770 – was forced to resign after a motion of censure (concerning the war in America) in the House of Commons. It is noteworthy that the motion was never voted, since Lord North was aware that he would certainly be defeated. The whole Cabinet resigned. Although reshuffle under a new head of the Cabinet was by no means unheard of in the following years, this was a great step towards parliamentary government. In point of fact, the 1780s are a landmark in the constitutional evolution of Great Britain: in 1781 the King ceased to attend cabinet meetings; soon after he was forced to accept, much against his will, the resignation of his Prime Minister, who was no more able to command a majority in Parliament; furthermore, collective responsibility of the Cabinet emerged. After a brief attempt of a coalition government, featuring Lord North and Charles James Fox (1749-1806), George III decided to call Pitt the Younger (1759-1806; Prime Minister 1783-1801, 1804-1806) to lead a minority government. In 1783 the Prime Minister obtained from the King the dissolution of Parliament: since then, this important royal prerogative has actually passed to the Prime Minister. The continued support of both Crown and Commons was still essential, but the idea that confidence of the Houses is more essential than confidence of the sovereign developed decidedly, although the latter (for other ministers as well) guarded its importance at least up to 1832. With the Great Reform Act, as a matter of fact, the Crown virtually lost the capacity to influence heavily the results of general elections. Already in 1778 Lord North had warned the King about the necessity of '*one directing Minister who should plan the whole of the operations of government and control all other Departments of Administration, so as to make them cooperate zealously and actively with his designs*'.[21] Pitt the Younger was the right man for the task. It is with this extremely

21 Dickinson, *George III and Parliament*, p. 40.

young Prime Minister (he was 24) that a new era undeniably begun. Not only did he enjoy a political dominance in the Cabinet, but he was also an influent parliamentary leader, able to command a parliamentary majority not through a cunning use of patronage (as Walpole before him), but through his skills as parliamentarian and an ample consent built around his political figure. Furthermore, as First Lord of the Treasury and Chancellor of the Exchequer he was in charge of the economic policy and had therefore the possibility to carry out significant financial as well as administrative measures. Party discipline (that increased during 19th century) brought to a new settlement, the Prime Minister being more confident in his majority in the Commons and in his leadership, expressed in his ability to deal efficiently with the House, party institutions and voters as well. As a rule, 18th century Prime Ministers had been great parliamentary leaders, quite at ease in the debates of the House, and surely not inclined to public speech outside Parliament; during 19th and 20th century, on the contrary, a new model of Prime Minister appeared, often silent in the House, but ready to meet (and charm) his electors.

All in all, in the last years of George III's reign, constitutional conventions had reduced the powers of the monarch, handing most of them down to this new conventional figure, the Prime Minister. Formally, the Crown still wielded conspicuous power; in reality, it had been drastically reduced. Probably it was with the shift of power from the Crown to the Cabinet, along with the growth of a strong bond between Prime Minister and Parliament and of collective responsibility of the Cabinet, that the British constitutional monarchy was transformed into a parliamentary monarchy. The permanent office of Prime Minister – even though only in the 20th century it was officially recognized![22] – was an essential element in such a revolution. So, although at the beginning of 18th century some circumstances had not been too dissimilar, a great change had taken place: the heart of the system was now in the House of Commons, whereas the House of Lords and the influence of the Crown had both faded. This situation led to a necessary permanent connection between the Cabinet and the House of Commons. The evolution of parliamentary forces was not as simple as it has sometimes been described, but a genuine two-party system was emerging. Even though Pitt cannot be straightforwardly called a Tory (he was labelled as such by Fox and his followers, who prided in their self-ascribed legacy of the Whig tradition) at the end of George's reign there was a governing party prepared to accept itself as a new Tory party and an opposition who called itself Whig. It is a vexed question whether (and to what extension) Pitt the Younger had enjoyed the benefits of Cabinet solidarity and of party discipline. His following in the Commons is difficult to estimate, too: surely a group of MPs politically identified with him, but the overwhelming majority he usually com-

22 Up to the Thirties, the Prime Minister did not have the right to a salary as such, but just as First Lord of the Treasure. It is quite a paradox that the acknowledgment of a salary to the *Leader of the Opposition* took less time. Cf. Torre, *Il* Cabinet system *da Thatcher a Blair: leadership e Costituzione*, in *La Costituzione Britannica / The British Constitution*, pp. 306-354, pp. 311-312, n. 13.

manded in the issues related to the Anglo-French Wars is most likely misleading. Probably these factors evolved during his rule. The situation was surely settled at the time of the ministry of Lord Liverpool (1770-1828; Prime Minister 1812-1827): Liverpool could rely on his colleagues following him were he forced to resign, on the decline of Crown influence, on a stronger control of party. It is significant that the figure of the leader of opposition[23] was consequently to gain a growing importance, too, but it must be remarked that in election the most dramatic victories were not won by an opposition seeking to gain office, but by the government.[24] A further key factor for the new balance of the constitution was the reduced number of MPs and Lords who thought of themselves as political independents.

What ensued was a wide distance between the mixed well-balanced theoretical constitution, and reality:

- much of the royal prerogative had been passed to the Prime Minister;
- the King being not accountable, Ministers were politically accountable to Parliament;
- Cabinet was now more homogeneous and the leadership of the Prime Minister undisputable;

nonetheless:

- the confidence of the King was still of vital importance;
- the House of Lords had powers similar to those of the House of Commons, except as far as finance was concerned;
- size of electorate was still small and elections were open to manipulation by the Cabinet.

The main features of the British constitution were probably born, with a strong Cabinet government, a parliamentary sovereignty, the first attempts to a single party control of government, and the accountability of the government to the Parliament (in fact, to the House of Commons) through the conventions of ministerial and collective responsibility.

3 – Towards the crucial year

At the beginning of 19th century the monarchy was increasingly brought into disrepute: the mental illness of King George III, the disorientation of the Regency Period (1811-1820) and the dubious morality of King George IV (1762-1830; Prince

23 On the theme of opposition, de Vergottini, *Lo «Shadow Cabinet». Saggio comparativo sul rilievo costituzionale dell'opposizione nel regime parlamentare britannico*, Giuffrè, Milano, 1973 was in Italy a pioneer in this field with his work, particularly from p. 49 to p. 65.

24 Derry, *Politics in the Age of Fox*, pp. 192-193.

Regent 1811-1820, King of the United Kingdom 1820-1830) put the Crown in a difficult position. Furthermore both politicians and the Anglican Church were charged with corruption.

The issue of Catholic Emancipation (i.e. the ending to political discriminations against Catholics) had long loomed over the ministries of the first quarter of 19th century. In 1801 Pitt had resigned when George III had refused to agree to Catholic Emancipation at the time of the union with Ireland: the King maintained that his coronation oath bound him to reject a measure that would weaken the privileged position of the Church of England. In 1807 the so-called Ministry of All the Talents had resigned after refusing the pledge asked by the King, never to raise the issue of Catholic Emancipation again. George IV was as stern as his father on the issue. Nonetheless, since 1807 every House of Commons (with a single exception) had passed a Catholic measure by a substantial majority,[25] and only the tenacious resistance of the House of Lords had prevented the passing of a Bill. Meanwhile, Catholic Emancipation had reached, during Lord Liverpool's government, the status of an 'open question': every member of the Cabinet was free to exercise his own judgement on it, regardless of cabinet solidarity, as soon as he stated that he was acting as an individual, and not as a member of government. In January 1828 George IV asked Lord Wellington (1769-1852; Prime Minister: 1828-1830, 1834), a Tory, to form a ministry, under the condition that Catholic Emancipation was not to be included in government measures. The Cabinet was nevertheless aware that the Catholic question had to be resolved, and that it was desirable to deal with it while the Ministry could still count on a reliable majority in the House of Lords. The effect of Wellington's pledge was just to put off emancipation for a few months, while conflict was exacerbated. Such a choice was counter-productive for the Prime Minister, as it caused rancour and bitterness in the Ultra wing of Tory party.[26] The last straw was the O'Connell case, an Irish politician who defeated the government candidate in a by-election rich in propaganda. O'Connell could not take his seat, as he was a Catholic: also in order to grant peace in Ireland, the Cabinet decided that Catholic emancipation could not be postponed. Thus in 1829 the Roman Catholic Relief Act was passed in spite of the strong opposition of King George IV and of the Anglican Church along with the personal dislike of the Prime Minister and of Home Secretary Robert Peel (1788-1850). The Act brought to an end political discrimination against Catholics, allowing them to become members of Parliament. According to Clark, the Emancipation Act marked the end of the Protestant Constitution, proving a real revolution in British constitutional history.[27] Not

25 Davis, *The House of Lords, the Whigs and Catholic Emancipation 1806-1829'* (1999) 18 *Parliamentary History*, pp. 22-43, at p. 29.

26 Davis, *Wellington and the "Open Question": The Issue of Catholic Emancipation, 1821-1829*, (1997) 29 *Albion: a Quarterly Journal Concerned with British Studies*, pp. 39-55, at p. 54.

27 Clark, *English Society 1660-1832: Religion, Ideology and Politics during the Ancien Regime*, 2nd edn, CUP, Cambridge, 2000, pp. 519 ff.

all historians agree, though. Anyhow, the Act made parliamentary reform easier. Ironically, disappointed Ultra Tories thought that reform of the franchise had become necessary, as 'they pointed out that only government control over small boroughs had secured a majority for Catholic emancipation', the measure having little support in the country.[28]

On 26th June 1830, King George IV's death brought about the subsequent dissolution of Parliament. In the general election the Tory party won a majority, but support for Prime Minister Wellington was weak. His ill-timed position in strong defence of the existing system of government and against the need of reform led to his defeat in the House of Commons in a vote on a financial measure, and to his subsequent resignation. With the Whig Cabinet of Charles Grey (1764-1845; Prime Minister 1830-1834) the road towards the Reform Bill, that is to say, the improvement of the electoral system in Great Britain, was open.

It was in the same year, 1832, that John James Park (1795-1833) wrote *The Dogmas of the Constitution*, a book which was rather neglected at the time, but that ought to be appreciated for its lucid perception of the evolution of the British constitution since the Restoration, the careful use of historical precedents and criticism of current interpretations, and for drawing dramatically attention to the dangerous difference existing between practice and theory of the Constitution. It is the author himself who warns the reader that his book was written 'in a period of overwhelming delusion' and who describes that mood in the following, rather alarmed, terms: 'a lying delusion which has become at length [...] not a *folly* merely, but a CRIME; since it is, perhaps, putting in risk the very existence of the Country'.[29]

J. J. Park was a scholar and an antiquarian since his adolescence. Having decided upon law as a career, in 1815 he got into Lincoln's Inn and already in 1819 he published a treatise on the law of dowry, that was to be regarded as one of the standard books on the topic. He was called to the Bar in 1822. He soon gained a reputation as a critic of legal codification and of the ideas of Jeremy Bentham. In 1830 he also graduated at the German University of Göttingen: he came to know Friedrich Carl von Savigny and was an admirer of the German Historical School of Law.[30] In 1831 he was appointed professor of English Law and Jurisprudence at the King's College, London: in *The Dogmas of the Constitution* he published some of the lectures delivered in his first course there. The College had been founded

28 Evans, *The Great Reform Act of 1832*, 2nd edn, Routledge, London – New York, 1994 (*Lancaster Pamphlets*), p. 43.

29 Park, *The Dogmas of the Constitution*, Fellowes, London, 1832, pp. VII-VIII.

30 Since 1830 he will sign his works 'Doctor of Law of Göttingen'. The extension of Park's enthusiasm for the Historical School is open to question, though. Cf. Varela Suanzes, *Estudio preliminar*, in *Los Dogmas de la Constitución. Cuatro lecciones, correspondientes a la primera, décima, undécima y decimotercera de un curso sobre teoría y práctica de la Constitución*. Edición y Estudio preliminar de J. Varela Suanzes. Traducción de I. F. Sarasola, Istmo, Madrid, 1999 (*Colección Fundamentos*, 157), pp. 7-51, at p. 14.

in 1829 by eminent figures linked with the more conservative wing of the Tory party and of Anglican Church, in nearly open contrast with the University College, founded in 1826 by Bentham and his followers.

Even though he taught in a Tory-oriented College, Park claimed nonetheless to be independent both from Tories and from Whigs. As he clearly states in the Preface of the *Dogmas*, his aim was not to speak either for Parliamentary Reform or against it, but to show the great and dangerous difference between the traditional Theory of the Constitution, and its Reality. He presents himself as a promoter, or a disciple at least, of a school of '*observational* political science'. The Preface is dated 31st March 1832. It was a crucial moment for the Reform and for England as well.

4 – The long, eventful road to the *Representation of the People Act*

The goal of the Act was to '*take effectual measures for correcting divers abuses that have long prevailed in the choice of members to serve in the Commons House of Parliament*'.

The House of Commons was then composed of 658 members; there were two types of constituencies, counties and boroughs. County members usually represented landholders, whereas borough members should have represented the mercantile and trading classes. Boroughs ranged from small villages to very populated cities and had been chosen since the Middle Ages, often in a rather whimsical or, at any rate, haphazard way. In the following centuries very little had been done to redress the situation, and large industrial cities such as Leeds, Manchester and Birmingham did not send their representatives to the House. Franchise was quite varied, too, but also in this respect the system had proved irrational.[31] Basically, the vast majority of individuals was unable to vote (just 13% approx. of adult males in England and Wales, around 1% in Scotland). In the constituencies figured 'rotten', 'pocket' and 'open' boroughs. Rotten boroughs were boroughs with a very limited number of voters: few than one hundred each, and some with only thirty-two (Dunwich), twenty-five (Camelford), or even less (Gatton, seven voters, and the most infamous of all, Old Sarum, whose eleven voters lived all elsewhere and had last been called upon actually to vote in an election in 1715). Predictably enough, in such boroughs the result of elections was always manipulated and corruption was not at all unheard of. Manipulation was not confined to 'rotten boroughs', though. Some constituencies were under the control of rich landowners, and were known as 'pocket boroughs' (i.e. they were 'in the pockets of their patrons'). Voters who resisted the influence of landlords were instead open to corruption, and in some boroughs (sometimes such as the open ones, where vote was free) electors were

31 'It was not a system based on property, but the caricature of one' (Brock, *The Great Reform Act*, Hutchinson & Co., London, 1973, p. 26).

even bribed collectively: 'the franchise was regarded as a form of property, not as a natural right'.[32] Attention must also be drawn to the fact that in many boroughs elections had become unnecessary, because the electors had financial or other strong inducements to vote for the candidate of the landowner, of the Crown, or of the government: an election was just a waste of time and money. Fewer than one-third of parliamentary seats were contested in the century before the Reform Act.[33] Attempts for reform had a long story behind their backs. Popular pressure for reform was particularly strong at the beginning of 19th century, also due to the demographic growth that in the first half of the century nearly doubled the population; nonetheless the House of Commons had rejected all the bills aiming at a global change in the system of representation.[34]

Seeing it through 21st century eyes, it is easy to find in the absence of a secret ballot the root cause of much corruption: when every elector's choice is bound to be publicly known, it is easier for votes to be bought and sold, and it is more difficult for the persuasive influence of a distinguished member of the elite to be resisted. It is noteworthy, however, that at the beginning of 19th century there was a different feeling on this issue: no attempt was made by the Whigs to introduce secret ballot in the Bill. As a matter of fact, it was regarded both as improper and as dangerous too, the elector being thus potentially able to sell his vote to more than a contender. Secret ballot had to wait until the 1872 Ballot Act.

The *Catholic Relief Act* and, later on, the fall of Wellington had brought substantial weakness to the Tories and so Whig Prime Minister Charles Grey had the chance to carry out Parliamentary reform.[35] On 1st March 1831, Lord John Russel brought forward the First Reform Bill[36] that was approved by one vote only (302 to 301), in the biggest parliamentary division ever recorded. It is worth stating that most resistance was directed against the new map of constituencies, rather than the

32 Derry, *Politics in the Age of Fox*, p. 18.

33 The number of constituencies that actually went to a poll had declined remarkably in the second half of 18th century (contested elections in county seats had already shrunk from 65% in 1705 to 8% in 1757: cf. Stone, *The Results of the English Revolutions of the Seventeenth Century*, in *Three British Revolutions*, pp. 23-108, at p. 88). It must be remembered, however, that the absence of a contest did not necessarily imply the absence of electoral competition. Cf. O'Gorman, *The Long Eighteenth Century*, pp. 139-140.

34 It is notable, though, that some of the most remarkable statesmen in the second half of the century were elected for rotten boroughs, such as Pitt the Elder (elected for Old Sarum in 1735: cf. O'Gorman, *The Long Eighteenth Century*, p. 181), while Pitt the Younger contested the Cambridge University seat, but lost, and was returned in a by-election for the pocket borough of Appleby.

35 'There was no reason for the Whigs ever to have come into office, had the Tories not imploded over religious issues' (Evans, *The Great Reform Act*, p. 39). Incidentally, the commitment to parliamentary reform was basically the one important issue on which the members of the new Cabinet shared the same ideas...

36 'A well-kept secret, its extent and audacity now came as a bombshell' (Clark, *English Society*, p. 541).

minor extension of the franchise: personal, selfish reasons surely played a role, but it was above all the link between population and representation underneath the Bill that was objected to, even by Whigs. The Ministry having also lost two votes on two motions, the Earl of Grey decided to ask the King to dissolve Parliament: the Whigs won an overwhelming majority in the elections. The Second Reform Bill was passed by a majority of 136 votes in July, and was then sent up to the House of Lords. Despite their well-known opposition to the reform, Lords were expected to abstain, rather than openly defy public will. Nonetheless, they rejected the Bill: the defeat of the Bill (rejected by 199 votes to 158) was worse than the Government had feared, and caused great concern. Should the King have been convinced to create new peers in order to approve the Bill, he would have been prevented to do so by the huge number of nominations required. Disorder followed, with riots at Derby, Nottingham, Bristol and in other towns.

The King was asked to prorogue Parliament and in the new session of December 1831 the Third Reform Bill was presented, and passed with even larger majorities in the following March (it was in this crucial moment that Park dated his *Preface*). Once more, opposition was strong between the Lords, but the opponents decided to change their tactics, being aware that another open rejection of the Bill could lead to a most serious social and political crisis. They chose, therefore, to propose wrecking amendments to the Bill. The Ministry saw only one alternative: the creation of a large number of pro-reform peerages, but the King denied his assent. Lord Grey tendered his resignation, and the Duke of Wellington was once more called to form a new government, while political agitation grew so much that a revolution was sometimes feared. The Duke being unable to form a ministry, William IV was eventually forced to call back Lord Grey and to consent to the creation of Whig Lords, but such a drastic measure was in the end unnecessary, as the King circulated a letter among Tory peers, warning them of the consequences of insisting in their opposition to the Bill.

On 7th June 1832 the Reform Bill became law. Nomination boroughs were reduced, and franchise was extended, although a few rotten boroughs remained and bribery of voters was still a problem. The Great Reform Act encompassed the middle classes in the ruling elite: as a whole the number of those entitled to vote rose in England and Wales[37] from around 439,000 (12.7% of adult males) to more than 652,000 (18%),[38] but working classes were still cut out from voting. Surely the Act had not been intended as a step towards democracy: on the contrary, its end was to hinder it and, as a compromise, it aimed to get the utmost that could be obtained from Parliament, and the minimum that could satisfy the country.[39]

37 In the same year similar Reform Acts were passed for Scotland and Ireland, too.

38 Evans, *The Great Reform Act*, *Appendix* 2, p. 75.

39 'The role of public opinion during the Reform Crisis can hardly be overestimated': O'Gorman, *The Long Eighteenth Century*, p. 364.

Many MPs had believed that a measure of parliamentary reform was necessary in order to prevent a violent revolution. The Reform Act was not meant to be a milestone in the constitutional history of the country: it was a compromise dictated by a serious crisis. As such, it was very successful: the dangerous riots that had taken place before the passing of the Bill disappeared from the British political scene of the century; probably the procedures that led to the passage of the Act themselves, more than its circumscribed contents, harbingered a new idea of democracy. Afterwards, the pre-reform society was perceived as part of a lost, nearly forgotten world, to which there could be no return.[40] For all its faults, the Reform Act had opened a door on a new political world.[41]

5 – *The Dogmas of the Constitution*

If in his *Preface* J. J. Park was at pains not to show a position either for or against the Bill, the final pages of the *Dogmas* are a straightforward appeal against the Reform. Nonetheless, the *aim* of his work is not an opposition to the reform. On the contrary, what Park really wants is to highlight the wide gap existing between theoretical and actual Constitution.[42]

Park's main point is quite clear: any theory of the Constitution is doomed to fail as far it is built too much on abstract ideas, and not on the perusal of what actually happens in the relations between powers and institutions. This is especially true in a country like the United Kingdom, whose constitution is unwritten and a few acts with constitutional value (such as Magna Charta or the Bill of Rights – that are not even mentioned in Park's book, anyway) are overshadowed by constitutional conventions and practices developed in the last century and a half. Where there is no written Constitution, principles can only be inferred by the observation of facts.[43] It is quite telling that, as the epigraph of his book, Park

40 Clark, *English Society*, p. 554.

41 Evans, *The Great Reform Act*, p. 67. A door feared by some who had opposed the Bill, as in Peel's words: 'I was unwilling to open a door which I saw no prospect of being able to close' (quoted ibid., p. 3).

42 'The traditional theory of the Constitution is either *right* or *wrong*. If it be right, the Constitution is practically obliterated by corrupt usage; and ought to be restored. If it be wrong, the practical corruption may be either the only mode, or one of several modes, of escaping from the theoretical fallacy. […]' (Park, *The Dogmas*, p. X).

43 'Gentlemen, I can conceive that, in a country which has a *written* constitution, the *writing* may still, in one sense, be denominated the constitution, although, by process of time and gradual departure, a different and undeclared mode of carrying on the government may prevail in practice; but in a country which has *no* written constitution, the constitution of that country can only be learnt by ascertaining the real mode in which, from time to time, the government has been carried on, the powers by which it has been effected, and the checks which have been brought into action' (ibid., pp. 30-31).

chose a quote by Auguste Comte, *'Les savants doivent aujourd'hui élever la politique au rang des sciences d'observation'*.

Facts, and just facts, are therefore the only evidence of what the English Constitution really is, whereas historians as well as politicians and jurists keep on describing a Constitution that has not changed for the last six centuries. Furthermore, there is a linguistic problem as well: everybody has been accustomed for too long to speaking a language of *constitutional courtesy* that does not correspond to the truth of things. Powers and relations between them have consequently been constantly described in a ceremonious language that gave the wrong impression of a static Constitution, whereas beneath the use of the same officious words reality had altered: the use of such language can just lead to further misunderstanding on the nature of the constitutional settlement and to dangerous confusion in the country.

According to Park, the Constitution is similar to a living being: a plant, or even an animal.[44] Since 1688, it has radically changed, despite the fact that many did not perceive it, because they thought that every change was just depending on specific circumstances. Alterations were therefore considered the contingent fruit of necessity, or an aberration of the correct constitutional settlement: were they regarded as the positive exception to the rule, or as a distasteful event that it was best soon forgotten, those alterations were never accepted for what they really were, i.e. lasting elements of the new constitutional settlement. Park emphasized that this was especially true for the heart of the British Constitution, namely the relationship between Crown and Parliament and the consequent balance of power.

Park shows how a system previously governed by a balance between the three powers of State was transformed into another, in which the House of Commons grew absolutely predominant. He therefore denies the dichotomy between legislative and executive power and points out the fact that the Ministry actually controls legislative power as far as political relevant laws are concerned, Parliament being dominated by parties.[45] In evidence of that, Park alleges the fact that rejection of an important Bill brought in by the Ministry usually leads to their resignation. The royal prerogative, on the other hand, drastically declined.

According to this interpretation, the balance of power is still an essential element of the English constitution, but it moved into the House of Commons.[46]

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44 Quoting Sir John James Mackintosh, Parker wrote: 'government […] is better illustrated by comparison with vegetables, or even animals, which may be, in a very high degree, improved by skill and care, which may be grievously injured by neglect, or destroyed by violence, but which cannot be produced by human contrivance' (ibid., p. 85).

45 This was, at least, Park's perception: today some historians find this idea premature.

46 'For the last 150 years at least […] the powers of government, which were previously carried on principally by force of the prerogative, have been essentially and substantially exercised and carried on in the House of Commons […] which has thus come to take a part, and exercise a voice, in every act of the cabinet; – that, as a necessary condition to the concurrent preservation

Park shows the decisive implications of his analysis, not merely pointing out the factual interference between the theoretical competences of legislative and executive powers, but also recognizing that this shift of the balance creates a new constitutional system: 'this is acknowledged *here* and *there*, now and then, by many; but no writer will broadly lay down this ground, and follow it out in all its innumerable consequences, although it is as capable of demonstration as any proposition in Euclid'.[47]

It is not surprising that in his challenge to the received idea of the Constitution, Park found in William Blackstone (1723-1780), the author of the *Commentaries on the Laws of England* (1765-1769), his *bête noir*. The *Commentaries* had been a very successful book, and were part of the education of lawyers and jurists: Blackstone's approach to Constitution had been a little peculiar, and for instance he neglected the use of the locution 'constitutional law' and expounded the powers of King and Parliament while dealing with the rights of individuals. In the *Dogmas*, Park completely refused Blackstone's celebrated ideas of the English constitution as a nearly ideal mixed constitution, of the division of powers and of the balance.

Blackstone had described the Constitution in terms of:

- a mixed constitution (monarchy: Crown; aristocracy: House of Lords; democracy: House of Commons, freely elected by the people);
- division of powers (Legislature: Parliament + Crown; Executive: Crown; Judiciary: judges are independent from executive power, although not completely from the legislative, at least as far as the House of Lords retains competence);
- balance granted by the royal assent and by the role of impeachment.

Although he was aware of the reduced role played by the royal prerogative, Blackstone still gave great importance to the executive power of the Crown, and to the royal veto, but he forgot that the role of the Crown in the legislative power was then just a formal one (this was Park's opinion, at any rate).

It is noteworthy that Blackstone did not even mention:

- Whigs and Tories;
- the role of the Cabinet;

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of the *theoretic* constitution, in which the supreme power is supposed to reside in three co-equal elements, of the crown, the aristocracy, and the commonalty, each of those elements has come to be *represented* [...] in the Commons' house of parliament, in which the supreme power had concentrated; and that, as a consequence, collision between these several elements, *out of the house*, has no longer happened, except on extraordinary occasions, because their battles have been fought, and their trials of strength made, *in the house*' (ibid., pp. 7-8).

47 Ibid., p. 9.

- the role of the opposition and the instruments used (motions, debates on budget…);
- powers and duties 'of his Majesty's great officers of state', whereas he dealt with sheriffs, constables and petty officials…

Park can therefore easily attack Blackstone on the ground that the Constitution he described was far away from reality:

- whereas Blackstone stated that there is a merely executive, or law-executing government, called to carry into effect what was decided by the legislature, or law-making government, the Ministry 'by some strange misconception of their functions' always resigns when there is a strong contrast as to the contents of laws to be approved;
- Blackstone maintained that the legislative power of the Crown resides in the veto, but it has not been exercised for a very long time;[48] on the other hand, many bills are introduced by officers of the Crown in their official character and on their responsibility as such;
- instead of a legislative power governed by fluctuating majorities, the Parliament displays a highly organized system, based on parties;
- a strict separation of King, Lords and Commons is only formal.[49]

The Constitution had been completely transformed in the last century and a half, but its forms were in many instances rigidly preserved, therefore such a great alteration went nearly unobserved, and sometimes it was thought that the original Constitution still existed, and that the deviations from it were casual corruptions only.

According to Park, there was a new system of checks and balances, which had moved into the House of Commons, because it is necessary for the balance to be preserved where the whole power is exercised. This accounts for Park's opposition to the Reform Bill, since he thought that it could put the balance in real danger.

Moreover, Park does not think that a strict division of powers is necessary; on the contrary, it would have the serious drawback of hindering or at any rate delaying the action of the State.[50] Anyway, freedom can be protected in other ways, and

48 The last monarch to withhold royal assent to a Bill passed by the Parliament was Queen Ann, on the Scottish Militia Bill in 1708. During George III's reign recourse to the royal veto had been contemplated. See above, § 2.

49 Park quotes Blackstone's claim that 'if ever it should happen that the independence of any one in the three branches of the legislature should be lost, or that it should become subservient to the views of either of the other two, there would be an end of our constitution', and then proceeds to sharp criticism: 'now, gentlemen, if «*there* would be an end of our constitution», *there* HAS been an end of our constitution long before the time when Mr. J. Blackstone wrote; for no such *essential* independence then existed, or has ever since existed, except in physical or external form' (ibid., p. 41).

50 Ibid., pp. 115 ff.

it is in this perspective that Park highlights the role of public opinion. The role of separation of powers in the British Constitution having long depended on the interpretation of Montesquieu and De Lolme, today widespread belief that their ideas were the result of a misunderstanding can endorse Park's opinion on the matter. Far from being a model of separation of powers, the English Constitution entails in fact their integration and even union through the constitutional balance. The organic relationship between government and parliamentary majority is anyhow mitigated by the possibility of its dissolution: on the one hand, Parliament can unseat the Cabinet with a vote of no confidence; on the other hand, the Cabinet can always ask the monarch to dissolve Parliament.

Park maintains also that two difficult goals have to be reached. First of all, stability in the State must be assured, without resorting to low tricks, such as corruption – if his opposition to parliamentary reform hints at Toryism, his vehement denunciation of political corruption is in the purest Whig tradition. Besides, people's freedom must be established, but prejudices of the mass cannot be allowed to overcome scientific truths. With the benefit of hindsight, it can be said that such a balance was probably more difficult to achieve than the one between powers in the English constitution…

Overall, Park's position was in some way curious: he lined up with the most conservative Tories in their strong opposition to the Reform Bill; on the other hand, his interpretation of the Constitution was strictly indebted to Whig historians. Clearly, he was proud of his independence of thought, proved by the attacks he had to face both from Tories and from Whigs, which he mentions in the dignified closing speech in the last lecture of his course.[51] But such a detachment, in the turmoil of the crucial year 1832, perhaps decided the fate of his thesis, which met little success. Anyhow, although not a very successful book when it was written, *The Dogmas of the Constitution* succeeded in demonstrating that the English Constitution of the time did not date back to the Middle Ages, but had evolved since 1688. Incidentally, Park destroyed also the myth of the ancient Constitution, which had been a weapon in the political and historical debate at least since the Glorious Revolution, and showed how the constitutional order in the 1830s (the same order he fears the Reform Bill would overthrow) was largely indebted to an evolution that had brought forth a new balance, new institutions, and a new relationship between them. In many ways, Park's readings anticipated those included in a more popular book written a generation later, Walter Bagehot's *The English Constitution* (1867).[52]

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51 'In what I have offered you, I have consulted no man's pleasure, – I have performed no man's bidding. By Whigs I have been called Tory, – by Tories I have been called Whig; – perhaps the best proof that I am independent of either. Like an honest man, I have perhaps offended both parties' (ibid., p. 124).

52 Cf. Varela Suanzes, *Estudio preliminar*, pp. 50-51 (it is important to bear in mind that Bagehot attended King's Collge ten years after the appearance of *The Dogmas of the Constitution*).

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The Connections between German Pandectist School and Italian Legal Culture at the End of XIX Century* §

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Summary

Introduction – 1. The influence of German Pandectist school on Italian legal science. – 2. The strategy of Filippo Serafini. – 3. The opinion of contemporary Italian historiography on the issue. – 4. Filippo Serafini and the *Lehrbuch der Pandekten* by Karl Ludwig Arndts. – 5. Paolo Emilio Bensa, Carlo Fadda and the *Lehrbuch des Pandektenrechts* by Bernhard Windscheid. – Conclusion.

Abstract

The rejuvenating approach to Roman law taken by the German Pandectist School in the 19th century exerted a great influence far beyond the boundaries of Germany. This phenomenon can really be seen as one of the "centralising forces" of European legal history, especially considering the simultaneous emergence of national codifications, which led to

* The content and the structure of this paper reflect the ones followed in the lectures which were given at the University of Trieste for the field of *History and technique of European codes and constitutions*. Therefore, the use of footnotes is limited and directed to point out the cases of literary quotation of bibliography, which has been translated in English language by the author of this paper when necessary.

§ This paper has been submitted to an external referee.

an increasing gap between the various legislations issued by European countries. Within Europe, the influence of the Pandectist School was particularly strong on Italian legal culture. The development of translations of German legal handbooks was particularly encouraged by Italian Romanistic scholars after the national unification, as an emblematic component of a general project for the diffusion of German legal culture in Italy. The translations were increasingly directed to original works, especially due to the multitude of notes provided by translators, which contributed to the critical revision of German erudition, namely by comparing it to Italian legislation. Especially the version of the Lehrbuch der Pandekten *by Carl Ludwig Arndts, written by Filippo Serafini, and the one of Bernhard Windscheid's* Lehrbuch des Pandektenrechts, *carried out by Carlo Fadda and Paolo Emilio Bensa, played an important role in the development of the studies of Roman and private law in Italy.*

Keywords

Codification – Translation – Roman law – Pandectist school – Windscheid, Bernhard

Introduction

In the 19th century the German Pandectist School, which represented the leading authority of German legal science at that time, took a rejuvenating approach to Roman law, in order to construct a system of contemporary private law suitable for the particular needs of the modern society. This methodology exerted a great influence far beyond the boundaries of Germany. In fact, the success of this approach, and especially its international influence, can be considered as one of the "centralising forces" of European legal history.

This particular connotation becomes even more significant considering the simultaneous emergence of national codifications as the opposing "decentralising force", which led to an increasing gap between the various legislations issued by European countries. This produced a break in the centuries-old tradition of continuity represented by the Roman-Canon *ius commune*.

As first important consideration, we have to notice that the success of German Pandectist School and the development of national codifications are concurrent phenomenons. At first sight the codification of private law could be considered as the end of the direct application of Roman law in legal practice. We refer above all to well-known Art. 7 of the Act Promulgating the *Code Napoléon*, dated 21 March 1804, which abrogated formally the roman sources.

This wasn't the case of Germany: as the well-known *Bürgerliches Gesetzbuch* came into force only in 1900, in the meanwhile the leading source of law was represented by German Pandectists. The great success of their methodology all over Europe can be considered as an important sign: Roman law still represented an

unavoidable source to interpret the new codes, to resolve doctrinal disputes, and to fill gaps in the law too. In other words, Roman law remained «an indispensable tool», and not only a historical introduction to modern private law: therefore, we cannot exclude a «substantial continuity» between the tradition of the *ius commune* and the Civil codes.[1]

1 – The influence of german pandectist school on italian legal science

Within Europe, the influence of the German Pandectist School was particularly strong on Italian legal science, especially after the promulgation of the first Italian Civil Code in 1865. It is well known that this Code was mostly influenced by the French model of the *Code Napoléon*. However, the methodology offered by German Pandectists became soon very useful to Italian jurists. A dual issue has to be dealt with, namely how to elaborate suitable interpretative tools for the newborn Civil Code, and how to provide cases and materials for legal practice, that were not yet developed directly upon the promulgation.

As second fundamental consideration to our reflection, we have to remember that the founding fathers of Italian private law were at the same time the most influential Romanistic scholars and had been trained in Germany by Pandectists. Therefore, they emphasized the value of Pandect-science as one of the best sources of principles for the Italian interpreter.

The development of Italian translations of German legal handbooks, as an emblematic component of a general project for the diffusion of German legal culture in Italy, was particularly encouraged by Italian Romanistic scholars. These translations were increasingly directed to original works especially due to the multitude of notes provided by translators. These annotated translations meant to help the Italian jurist both on the doctrinal side, by integrating the domestic literature (which seldomly reached remarkable scientific levels at that time), and even more on the practical side, by providing cases and materials to Italian lawyers.

Many authors acknowledge a real «strategic attack» launched by Italian Romanistic scholars to promote the German Pandectist model immediately upon promulgation of the national Civil Code, which could result in «the sad burial of Roman law as the current branch of knowledge and teaching».[2] Especially Paolo Grossi identifies «an indissoluble link between Italian *Risorgimento* and the revival of Roman law».[3] The full weight given to this discipline in study plans of the faculties corresponded not only to «a remarkable scientific production» but also to a public office (Vittorio Stella uses the expression *munus*), in order to defend

1 Zimmermann, *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today*, Oxford University Press, Oxford, 2001, 3.

2 Grossi, *Scienza giuridica italiana. Un profilo storico 1860–1950*, Giuffrè, Milano, 2000, 40.

3 *Ibidem*.

the civil unity against the unavoidable disturbances after the first Italian political crisis, which followed the fall of the right-wing government in 1876.[4] Therefore, we can assert that in the second half of 19th century, by teaching Roman law, Italian jurists «meant to educate professional men in general and to elevate the legal culture of the Nation».[5]

2 – The strategy of Filippo Serafini

In this "struggle" for the survival of Roman law, as a branch of research and teaching, in a time in which private law was mostly regulated by the Civil Code, we have to remember especially one Italian Romanistic scholar. The revival of Romanistic scholarship was greatly strengthened by the «revitalizing strategy» of Filippo Serafini (1831-1897).[6]

He was born in Preore, a village near Trento, then a part of the Austro-Hungarian Empire, and taught at the universities of Pavia, Bologna, Rome and, in the end and for the longest period of time, Pisa. Thanks to his knowledge of German language, he could keep in touch with the most influent German-speaking European legal science. In 1881 he took part in the commission convened in Bern for the compilation of the Swiss Federal Code of Duties, the year after in the commission of coordination for the Italian Code of Commerce, then in the one convened in 1889 for the compilation of the Swiss Federal Law of Enforcement and Bankruptcy, which came into force in 1892.

In 1869 Serafini had taken over the management of the law journal *Archivio giuridico* from Pietro Ellero, who had founded it only one year before in Bologna. From the first year of publication, Serafini had already begun with editing the comparative column *Rivista mensile del movimento giuridico in Germania* in the journal. It was dedicated to the review of the most important German publications regarding civil and criminal law, as well as legal history. For a long time it had been one of the steadiest sources of information in Italy about German legal science, in particular concerning the Romanist branch of the Historical School.

In 1869, in the fourth volume of the journal *Archivio giuridico*, Serafini significantly urged Italian students to compensate for the poorness of Romanistic teaching, especially by studying «the best handbook of Roman law», namely that of the famous professor Windscheid (1817-1892), who had become the most influential

4 Stella, *Giuristi, pensatori politici, sociologi, economisti*, in Balduino (cur.), *Storia letteraria d'Italia*, new edn, *L'Ottocento*, 3rd Volume, Piccin-F. Vallardi, Padova-Milano, 1997, 1655.

5 Landucci, *Filippo Serafini (10 aprile 1831-10 aprile 1931)*, (1931) XXI (CV of the complete collection) 4th Series, *Archivio giuridico* "Filippo Serafini", Società tipografica modenese, Modena, 123.

6 Grossi, *Scienza giuridica italiana*, cited above, 41.

exponent of German Pandectist School.[7] Together with the study of Roman law, Serafini strongly recommended that students pay attention to legal history, being aware of the lack of thorough scientific examinations with regard to this subject.

As many Italian students decided to study abroad at that time, not being satisfied with the purely professional purpose of their undergraduate studies, Serafini had also promoted a legal history seminar at the University of Pisa. This legal history seminar had to be different from academic courses, though similar and connected with them. It was aimed at the training of «real scientists, suitable for teaching and to increase their national legal literature with original works».[8] Further, it soon won praise abroad, persuading professors at the legal faculty of the University of Zagreb to inaugurate a similar one in 1880. In fact, this can be considered as another important proof of the circulation of methodologies in European legal science during the whole XIX century, together with the diffusion of translations of foreign legal works.

According to Serafini, whose thinking was to be further developed by his followers Biagio Brugi (1855-1934), Francesco Ferrara (1810-1900) and Alfredo Rocco (1875-1935), the translation into Italian of the works written by foreign legal scholars could be divided into two successive periods. The first had developed before the unification of Italy and was characterized by a simple outward knowledge of foreign doctrines, without remarkable effects on the local legal science. On the other hand, we could talk about the second in terms of complete reception, which meant real scientific maturity and, finally, the beginnings of an independent doctrinal production.

As well as an increasing interest in German works, the main turning point was therefore the meaning given to translations, noticed by Serafini himself. However, the French influence, which had prevailed in Italy since the promulgation of the *Code Napoléon*, was still far from extinction. The parallel development of the two trends can be nicely illustrated in two ways. Firstly, by comparing the titles of the works translated from French and from German in the period between 1830 and 1865 (when the majority of Italian translations was written). Secondly, by considering - as decisive proof - the Italian Civil Code of 1942, which is a compromise between these two different foreign models.

The Italian translation of the *Lehrbuch des Pandektenrechts* by Bernhard Windscheid was written by Carlo Fadda (1853-1931) and Paolo Emilio Bensa (1858-1928) and published in instalments between 1886 and 1902. Therefore, it places itself in the second period of complete reception of foreign literature mentioned by Serafini, during the "turning-point of the eighties", which determined the de-

7 Serafini, *Rassegna d'opere giuridiche tedesche*, (1869) IV *Archivio giuridico*, Tipi Fava e Garagnani, Bologna, 342.

8 Buonamici, Scolari, Serafini, *Programma, Statuto e Discorso inaugurale del Seminario storico-giuridico di Pisa*, (1877) XVIII *Archivio giuridico*, Tipi Fava e Garagnani, Bologna, 561.

cisive transition from the «exegetic» methodology and teaching imported from France to the systematic and scientific one of German origin.

Though this period can definitely be considered as the apogee of Italian translations of the masterworks written by German legal science, and therefore should be rendered a fair tribute to masters like Serafini, Fadda and Vittorio Scialoja (1856-1933), we should not forget that this period of intense reception was preceded by a slow cultural preparation. Its seeds can really be found in the excellent tradition of studying German legal literature, which started around thirty years before Italian political unification.

In any case, a decisive contribution to the expansion of the Pandectist trend all over Italy was surely made by Filippo Serafini, who had hoped for a better and deeper knowledge of German juridical culture in Italy. He had studied it since his time at the universities of Vienna, Innsbruck, Berlin and Heidelberg, where he had attended the courses of Karl Joseph Anton Mittermaier (1787-1867), as well as the ones of the most famous Pandectists, like Karl Ludwig Arndts (1803-1878), Karl Adolf von Vangerow (1808-1870), Adolf Friedrich Rudorff (1803-1873), Friedrich Ludwig Keller (1799-1860).

Furthermore, Filippo Serafini used to correspond regularly with Rudolf von Jhering (1818- 1892). While German legal science was still mostly under the dominating influence of the "Savigny cult", the author of the famous book *Der Kampf ums Recht* was trying to adapt the old methodologies to the new exigencies of contemporary society, by building up a system of "natural jurisprudence". Maybe it is no exaggeration to say that, in the second half of the 19th century, the reputation of Jhering was as high as that of Savigny (1779-1861) in the first half. Their methods were almost diametrically opposed: Savigny and his school represented the conservative, historical tendency, while Jhering believed in a philosophical conception of jurisprudence, as a science to be utilized for the further advancement of the moral and social interests of mankind. He had also a vision of a universal comparative legal science, that is the most important element to our considerations.

In a letter addressed to Serafini in 1872, Jehring was delighted about the first Italian Legal Congress because it not only consolidated the unity of Italy, but it also offered the opportunity to realize the important task which history now had entrusted to the European peoples, more than ever: «the great conquest of a law in common».[9] Jehring was glad to notice the leading position assumed in international relations by the German and Italian nations, sharing similar political events and cultural interests. Above all, they acted as go-betweens by settling the «antagonism between the Latin and Germanic races», and therefore they were first in the way to the «universality of law, against the triumph of national selfishness».[10]

9 Jehring, *Lettera n. 19, Rudolf von Jehring a Filippo Serafini, Vienna, settembre 1872*, in Behrends (ed.), *Rudolf von Jehring, Beiträge und Zeugnisse aus Anlaß der einhundertsten Wiederkehr seines Todestages am 17.9.1992*, 2., erweiterte Auflage mit Zeugnissen aus Italien, Wallstein, Göttingen 1992, 136.

10 *Ibidem*.

Jehring gave a really high regard to Filippo Serafini. He noticed himself that the Italian scholar had been seen for many years as a kind of «intermediary between Italian and foreign jurisprudence», «one of the most powerful and tireless representatives of foreign legal science in Italy».[11] In fact, Serafini gave an important contribution to the cancellation of a kind of «ideological mortgage» prevailing in Italy toward German-speaking countries at that time, which had linked German literature with the Austrian enemy until the *Risorgimento*.[12]

Filippo Serafini can really be considered as the «connecting link» between German and Italian literature.[13] Especially thanks to him, the knowledge of the systematic and scientific methodology and of the masterpieces of the Historical School began to spread copiously in Italy, spurring the revival of Romanistic studies by following the example of the improvement which had occured in Germany. By translating German Pandectist literature, Serafini's "school" therefore pleaded the Romanistic cause, spreading «the example of a vigorous and vital Roman law, transformed and distorted by the new demands but still developed from the same legal, technical and cultural platform presented by the remote Pandects of Justinian».[14]

3 –The opinion of contemporary italian historiography on the issue

Some influential contemporary Italian historiography has noted how, after the promulgation of the Italian Civil Code in 1865, under the emphasis of their opening lectures, the great Italian Romanists tried to hide their worries about a possible loss of topicality for Roman law.

Above all, Paolo Grossi has highlighted the special meaning given to opening lectures at Italian universities around the Eighteen Eighties. Gulio Cianferotti considers especially the lectures *Del diritto positivo e dell'equità*, read by Vittorio Scialoja in Camerino in 1880, and *I criteri tecnici per la ricostruzione giuridica del diritto pubblico,* given by Vittorio Emanuele Orlando in Palermo in 1889, as the main moments in which Italian academic science became aware of its «predominance plan» over practice as a legal source.[15] This plan was to be carried out «by

11 *Ibidem*.

12 Beneduce, *Il* «giusto» *metodo di Emanuele Gianturco. Manuali e generi letterari alle origini della* «scienza italiana», in Mazzacane (ed.), *L'esperienza giuridica di Emanuele Gianturco*, Liguori, Napoli, 1987, 301.

13 Landucci, *Filippo Serafini (10 aprile 1831-10 aprile 1931)*, cited above, 4.

14 Grossi, *Scienza giuridica italiana,* cited above, 41.

15 Cianferotti, *La prolusione di Orlando. Il paradigma pandettistico, i nuovi giuristi universitari e lo stato liberale*, (1989) 4 *Rivista trimestrale di diritto pubblico*, 998.

adopting the Pandectist paradigm», which was realized in fact at least until the promulgation of the Italian Civil Code of 1942.[16]

Franca De Marini Avonzo, on the one hand, acknowledged Bensa's credit for translating and annotating the *Lehrbuch des Pandektenrechts* by Windscheid into Italian, and more generally the Pandectists' one for creating modern Law. On the other hand, she criticized the confusion they made between historical and creative work, as they passed off the real renewal of law as a simple re-exposition of already existing law. In other words, although Pandectists played a leading role in the updating of positive law hoped for by legislators on the doctrinal side, their attempt to justify the introduction of new ideas by disguising them as the habitual revitalizing use of Roman sources would be open to criticism. But above all, De Marini considered the traditional reference to Roman law as an excuse for legal policy choices.

We have to notice that the same argument has been put forward to justify Savigny's opposition to codification: according to most of the historiography, the founder of the Historical School was forced by the oppression of codification to promote a great cultural operation whose aim was «to confirm the necessity of a renewal of legal studies by a re-evaluation of Roman Law».[17]

In Italian jurists' case, the usual reference to Roman law could be especially a way to avoid the "Social Question" emerging between the 19th and 20th centuries, which hoped for a revision of liberal codes in favour of the poorer classes. Consequently, the Pandectists tried to use the power of tradition to argue against the need for renewal.

According to Antonio Mantello, the functionality of these behaviours to legal policy choices becomes even more verifiable nowadays, thanks to a critical assessment of modern codifications. By analysing the doctrinal contribution given by Pandectists to positive law, it would be possible to reconstruct their reaction to the "Social Question" at that time. In confirmation of the fact that the revival of Roman law hid a plan much more complex than a simple defence by Romanists of their own subject against codification, Mantello emphasizes the contribution also made by Italian experts in private law to «the battle for Roman law».[18]

4 – Filippo Serafini and the *Lehrbuch der Pandekten* by Karl Ludwig Arndts

The translations of the handbooks by German Pandectists, written by the most influential scholars of Roman law and private law in Italy, can surely be considered as an important part of their operation of legal culture.

16 *Ibidem*. See also p. 1020.

17 Trombetta, *Savigny e il Sistema. Alla ricerca dell'ordine giuridico*, Cacucci, Bari, 2008, 23.

18 Mantello, «Il più perfetto codice civile moderno», *a proposito di BGB, diritto romano e questione sociale in Italia*, (1996) XCIV(1) *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 1105.

The first one to remember is the *Lehrbuch der Pandekten* by Karl Ludwig Arndts, which was translated into Italian by Filippo Serafini himself. The first edition of Arndts' masterpiece had been published in Munich in 1852, soon followed by several new ones and was reviewed in Italy by Vittorio Scialoja.

Karl Ludwig Arndts was born in Arnsberg, a town of Westphalia, in 1803 and died in Vienna in 1878. After three years of legal studies at the universities of Bonn and Heidelberg, he attended Savigny's lessons in Berlin, which struck him strongly. He started his academic career in Bonn and in 1838 refused a position as full professor in Breslau to teach in Munich, where he reached the top of his literary production by composing the famous *Pandekten*. He took also the chance to take part in the Bavarian legislative commission between 1844 and 1847, and in the Parliament of Frankfurt between 1848 and 1849. In 1855 he moved to Vienna, where he taught until 1874, as he had been chosen for the divulgation in Austria of methodology and works by the Romanist branch of the Historical School.

Surely were the *Pandekten* by Arndts widely renowned, but why did Serafini choose to translate them among all the masterworks written by German Pandectists?

First, because he believed they were the most suitable to the Italian legal situation. They could serve especially as a guidebook for those, among Italian scholars, who wanted to rise from sheer practice to the «magnificent theory», as Italian legal literature was still backward at that time. On the one hand, Serafini acknowledged the praiseworthy results of Italian legal practice, as a fruit of that special kind of judgement which had also enabled the promulgation of the Civil Code of 1865. On the other hand, he blamed the shortage of «systematic and colossal» doctrinal works, able to embrace all private law like the huge masterworks written by German Pandectists.[19]

Secondly, the fact that Serafini had already become acquainted with Arndts was surely an important factor in his choice to translate *Lehrbuch der Pandekten*. In 1857 Serafini had been appointed professor in Pavia by a commission in which Arndts himself took part, together with Vangerow, Keller, Rudorff, and Mittermaier. Arndts had allowed Serafini to translate his masterwork without asking for any remuneration and he also worked together with him on the revision of the translation.

This fact gives us the opportunity to focus on another important element to our consideration: the collaboration offered by German authors to Italian jurists on the translations of their own works. Previously, Savigny had co-operated with the Italian translators of his masterpieces too, in order to assure the accuracy of their work. We remember especially the Italian version of *Das Recht des Besitzes* by Pietro Conticini (1805-1871), which was completed in Berlin under Savigny's guidance and published in 1839, and the translation of *Geschichte des römischen Rechts im Mittelalter* realized by the Turinese Emanuele Bollati (1822-) between 1854

19 Serafini, *Trattato delle Pandette del Cav. Lodovico Arndts, Professore di diritto romano dell'università di Vienna, Prima versione italiana sulla settima edizione tedesca arricchita di copiose note, appendici e confronti*, *Volume I*, Tipi Fava e Garagnani, Bologna, 1872, *Prefazione del traduttore,* V-VI.

and 1857. Savigny's interest in translations of his works is well-known: Laura Moscati has pointed out how he usually was in correspondence with those who showed an interest in his teaching.[20]

It is interesting to note that Antonio Salvotti (1789-1866), the well-known judge of the Austrian government, who is sadly famous for the political trials taking place in Lombardo-Veneto between 1820 and 1821 and involving Silvio Pellico too, and who had been in his youth Savigny's follower in Landshut, took a special interest in the accuracy of both translations. Besides taking part in the transcription of the manuscript of *Institutiones* by Gaius, Salvotti strove for the diffusion of Savigny's thinking and works in the Austrian-ruled Lombardo-Veneto and in Austria. In 1838 he revised part of the Italian translation of *Das Recht des Besitzes* by Conticini, and took interest in the diffusion of *Geschichte des römischen Rechts im Mittelalter* too, being involved by Savigny in the events of the translation made by Bollati.

This special co-operation between authors and translators exemplifies the cosmopolitan feature of 19th century European legal science, despite the challenges that national codifications could mean for legal doctrine. Serafini himself attached even more importance to the intellectual exchanges between the different European peoples in the period of national codifications than in the age of the *ius commune*, in which these intellectual exchanges were customary. To testify the importance of translations to European legal culture as a considerable opportunity for exchange, we think it convenient to remember a translation into modern Greek of *Lehrbuch der Pandekten* by Arndts, published in 1889. What is surely remarkable is the fact that the Greek translator Kiriakos, although he was a great expert of the German language and literature, declared he had taken «great advantage» of the Italian translation.[21]

In almost a decade, different and subsequent editions of the Italian translation of Arndts's *Lehrbuch der Pandekten* were published. It is interesting to notice that they grew very different one from each other. In the «Preface to the fourth edition» of his translation, published in 1882, Serafini clarified that he especially had expanded and elaborated the notes, in order to turn the translation into an original work. Therefore, it was no longer a work by Arndts, but a new one, due to all the legal literature which had been incorporated: both ancient and modern, Italian and foreign.

No less important is the fact that Serafini changed the reference to the users of his work, too. Instead of talking about a «book meant for scholars», as he had done in the «Preface to the first edition», ten years later he noticed how his

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20 Moscati, *Da Savigny al Piemonte. Cultura storico-giuridica subalpina tra la Restaurazione e l'Unità*, Carucci, Roma, 1984, 150.

21 *Bollettino bibliografico*, 2. Arndtss. *Ρώμαικον δίκαιον ἐκ τῆς δεκάτης τρίτης γερμανίκης ἐκδοσέως τῆς γενομένης ἐπιμελεῖα L. Pfaff καὶ F. Hofmann μετάθραστεν καὶ πολλᾶις σημεῖωσεσιν αὐξητεν ὑπο I. Th. Kiriakos. – Ἐν Ατῆναις, Κάρολος Βίλμπεργ* 1889, (1890) XLIV *Archivio giuridico*, Tipi Fava e Garagnani, Bologna, 596.

translation could not only be used by scholars but also by legal practitioners, which he initially might not have expected.[22] To make his work more suitable for legal practice, Serafini enriched the notes by citing decisions of Italian courts and compared them to legal doctrine. In fact, one of the reasons why he chose to translate the work by Arndts, among all the masterworks written by German Pandectists, was the evident merit to expose the current law, instead of its historical development: Serafini intended to give a practical style to his translation.

Similarly, he wanted to ensure for his law journal *Archivio giuridico* the widest co-operation especially by lawyers and judges, in order to get not only ideal contributions but also a steady financial support. Windscheid showed his perplexity about the «typically Italian» purpose to deal with different subjects in the same law journal, although he viewed the joining of theory and practice for «the cultural and scientific unification of the Italian nation» positively.[23]

The increase of the work and the amplification of the prospects made it impossible for Serafini to edit new editions by himself. For the first edition he could already avail himself, not only of Arndts's suggestions, but also those of his young follower Vito Perugia as well as his legal and philological competence. In any case, the fourth edition grew different from the first, being practically considered a team-work: many famous jurists took part in it, like Vittorio Scialoja, Carlo Fadda, Pietro Cogliolo (1859-1940), Biagio Brugi, and many others. It was clearly the beginning of a kind of «ample intellectual project», to which Paolo Grossi refers in order to explain how Serafini especially encouraged the cultural influence of the German model around about the 1880s, also by training an increasing number of young followers to seriously study German legal science.[24] So Serafini urged everyone who was writing monographs or other kinds of publications about the law of contracts and the law of torts to take part in producing the new editions, by asking them heartily not to hesitate to share useful improvements to the Italian version of *Lehrbuch der Pandekten.*

All in all, it is especially important to note that Serafini's plan represented not simply a passion for German things, but that it was a way to restore the study of Roman law in Italy. According to the senator Francesco Buonamici (1832-1921), who commemorated Serafini's death, this was exactly the leading thinking of his entire life. It is admitted that the revival of the study of Roman law was closely linked to the renewal of a civil society, which distinguished this period in the history of Italy.

22 Serafini, *Trattato delle Pandette del Cav. Lodovico Arndts,* cited above, *Prefazione del traduttore,* VII.

23 *Testimonianze-Zeugnisse, [84],* in Behrends (ed.), *Rudolf von Jehring*, cited above, 128.

24 Grossi, *Scienza giuridica italiana,* cited above, 41-42.

There are significant analogies between Serafini's translation and the Italian version of Windschied's *Lehrbuch des Pandektenrechts* created ten years later by Fadda and Bensa: they both have a lot of notes, which aroused even more interest and success than the translation itself. In fact, especially thanks to the notes written by these two great Italian scholars to give a commentary on the German original text, their translation became surely the one which contributed the most, not only to the diffusion of German erudition in Italy, but also to its critical revision, namely by comparing it to Italian legislation. As the notes range over various legal subjects, such as private law and public law, and general theory of law and legal practice, we can gather from this that Fadda and Bensa had great erudition and capacity to excel in all these different disciplines.

Carlo Fadda was born in Cagliari in 1853 and died in Rome in 1931. He became one of the most eminent Romanistic scholars in Italy halfway between the 19th and 20th centuries, by teaching Roman law at several universities and finally in Naples. Being a connoisseur of the trends of German legal science, he joined the Pandectist methodology and encouraged its reception in Italy. At the same time he distinguished himself at the Bar and in several public positions, being appointed senator of the Kingdom of Italy in 1912 and member of the committee for the revision of Italian codes in 1924.

According to Vincenzo Arangio-Ruiz (1884-1964), one of the main followers of his, Fadda had conceived the idea of a work suitable not only for the teaching of Roman law, but also for the creation of a sound starting point for the study of private and commercial law in Italy.[25] It had to be based on the huge scientific production by German Pandectist School, which Fadda had already thorough examined.

Just when Fadda started to conceive this project at the University of Genoa, Bensa was teaching there too. This was a lucky coincidence, as Bensa had attended Windscheid's lessons at the University of Leipzig during the summer semester in 1877, being therefore particularly qualified for the translation of *Lehrbuch des Pandektenrechts*. In 1878 he had also published a review of Windscheid's research *Wille und Willenserklärung*.

The young scholar was born in Genoa in 1858, and died there in 1928. Besides being a well-educated man in philosophical, historical and literary subjects, he taught private law at the University of Genoa for forty-four years and practised the legal profession for his entire life. Like Fadda, he was appointed senator of the Kingdom of Italy in 1908 and member of the committee for the revision of Italian codes in 1924. After he had fought as a volunteer during the First World

25 Arangio-Ruiz, *In memoria di Carlo Fadda*, in *Congresso giuridico nazionale in memoria di Carlo Fadda (Cagliari-Sassari 23–26 maggio 1955)*, Giuffrè, Milano, 1968, 3–21.

War, he took part in the committee of enquiry on the causes and responsibilities of Caporetto in 1918.

The importance of the work by Fadda and Bensa rests on the original notes they added to their translation. In fact, they opened the scientific debate especially on matters of which, unlike German Pandectists, most Italian scholars were still unaware. Therefore, these notes show their intent to develop from the sheer reception of foreign legal science to its adaptation to the legislation in force in Italy, which was a typical trend of that time. To tell the truth, providing notes in the margin of the translation was not a peculiarity of these two Italian jurists. This kind of notes can also be found in the Italian translations of French works written right after the Restoration, when the influence of French models was at its height. These notes had a decidedly comparative purpose, in order to search for similarities and differences between the various legal systems. For example, in that period new translations of the masterpieces by Domat and Pothier into Italian were realized, complete with notes comparing French legislation with Italian law, in order to emphasize their «common Roman background».[26] Therefore, we can assert that the real aim of these translations consisted not in a mere respect for foreign models, but in a reunion with the native tradition of Roman law, by means of legal comparison. Later, the drafters of the first Italian Civil Code of 1865 were still trying to justify the choice of *Code Napoléon* as a model for Italian codification by referring to the *topos* of the substantial continuity between the latter and Roman law.

The real peculiarity of the notes by Fadda and Bensa consisted in their having been written at a turning point in the development of Italian legal studies. Thanks to the contribution made respectively by the Roman law scholar Fadda, and by the private law expert Bensa, at the same time the notes represent the completion of the previous period of expansion of Romanistic studies as well as the sound starting point of the new scientific study of Italian private law.

Although the great interest and success aroused by the Italian notes can be considered as a similarity shared by the Italian translations of Arndts's and Windscheid's masterworks, the working procedure chosen respectively by Serafini and by Fadda and Bensa is really much different. In their translation, Fadda and Bensa chose to keep as close as possible to Windscheid's thinking, while they used their notes to develop a kind of "active reaction" to the translation, an explanatory commentary to the original version, feeling themselves free from all ties of accuracy which distinguishes their translation instead. By presenting their notes at the end of every book, clearly separated from the translation of the original text, they made it easy for the reader to distinguish their personal opinions from Windscheid's thinking.

This working procedure is actually very different from the one chosen by Serafini to traslate *Lehrbuch der Pandekten* by Arndts. First, even in the translation

26 Napoli, *La cultura giuridica europea in Italia, Repertorio delle opere tradotte nel sec. XIX, I. Tendenze e centri dell'attività scientifica*, Jovene, Napoli, 1987, 41.

of the original text by Arndts, Serafini felt himself freer than Fadda and Bensa, who always tried to find the Italian word expressing the same meaning of the original in the most literal way. Beyond the greater or lesser accuracy of the translation, the main difference between their *modus operandi* consists in Serafini's choice to juxtapose his own contribution to the translation of the original notes written by Arndts. In this way, he made it really difficult for the reader to distinguish between his notes and Arndts's thinking. In the fourth edition of the Italian version of *Lehrbuch der Pandekten* even more than in the first, it is very difficult to compare the original notes added to the text by Arndts himself to the translation provided by Serafini. Without always distinguishing his own additions from the original content, Serafini also changed the order of the notes written by Arndts, enlarged them by providing new citations of foreign and Italian doctrine and his own observations, and even added many new notes.

In the «Preface» of the second edition of the second volume, which was published in 1875 (only three years after the first edition), Serafini himself informed the reader about the alterations he had made in the translation, by adding references to the more up-to-date monographs, new comparisons with Pandects, provisions of the Italian Civil Code and the judicial decisions of Italian law courts. In this way he emphasized once again the possibility to make the theoretical teaching suitable for legal practice too. Sometimes Serafini took the opportunity of these juxtapositions to pay attention to the Italian context, which was not examined at all by Arndts. For example, regarding the concept of law of the Pandects, whose value is confirmed by Arndts in spite of codification, Serafini cites the Italian Civil Code of 1865 too, emphasizing its decidedly Romanistic background. Instead, on the matter of codification, Arndts had mentioned only Austrian and German Codes (such as the Prussian *Allgemeines Landrecht des Königlisch-Preussischen Staaten* of 1794) besides the *Code Napoléon*.

While they managed to complete the translation of the original text of the Pandects and Windscheid's notes, Fadda and Bensa didn't finish their work of annotation and commentary. This operation was carried on by another two able Romanist scholars, Pietro Bonfante (1864-1932) and Fulvio Maroi (1891-1954): anyway, their notes seem to stop at the third book of *Lehrbuch des Pandektenrechts*, on the subjects of property and possession.

Nonetheless, we can assert that the main purpose of the hard work undertaken by Fadda and Bensa had already been done. In fact, they had succeded in realizing the essential basis for the development of an Italian science of private law, by elaborating a wide-ranging "General Part" of Italian private law, which inspired all later scientific production. Therefore, it is admitted that Fadda and Bensa elaborated the general theory of Italian law, taking inspiration from the methodology of the German Pandectist School, but mitigating the excesses of dogmatic abstraction, thanks to the references to the legislation in force in Italy.

Conclusion

This short reflection upon the most important Italian translation of German Pandectist literature illustrates what probably were the main functions of the reception of German legal science in Italy.

First, it is admitted that this phenomenon coincided with a main turning point for Italian legal history. In the second half of the 19th century, the work of assimilation and comparison with foreign cultures, mainly represented by German and French models, contributed to make the "newborn" Italian people aware of their national characteristics. This can be seen, for example, in the multiple references to the Italian legal context in the notes written by Fadda and Bensa in their translation of the *Lehrbuch* of Windscheid.

The comparative method which gained ground thanks to the translation, and especially thanks to the annotation of foreign legal literature, accustomed Italian jurists to comparing the laws of the various European nations, in order to search for similarities and differences, and above all to develop a passion for scientific research. It is admitted that German legal science played an important role by spreading methods of research, and in developing the habit and passion for it. Consequently, this influenced how the mission of the Italian jurist was conceived: it was hoped that he could play an active role in Italian society as "jurist-scientist", personally devoted to show politicians the way to a new legislation. The application of the German scientific method therefore guaranteed a significant presence of jurists in Italian society, and the value of this method was promoted in comparison with the French method of «Exégèse». In short, by coming into contact with the German Pandectist School, Italian jurists were encouraged to deepen the scientific approach to legal matters.

Therefore, the Pandectist methodology can surely be considered an important stage -though later overcome- in the development of legal culture in Italy, as well as in Germany and in the other countries which went through it.

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Legal Integration of Private Law in Europe and in the United States of America – Comparative Remarks* §

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Summary

1. Legal integration of private law: comparing two models. – 2. The idea of legal integration: historical overview. – 3. Advantages and drawbacks of legal integration. – 4. Forms and formants of legal integration. – 5. Legal integration in the United States: institutional and cultural factors. – 6. Legal integration in the United States: forms and formants. – 7. Legal integration in the EU: cultural and institutional factors. – 8. Legal integration in the EU: forms and formants. "European" scholars. – 9. Legal integration in the EU: forms and formants. The EU institutions. – 10. Inconsistencies in EU law-making activity. The new directive on consumer rights. – 11. The European Law Institute. – 12. Legal integration in the U.S.A. and in the EU: similarities and differences.

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Abstract

The increasing convergence of law, particularly private and commercial law in the Western legal systems is among the most debated issues in comparative law studies. This paper analyzes legal integration of private (and commercial) law in the U.S. and in the EU legal systems, and aims at comparing – in a nutshell – actors, methods, strategies and outcomes of this phenomenon in the two different institutional settings. Legal integration initiatives are part of a coherent plan to support economic transactions with a legal structure that encourages enterprise and reduces costs. The motivation for these changes is economic, but the engine driving legal integration is essentially political and cultural, and therefore is closely linked to the institutional setting and the legal tradition(s) in which legal integration takes place.

Keywords

Comparative Law – Legal formants – Legal traditions – Legal integration – Private Law – European legal systems – U.S. legal system(s)

1. Legal integration of private law: comparing two models

The issue of the increasing convergence of law, particularly private and commercial law in the Western legal systems is among the most debated questions in comparative law studies[1]. In Europe this phenomenon is strictly interconnected with the existence of a *sui generis* supra-national organization like the European Union. In order to create an internal market – which is the central aim of the EC/EU since the beginning – it has exercised its legislative competence in many fields of member States' private and commercial law, thereby accelerating the approximation of member States' national laws. The increasing bulk of EC/EU law is one of the main causes of the creation of a European private law and this phenomenon of "Europeanization" of national laws lies at the very core of European legal integration which happens through the interplay among many actors, particularly EU and national legislators, EU and national judges, law professors. The role played by scholars has been particularly prominent in recent years. Their engagement at the EU level has led in 2009 to the drafting of a sort of European civil code, named "The Draft Common Frame of Reference" (DCFR)[2]. Although this product has not been adopted so far by the EU institutions as binding leg-

1 Merryman, *On the Convergence (and the Divergence) of the Civil Law and the Common Law* (1987) 17 *Stanford J of Int L* 357; Gordley, *"Common law" v. "Civil law". Una distinzione che va scomparendo?*, in Cendon (cur.), *Scritti in onore di Rodolfo Sacco: la comparazione giuridica alle soglie del 3° millennio*, I, Giuffrè, Milano, 1994, 559 ff.

2 Study Group on a European Civil Code/Research Group on EC Private Law (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference* (Full Edition), Sellier, Munich, 2009.

islation[3], it certainly is the most notable step of the EU private law integration project. Besides the traditional actors, new ones are emerging, such as the European Law Institute (ELI), an independent organization set up in 2011 that aims to enhance the quality of the European legal integration process.

At first glance, there seems to be a similarity of actors, trends and possibly results of EU legal integration with the similar process that has developed in the U.S.A., especially in the Twentieth century. There, the allocation of legislative and judicial competences, divided between federal and state level, formally attributes competence in private law matters to the states. However, many factors, such as the extensive interpretation by the federal Supreme Court of the constitutional clauses relating to competences impinging on private and commercial law; the existence of a common legal education that creates a homogeneous mentality among lawyers throughout the nation; the unity of the legal language; the "restating" activity successfully carried out by the American Law Institute (ALI) under the initiative of prominent law professors and practitioners; and many other factors have led to a very high degree of harmony in the field of private and commercial law.

We believe that a comparison between the two experiences of legal integration – pointing out similarities and differences – can be extremely useful in order to understand the current issues and future perspectives of the legal integration process in the EU as well as in the rest of the world. This paper analyzes legal integration of private (and commercial) law in USA and EU and aims at comparing – in a nutshell – actors, methods, strategies and outcomes of this phenomenon in the two different institutional settings. The general assumption is that legal integration initiatives are part of a coherent plan to support economic transactions with a legal structure that encourages enterprise and reduces costs. The motivation for these changes is economic, but we will show that the engine driving legal integration is essentially political and cultural, and therefore is closely linked to the institutional setting and the legal tradition(s) in which legal integration takes place[4].

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3 Yet, on 26 April 2010 the EU Commission set up an Expert Group on a Common Frame of Reference in the area of European Contract Law. This Group was entrusted with the task of carrying out a Feasibility Study exploring the possibility of a future European contract law instrument, using the DCFR as the starting point. This Feasibility Study was published on 3 May 2011. On this basis the EU Commission drafted a Proposal for a Regulation on a Common European Sales Law (COM/2011/635 final), which was presented on 11 October 2011. This proposal for an Optional Instrument contains rules applicable to cross-border transactions for the sale of goods, for the supply of digital contents and for related services, in cases where the parties to a contract agree to do so. As such, the proposal represents a significant scaling back of the original DCFR proposal, thus limited to a significantly narrower spectrum of transactions.

4 Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law* (1992) XL *Am.J.Comp.L.* 683 f.

2. The idea of legal integration: historical overview

In these pages the expression "legal integration" is used as a "*locution valise*" applying to different forms of production of legal rules, by which similar, convergent or uniform legal solutions have historically emerged in the field of law, private and commercial, among different legal systems. As such, legal integration has been the response to the need to overcome the unavoidable fragmentation of the law among the world's people and nations throughout history. Indeed, the diversity of the law governing different societies is a fact which relates to the essence of any legal order and is supported by a variety of driving forces such as tradition, history, the specificity of each national culture, the absence of a supra-national legislative authority in the international community, the absence of a universal legal language.

The need to develop common ways to handle practical problems of people from different countries, regulated by different laws, has been felt since ancient times and was once dealt with by making recourse to Roman law. In the Middle Ages, *jus commune* developed from Justinian texts was used throughout Europe as common law, overcoming local diversities of the law, as well as a basis for transnational commercial law.

The call for legal approximation has been subsequently further fostered by the formation of the nation States in Europe. The first efforts to contrast national diversities in the law started in the Nineteenth century and were focused on the approximation of the conflict of law rules. Indeed, in a context of growing legal nationalism, the only way to handle international legal problems was to find the right national rule applicable to the case. In a cultural context dominated by legal positivism, any activity of legal integration was eminently focused on legislative law[5].

At the turn of the Nineteenth and at the beginning of the Twentieth century the growth of trans-border commercial relationships, facilitated by technical progress in communication and transport, made the quest for legal uniformity among nations more pressing. The first relevant steps in this direction were a series of international conventions on intellectual property (1883 and 1886), carriage of goods by rail (1890), collisions between vessels (1910), conflict of law rules concerning marriage (1902) and divorce (1902), the guardianship of minors (1905), etc. Supported by faith in the progress of humankind, which prevailed in positivistic ideology, legal integration was regarded as an aim in itself and some scholars even advocated the drafting of a universal codification of private law, envisaged as "*Weltprivatrecht*" (Zitelman) or as "*droit commun legsilatif*" (Lambert).

World War I swept away these utopian visions, but not the need for legal integration and unification of private law. This idea regained importance when relevant international bodies, existing before the first World War, like the Hague

5 Ferreri, *Unificazione, Uniformazione*, in *Dig. IV, Disc. Priv., Sez. civ.*, XIX, Utet, Torino, 1999, 504 ff.

Conference on Private International Law (1893) or the *Comité Maritime International* (1897), resumed working on it, supported by the newly set up League of Nations (1919) to which at that time belonged both the International Labour Organization (ILO, 1919) and the *Institut international pour l'unification du droit privé* (UNIDROIT, 1926).

It was only after World War II that the legal integration activities became more difficult. The international context was radically changed. The U.S.A. substituted Europe as the leading world's economy. The ideological opposition between East and West, together with the economic contrasts between the rich North and the poor South of the world, reshaped the contours of the concept of legal integration of private law. The latter could be now conceived only with reference to international relations between the Western capitalistic economies, sometimes taking into account the special needs of the developing countries, and with a much stronger involvement of the U.S. (who had stepped out of the negotiations in previous uniform laws). When later on socialist legal systems were added to the scope of legal integration activities, these had to take into account many political issues beside the technical ones. As a consequence, the limits of legal integration and uniformation activities became more evident.

These problems are well reflected in the preparation of a uniform law for the international sale of goods, one of the most important topics in the perspective of the international business. This enterprise started in 1929 under the initiative of Ernst Rabel and culminated first with two uniform laws in 1964 (Uniform Law for the International Sale of Goods, ULIS and Uniform Law of the Formation of Contracts for the International Sale of Goods, ULFIS). These were dominated by the problem of overcoming divergences between the civil law and common law traditions. The dissatisfaction with these two conventions that were not widely adopted led to the UN Convention for the International Sale of Goods of Vienna (CISG, 1980), drafted by the United Nations Commission of International Trade Law (UNCITRAL, set up in 1966). This time the preparatory works of the convention took place with the socialist and the developing countries. In the UN convention many traces have been left of the political questions underpinning the convention and relating to the necessity to combine the needs of widely different legal traditions – questions that could not be solved in a always clear-cut way, such as the principle of freedom of form, or the requirement of the determination of the price for a valid contract and many others[6].

The end of the Twentieth century has witnessed the fall of the Berlin wall and the failure of the socialist political and economic systems. The opening of the former socialist countries (China is one of the prominent examples) to a market economy – a phenomenon which is related to globalization in its manifold forms – has boosted legal integration as never before. In the field of private and com-

6 Bonell, *Comparazione giuridica e uniformazione del diritto*, in Alpa et alii, *Diritto privato comparato*, 3rd edn, Laterza, Roma-Bari, 2004, 63 ff.

mercial law, legal integration fostered by globalization implies a spontaneous phenomenon of imitation of Western legal models by non-Western legal traditions. This circulation of legal models is not radically different from the one that took place in the Nineteenth and Twentieth century with reference to the European codifications or doctrines. The French civil code or German Pandectistic doctrine have been transplanted in many European and non-European countries by way of political imposition (e.g., Napoleonic conquests, colonialism) or because of their intrinsic cultural prestige (Germanic pandectistic school in Western Europe, Eastern Europe and Russia, U.S.A., Latin America, etc.; Code Napoléon in Italy after the end of the Napoleonic domination)[7]. Despite the wide-spread rhetoric centred on the need for a democratization of non-Western nations, today the driving forces of the current global legal integration are far more economic than political or cultural, and are centred in the efforts of imitation of a economic version of the "rule of law" concept by many non-Western legal cultures[8].

3. Advantages and drawbacks of legal integration

We have anticipated that the motivation of legal integration has always been economic: the need to govern economic transactions between people regulated by different laws pushed towards legal integration. Today, global legal integration purpose uniformation of the law is highly considered. Legal differences are decreasing even between Western and non-Western systems, at least in economically sensitive topics. In addition, many lawyers around the world think that legal integration and uniformation is the natural end of comparative law. The advantages of legal integration have clearly an economic nature. Yet, faith in this process is no longer absolute, as the critical eyes of the legal anthropologist have guarded against the risks that may derive from uniformation of the law. Law as a cultural product of human societies is not only different in every society, but changes and evolves continuously, just as language and culture do. Its living dimension is variety and change, and this holds true also for harmonized or uniformed legal rules and models. In order to fulfil their goal of encouraging international business, they need to be open to modifications. Legal variety and change necessarily imply competition of legal models in the global arena. This is an asset for legal evolution, because it facilitates the prevalence of the rule or model that better fits the changing needs of law users. The risk of an increasing and all-encompassing uniformation of the law is that it reduces the models available for legal competition and development. In addition, any imposed uniformity bears the risk that the dominant rule be that of the stronger culture, with an evident (but unjustified) sacrifice of

7 Sacco, *Introduzione al diritto comparato*, in *Trattato di diritto comparato* diretto da Sacco, Utet, Torino, 1992, 147 ff.

8 Bussani, *Il diritto dell'Occidente. Geopolitica delle regole globali*, Einaudi,Torino, 2010, 48 ff.

the weaker ones. It must be noted that these risks have not only a cultural value, but also a technical one: A 'poor' uniformation (because grounded on a limited set of competing models, or imposed without sufficient attention to the cultural tradition in which it should apply) may lead to a misunderstanding of the uniform rule and thereby to its operative failure[9].

4. Forms and formants of legal integration

First of all, the many forms of legal integration and their specific terminology need to be distinguished[10]. The word "*unification*" refers to forms of *legislative legal integration* in which usually a supra-national body with regional geographic relevance produces rules that shall be applied uniformly in a plurality of national systems. This uniformity of operational outcomes is guaranteed by the activity of a supra-national body, whose decisions shall be binding in all the domestic systems under consideration. As such, legal unification is the most powerful means of legal integration, whereby the risk of diverging application of the single rule in the different legal systems is reduced. A noteworthy example is given by the EU legislative competence to issue Regulations that "shall be binding in [their] entirety and directly applicable in all member state" (Art. 288 TFEU). The uniform judicial application of Regulations is guaranteed by the European Court of Justice.

The operational result is not the same when other legislative integration techniques are used. When it comes to "*uniformation*", uniform legal rules are produced by a supra-national body, or voluntarily by a multiplicity of States belonging to the international community, but the application of the rules is left to national courts. Therefore, the application of the same rule can vary from one jurisdiction to another. This is mostly the case of the international conventions that are stipulated between nations: after ratification they become binding domestic law of the contracting States and are applied by national courts.

Finally, "*harmonization*" technically refers to a law-making activity establishing only a general uniformity of legal rules among different legal orders which allows some variations between jurisdictions, but the differences are not so deep as to alter the basic, harmonized legal model. The classical example of harmonization is represented by the EU legislative competence to issue Directives that "shall be binding, as to the result to be achieved, upon each member state to which [they are] addressed, but shall leave to the national authorities the choice of form and methods" (Art. 288 TFEU)[11].

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9 Sacco, *Antropologia giuridica*, Il Mulino, Bologna, 2007, 59 ff.; Id., *Introduzione al diritto comparato*, cited above, 132 ff.

10 Benacchio, *Diritto privato della Unione Europea*, 5th edn, Cedam, Padova, 2010, 15 f.

11 Differently from Regulations, Directives need to be implemented by national legislations. However, if they are badly implemented or not implemented, and if they are framed in a par-

Legal unification, uniformation and harmonization presented so far refer to positive law rules (*legislative legal integration*). However, these techniques do not represent the entire legal integration process, as much as positive law does not represent law as a whole. Comparative law studies show that convergence or divergence of legal solutions does not depend only on black-letter rules, but rests on other legal formants. Among them, judges and scholars play a major role. The activity of these subjects is determined by (and is a product of) the scholarly tradition of each legal system that impacts on the interpretation of positive law[12]. Therefore, we can also distinguish *judicial legal integration* and *scholarly legal integration*.

Judicial legal integration is crucial especially in the EU institutional setting, because it guarantees uniform application of EU law not only through the activity of the European Court of Justice, but also through the duty imposed upon national judges to apply its principles when interpreting both EU and national law[13]. The EU system is also influencing the convergence of the legal cultures of national judges[14]. The importance of judicial legal integration is felt also with reference to national judges and international arbitrators applying international uniform law conventions. They are entrusted with the task of interpreting international conventions in a uniform way. Yet, in this case the judicial assignment is more difficult, because only in few cases court or arbitral decisions on international conventions are reported and therefore available to the international judicial community[15].

Scholarly contribution to legal integration can be measured not only in the drafting activity of international conventions and uniform laws, but also in the preparation of restatements or bodies of principles of the law, deemed to be used as harmonizing tools by legislators or practitioners, as well as in the field of legal education. The U.S. Restatements of the Law, sponsored by the American Law Institute (starting from 1923), in Europe the Principles of European Contract Law written by the Lando Commission (2000, 2003), and later the Principles of European Law by the Study Group on a European Civil Code (from 1998), the DCFR (2009) as well as, at international level, the UNIDROIT Principles of International Commercial Contracts (1994, 2004, 2010), are only some of the most notable products of *scholarly legal integration*.

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ticular way so as to confer autonomous rights to citizens and other requirements are met, they can have direct vertical effect according to the case law of the European Court of Justice: Craig, De Burca, *EU Law: Texts, Cases and Materials*, 5th edn, OUP, Oxford, 2011, 139 ff., 178 ff.

12 Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*; Inst. I (1991) 39(1) *Am.J.Comp.L.*, 1 ff.; Inst. II (1991) 39(2) *Am.J.Comp.L.*, 343 ff.

13 Rössler, *Interpretation of EU Law*, in J. Basedow, K.J. Hopt, R. Zimmermann (eds), *Max Planck Encyclopaedia of European Private Law*, II, OUP, Oxford, 2012, 979-982.

14 Mattei, *Il modello di common law*, 3rd edn, Giappichelli, Torino, 2010, 82 ff.

15 Yet, for the UN Convention for the International Sale of Goods (Vienna Convention, CISG, 1980) reports of case law and arbitral awards are available on-line: see UNILEX database, set up by Pace University (http://www.cisg.law.pace.edu), which also contains bibliographical references and scholarly writings on case law interpretation.

Another important source of spontaneous legal integration is international business practice. It works in an unofficial way, without any endorsement by national authorities, through the development and use of uniform contractual forms and customs tailored on specific business transactions, or standardized so as to fit the need of delocalization of international contracts. Notable examples of this private law-making are the model contract terms elaborated by UNCITRAL, or the banker's rules dealing with documentary letters of credit (*Uniforms Customs and Practice for Documentary Credits*, International Commercial Chamber, last edn 2006) or the *International Commercial Terms* dealing with the delivery and risks in sales contracts (INCOTERMS, International Commercial Chamber, last edn 2010). This kind of harmonization can be termed *contractual legal integration*. As it happens with international conventions or uniform laws, also the text of the international contracts needs to be interpreted by national judges or international arbitrators, therefore the same remarks as for the judicial legal integration apply.

Finally, and in addition to the four dimensions of legal integration mentioned so far (i.e. the legislative, judicial, scholarly and contractual ones) other meta-legal factors deserve attention because they have a powerful impact on law, such as policy considerations, economic and/or social factors, the social context and values, and the structure of the legal process in each institutional setting. Therefore, the process of legal integration is a complex interplay of different levels that must be analyzed taking into account the practical and cultural dimension in which positive law operates.

5. Legal integration in the United States: institutional and cultural factors

Legal integration in the United States cannot be approached without a preliminary sketch of the institutional setting which characterizes this important common law system. First of all (and differently from England and from the EU), the U.S. are a federal system. In the U.S. federalist organization, federation and states have been assigned by the federal Constitution (1787; Bill of Rights, 1791) different spheres of competence, the boundaries of which, however, are not completely clear-cut. The major synthesis of the allocation of powers between federation and states is stated in the X Amendment of the federal Constitution: "the powers not delegated to the United States [i.e. the federation] by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people". Consequently, the competence of the states is the rule, whereas federal competence is the exception. This is true with reference to both legislative and judicial competence. The legislative competence of the federation (Congress; see Art. I) covers matters related to tax law, common defence and general welfare of the U.S.A., the power to coin money, maritime law, interstate and foreign commerce (*commerce clause*). In these matters, Congress shall have the power to "make all laws which shall be necessary and proper for carrying into execution the [...] pow-

ers vested by this Constitution in the Government of the United States" (*necessary and proper clause*). In U.S. history, the extensive interpretation of the "necessary and proper clause" and the "commerce clause" have been a powerful instrument to enlarge the legislative competence of the federation. To our purposes, it must be stressed that, in accordance with this constitutional construction, most of private law is a competence of the states (statutes and case law), and not of the federation (as it is, e.g., in Germany). However, determining what competence belongs to the states and what is left to the federation, needs closer examination also with regard to the allocation of the judicial competences between federal and states courts. Federal courts have limited jurisdiction, i.e. only when the Constitution explicitly recognizes it. According to Art. III of the Constitution, there is federal jurisdiction in two instances: (i) "*federal question*", i.e. when the judge shall apply the federal Constitution or other federal law; and (ii) "*diversity jurisdiction*", i.e. in cases affecting ambassadors, other public ministers and consuls, or in cases of admiralty and maritime jurisdiction, in controversies to which the United States shall be a party and to controversies between two or more states, between a state and a citizen of another state and between *citizens of different states*. Also the problem of the delimitation of judicial competences is in fact much more complex than the letter of the constitutional text, if one only considers that – according to the case law of the federal Supreme Court – federal courts can apply also state law (statutory and case law) and that this has been frequent especially in matters relating to "diversity jurisdiction". Without going into the details of this complicate system, suffice here to point out that federal courts also play a role in interpreting and applying state laws (statutes and case law), and that this adds to the legal integration of private law throughout the nation, counterbalancing the image of a U.S. private law highly fragmented in 50 jurisdictions.

Besides these institutional aspects, a series of cultural factors have been fostering legal integration of private law in the U.S. In this perspective, the emergence of a common legal education based on the universities must be first acknowledged. This phenomenon is linked to the name of Christopher Columbus Langdell, who in the second half of the Nineteenth century adapted to the U.S. context the Blackstonian legacy of the need for academic teaching of the law. Langdell elaborated a method for the academic analysis and teaching of the law based on the *case books*, named *case method*. In these books (that started a new literary genre typical of the U.S. legal education system) a selection of relevant cases is offered by the author, together with a brief presentation of the facts and the full opinion. No personal comment or interpretation of the court decision was added by the author. Thereby students were educated to the first-hand work on cases. This method emphasized the influence of case law for legal education (not only for practice, which was obvious in a common law system) and to assign to law schools a leading role in legal education throughout the U.S. Appointed as Dean of the Harvard Law School in 1870, Langdell reformed its teaching method; on this model all other U.S. law schools have been shaped. Law professors play a

crucial role for the success of this method. To be sure, this technique is centred on case law, but it cannot work without the critical contribution of the scholar who selects from a bulk of cases those having scientific relevance, which can be regarded as "making the law". In this way, also the student is trained to a critical use of case law and, more in general, to a critical way of thinking.

A common legal education is the reason for the development of a common legal literature that, beside the case books, is based on a successful law reporting system. The latter is a particularly relevant factor in the formation of a legal mentality, because it influences the approach of lawyers to cases and, indirectly, also to the other types of legal literature. Before the Nineteenth century, in the U.S. there were relatively few courts, and even fewer published reports. In 1819 there were 18 volumes of American case reports. By 1848 they had grown to 800, and to 3.800 in 1885[16]. During the last quarter of the Nineteenth century a commercial publisher, the West Publishing Company, created a system for reporting and indexing in an economical and accessible way the court decisions from all the states. Since the full text of court decisions is reported, the success of the system depends on an ingenious indexing, known as "key number", that, coupled with recent technological electronic development, enables lawyers to find quickly cases on a particular point of law from all jurisdictions. This of course increases the knowledge of any lawyer about other states' law. Communication among jurisdictions is certainly a key strategy for creating a harmonized approach to the common law.

Another relevant factor that has pushed U.S. private law towards convergence is connected with (and is a consequence of) the common legal education, namely the emergence of a common legal profession. In theory, any question relating to the legal profession is, again, competence of the states. However, the American Bar Association (ABA), a private, non-governmental organization representing lawyers in the whole nation has a strong role in defining professional regulations. Usually the rules proposed by the ABA are approved by states' Supreme Courts with no objection by their judges. This is due to the high degree of homogeneity between lawyers and judges, who feel they belong to the same group. Furthermore, the ABA carries out its activities together with the Association of American Law Schools (AALS), another private organization gathering the law schools. In this way, the U.S. legal practice has a strong impact on the university curricula and gives prestige to the academy (rather than the other way round). It is ABA that grants accreditation to the law schools for the bar exam. This is the state-based exam that all graduate students (after three years of law school) have to pass in order to become lawyers (attorneys at law). Despite the state competence on the bar examination, and the diversity of states' private laws, it is an exam based on the "general principles of the law" that are taught at any law school in the U.S.

16 Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, cited above, 691 f.

Last but not least, the existence of a common legal education and literature implies a common legal language throughout the U.S., which is of course highly facilitated by the use of English as the national language.

6. Legal integration in the United States: forms and formants

We have already mentioned that by the end of the Nineteenth century the growth of case law and the consequent confusion caused by the increasing difficulty in solving contradictions between different decisions needed to be countered in order to preserve legal certainty. This happened through the use of the case method in legal analysis and education, but also by setting up in 1923 an institution specifically designed to promote clarification and simplification of U.S. common law and law reform: the *American Law Institute* (ALI)[17]. Membership in the ALI is limited to 4000 judges, lawyers and legal scholars from all the United States. Since its creation the ALI contributes to the harmonization of U.S. private and commercial law with three types of activity: Restatements, Model Laws and Principles.

Restatements. Restatements are "codification-like" bodies of written law that seek to inform judges and lawyers about general principles of common law in different areas of private and commercial law. The first series of Restatements appeared between 1923 and 1944 on topics such as Contracts, Torts, Property, Restitution, Agency, Suretyship, Judgments and Conflict of Laws. In 1952 the Restatement Second was started (covering subjects not included in the first Restatement, as well as new updated editions of the original Restatements), and in 1987 the Restatement Third, which is still going on. Theoretically, purpose of the Restatements is to state private and commercial law how it is in reality, without any modifications, distilling commonalities among the decisions of the various jurisdictions. However, reality has sometimes been rather different. Since state laws are different, sometimes the drafters have chosen the "best rule". With regard to the style of the Restatements, the first of them consisted of a series of abstract statements on the law (while the current generation of restatements comprises comments and notes that do not always add to clarity which was the original *raison d'être* of the work). Because of this abstract style and their systematic organization the (especially first) Restatements resemble continental codifications – some authors have called them "unofficial codifications".[18] Yet, their role in the system of the U.S. sources of law is not comparable to that of the European civil law codifications. Being essentially a product of scholars and practitioners, i.e. a private law-making product, they cannot have official authority as source of the law. Yet, in practice they enjoy a degree of authority, because they

17 See: www.ali.org/.

18 von Mehren, *The U.S. legal system: between the common law and the civil law legal traditions*, Centro studi e ricerche di diritto comparato e straniero, Roma, 2001, 11.

are often applied by courts "as if" they were sources of the law. In its turn, this practical authority rests of a widespread *consuetudo* and *opinion necessitatis* that they represent the actual law or rules that are acknowledged to be "good law".

Model laws. While Restatements codify the law "how it is", model laws represent the law "how it should be". Model laws represent the efforts of ALI towards law reform: They seek merely to inform and provide a model for states legislatures. The latter are encouraged to consider it, but are not obliged to adopt it, not to adopt it without modifications. A classic example is the Model Penal Code of 1962 (and its subsequent reforms), which has been adopted almost *in toto* in only four states, but whose influence is clearly evident in the penal code reforms of most states.

Principles. They are the result of the ALI efforts of analysis of legal areas thought to be in need of reform and consist of recommendations for change in the law published in the form of principles of the law. They have been issued for subjects such as Aggregate Litigation, Corporate Governance, Family Dissolution, Software Contracts, Transnational Civil Procedure, Transnational Insolvency, and Transnational Intellectual Property. Principles aim at stating "the law as it ought to be" and this explicit purpose differentiate them from the Restatements, representing "the law as it is".

Besides the ALI, since 1892 the *National Conference of Commissioners on Uniform States Law* (NCCUSL)[19], composed by states' representatives, drafts *Uniform Laws* as well as legislation that aims to lead to clarity and stability in crucial areas of state statutory law. Differently from model laws, uniform laws are specifically designed for state legislative adoption. As such, they have a significant harmonizing potential, but also some problems. In fact, despite the large number of laws that have been produced so far, they have led to few uniformity, and sometimes they have been a failure. Many of them have been adopted by few, if any, states. In some cases they have been influential for state law reforms, where legislatures have picked up selectively some aspects of them. The reasons for such failure are sometimes related to state legislatures and governments which often lack a professional staff or a group of trained civil servants able to draft well-conceived laws on private law matters; sometimes there is a lack of the political will to conform to the choices made in the uniform laws.

The best example of both the potential and problems with uniform laws in the U.S. is certainly the *Uniform Commercial Code* (1952, and subsequent amendments), which contains a comprehensive regulation of interstate commercial law, covering transactions such as sale of goods, contracts, leases, security interests, etc. It is a joint product of the ALI and the NCCUSL, not federal law, but it has adopted by all 50 jurisdictions, although sometimes with state variations. The UCC has been of tremendous significance in reforming the law. Proof of this is the case of Article 9 of the UCC, dealing with security interests over movable assets. The original text was a brilliant and innovative product in the 1950s of one of

19 See: http://www.uniformlaws.org/.

the central drafters of the UCC, Prof. Karl Llewellyn, which completely reshaped the legal categories and taxonomies in a crucial topic for business transactions, where legal certainty and uniformity are essential. Yet, the process of state adoption of the code had just started when the Permanent Editorial Advisory Committee started working for the revision of Art. 9. Its new version was completed in 1972 and it has taken 15 year to be adopted by the states. In the meantime, two versions and a number of local variations have been in force.

All these elements are part of a top down process of legal integration of private and commercial law which has certainly been influential. Yet, it does not represent the entire picture, nor can it be regarded as the only driving force of legal harmonization in the U.S.A. The substantive harmony without uniformity of U.S. private and commercial law rests above all in a shared commercial culture, which moves bottom up. The common national economic market and the high mobility of the U.S. population have favoured an harmonious development of the law. In this context, any success of top down harmonization efforts is due to the homogeneity of the business practice, as much as to the technical quality of uniform and model acts or to concepts and choices of the legal profession. American lawyers are positively aware of this: "Whatever we do, the process of harmonization appears inexorable, precisely because of the power of the forces for expansion and coordination of commercial markets within our nations"[20].

7. Legal integration in the EU: legal traditions and institutional factors

Legal integration in Europe is a recent phenomenon that builds on the creation of the European Community in the 1950s and cannot be analyzed separately from it. Indeed, as far as private law is concerned, the European landscape at that time was more fragmented than that of its U.S. counterpart. To be sure, the European civil law legal tradition has been developed on the grounds of the common foundations of Roman law as it had been worked out in the age of the *jus commune*. Yet, the formation of the national states was based on a (at least) formal, proud partition from the common heritage, represented in the crystallization of variations in the national codifications of civil and commercial law. Political fragmentation in the nation states implied a variety of institutional and cultural elements that strongly impacted on the style of each legal system. It is true that differences in style and in declaration of principles did not affect the deep layers of the common Roman law tradition, but the impressions of an observer approaching the private laws of Europe were puzzling. First of all, the diversity of languages did not help the understanding of the legal languages developed in the different legal traditions: common law in England; civil law on the Continent, in its variations of Ro-

20 Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, cited above, 695.

man and Germanic traditions; the Nordic legal traditions. For each of these traditions, a variety of sources of the law could be found. Even though the codification was the centripetal legal source on the continent, different styles and languages of codifications existed and their interpretation and application was left to different judicial organizations and styles. In the same period of national codifications legal education systems in Europe also began to diverge. The European nation states wanted to break off from the past, therefore abandoned the unity of the university teaching method developed in the *jus commune* age on the basis of the study of the Roman sources, setting up their own university model. Diverse legal education systems necessarily led to the development of different legal literatures.

This was the background of legal fragmentation in which the EC was created with economic motivations, but aimed in the long run at creating political integration in Europe in order to guarantee stability and peace in the region. The first economic goal for the EC was the setting up of a common economic market – the single, now internal market. This was fostered by competition, increasing the general wealth of the people living in this region. The pattern of legal integration of private law in the EU is strongly linked to the policy of the internal market, which has always been a cornerstone of the EC/EU[21].

The creation of an internal market by the EC/EU institutions implies the allocation of competences between Community/Union and member States. The EC/EU Treaty formally establishes that the Community/Union has attributed competences, i.e. it can act only when the Treaty specifically confers power to it, linked to the objectives set by the Treaty (art. 5(1) TEC, now art. 5(1)(2) TEU). If this principle is taken literally, there is no EU competence to legislate generally on private law. Yet, numerous legislative acts that are related to contract and private law have been enacted, based on the need to establish the internal market and make it work. The argument goes that the existence of different national rules in areas related to the internal market (such as contract law) may hinder the working of the internal market, and consequently legal harmonization is needed in order to overcome these obstacles. Although this choice is usually seen as a merely technical move, in fact it implies shaping of a species of "European private law". This harmonization process has been based on arts. 94 and 95 TEC (now arts. 115 and 114 TFEU) concerning the internal market, whose scope is so wide as to make it virtually impossible to set definite and rigid boundaries. In fact, they have also been employed to justify the expansion to "bordering" areas, which were linked but not amenable to the internal market: this has been the case, for instance, of consumer law, where the member States have been willing to shift their regulatory competence to the EC/EU by using the legal base related to the internal market. This has determined a creeping erosion of national competences, which is not easily reconciled with the principle of enumerated competences of the EU.

21 Antoniolli in Antoniolli, Fiorentini (eds), *A Factual Assessment of the Common Frame of Reference*, Sellier, Munich, 2011, *Introduction*, 28 ff.

In spite of the fact that EC/EU legislation is selective, i.e. it only addresses specific issues, leaving the general legal framework at the national level, this affects the way in which member states regulate these areas. A very broad reading of the Treaty rules related to the internal market can encroach on subject matters which are external to it, but which may interfere with it, thereby reshaping the scope of action for the states. The conflicts of competences between EC/EU and member states have been addressed also by the European Court of Justice (ECJ), as in the area of free circulation of goods, where its very broad reading of arts. 28 and 30 TEC (now arts. 34 and 36) in the 1970's and 1980's has determined a situation where theoretically any national rule potentially affecting the circulation of goods (such as e.g. rules on opening hours of shops) could be considered as infringing EC law. In the 1990's, with the leading decision *Keck and Mithouard* (C-267, 268/91 [1993] ECR I-6097), the ECJ has tried to limit this encroachment to rules that are directly related to the free circulation of goods and the internal market and have a discriminatory nature. It means that states can argue that national rules related to social needs can be justified even though they may affect the way in which the internal market works. The definition of the boundaries between what member states can legitimately do and what is prohibited because it contrasts with EC/EU rules is defined by the EC/EU institutions themselves, not by the member states. In the famous Tobacco advertising case of 2000 (*Germany v. Parliament and Council*, C-376-98 [2000] ECR I-8419) the ECJ held that legal diversity *per se* does not justify harmonization by EC institutions, unless it is sufficiently proven that different national legal rules create an obstacle to the working of the internal market, and that the harmonized rules are needed to cure the problem. This means that EC institutions do not possess a general law-making power related to the internal market, but must specifically show the obstacles to it that the EC rules aim to remove. When applied to the private law context, this reasoning seems to imply that the EC/EU institutions cannot harmonize the whole of private law, but rather must limit their intervention to selective issues in which it is demonstrated that regulatory differences adversely affect the internal market. This seems also to be in line with the principle of subsidiarity, according to which in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (Art. 5(3) TEU).

The existence of shared competences of the EU and member states in the area of private law implies the existence of a *multi-level system*, where the EU and States must cooperate in order to reach a satisfactory regulatory framework. One way in which this is done is through the use of the mechanism of *minimum harmonization*: EC/EU directives often provide for a minimum level of harmonization, which can be lawfully increased by member states, for reasons related, e.g., to social justice considerations. This is what has happened in the area of consumer

protection, but it must be emphasized that at the moment the Commission has shifted its strategy and decided that in order not to hamper the working of the internal market, *maximum harmonization* is required (see *infra*, n. 10, with regard to the new directive on consumer rights). Again, this is motivated purely on the basis of technical considerations (the need to provide for proper harmonization and to avoid fragmentation), but in fact it has an important "constitutional" effect, since internal market considerations become paramount, and may impede the pursuit of other legitimate and relevant interests at national level, such as, e.g., those related to social justice .

Within this complex framework of allocation of competences between EC/EU and member States there has been a gradual, but constant increase of EU law-making activity through Regulations and Directives (see *supra*, n. 4) in the core fields of private law, such as contract and tort law – as well as labour and company law. This has promoted an approximation of national legal systems that, although far from being complete and systematic, could not have been anticipated at the time when the European Communities were established.

Yet, the making of EU law suffers from well-known limits that may impair its performance. Not only is EC/EU legislation sectoral and fragmented in its contents and form, and limited by the narrow institutional boundaries sketched above, but it is placed upon – and often overlaps with – a variety of national and local legislations that are related with local social patterns. Moreover, also case law is fragmented. Indeed, the ECJ is far from being a Supreme Court of the European Union, since its intervention is only interstitial in guaranteeing the application of EU law, and its action is consequently inadequate to produce uniformity in all relevant areas. In addition to that, legal doctrine in Europe is still largely limited to traditional municipal law and legal education and legal literature are still mainly concerned with national law.

These limits have not stopped the progress of Europeanization of the law and the academic debate on the building of a "European" private law. From a structural point of view, lurking behind the debate on the development of European private law is a fundamental issue of policy, i.e. determining who should be in charge of defining the content and the contours of this emerging "common" law. As mentioned above, formally it is the EU institutions who have the task to establish new binding rules, a process which is dialectically linked to the definition of the scope of the EU competencies in relation to the member States, which retain residual competencies outside the areas devolved to the EU. Yet, the substance of European private law, particularly in the last decade, has been deeply influenced by the academic debate developed by European scholars. This process has contributed to the strengthening of a class of scholars that everywhere in Europe had gradually lost its social prestige starting from the age of national codifications.

The EU legal integration process develops along two tracks: on the one side, "hard law" and officially produced by the EU institutions; on the other side, "soft law", mainly related to the scholarly activity. What deserves attention is the role played by these two formants, and the products of their activity. Beginning with the academic side, since the 1980's scholars coming from different European countries have embarked on the study of national private laws of Europe with the aim of fostering legal harmonization. They gathered initially in research groups that were the result of the private initiative of academics, which had different working methods and tried to give substance each to their own idea of harmonization, but shared the opinion that harmonization had to be carried out through the creation of a set of European black letter rules.

The first enterprise of this kind has been the so-called "Lando Commission", set up in 1982 under the direction of Prof. Ole Lando of the University of Copenhagen to prepare a body of rules on general contract law and, partially, the general law of obligations: the Principles of European Contract Law (PECL). These Principles have reached a remarkable degree of success as an authoritative reference for the development of national legal systems in Europe. In the mind of their authors, the PECL were deemed to serve a variety of goals, such as being the initial basis for a European Civil Code, or a model law to be referred to by national legislators aiming to modernize their law; they could be also used as model both for future EU legislation and for judges and arbitrators in the adjudication of legal disputes, or as the governing law which could be chosen by the parties in private agreements, according to the applicable rules of international private law.

Later, the Study Group on a European Civil Code has been established in 1998 as the successor of the "Lando Commission", under the leadership of Prof. Christian von Bar of the University of Osnabrück. The name itself of this Group shows that its initial goal was to develop the idea expressed by the European Parliament to foster the creation of a European Civil Code. The comprehensiveness of the codification scheme led this undertaking to enlarge the scope of the research from the general law of obligations and contracts to most of private patrimonial law. Therefore, the work of the Study Group includes not only specific contracts, but also benevolent intervention in another's affairs, unjustified enrichment, tort law, and some matters relating to property law, such as transfer of movables, security rights over movables and trust. The overall aim is to elaborate a basic set of rules for Europe, composed of principles deriving from comparative research and distillation of the best rules by way of scholarly analysis. At the root of the project is the belief that European law can emerge only as *Professorenrecht*, a belief that is reflected in the method of the Study Group's work, developing a shared legal culture in Europe.

The codification idea has been adopted also by another academic group, the *Académie des Privatistes Européens*. Since 1992 this Group is working on a *Code Eu-*

ropéen des Contrats, under the coordination of Prof. Giuseppe Gandolfi of the University of Pavia. The *Académie* chooses the traditional concept of codification used in continental Europe, as a set of specific rules, intended to leave less scope to interpretative activity. The provision of the *Code Européen des Contrats* employ as a starting point the Italian Civil code, but are sometimes open to solutions coming from other civil law systems and the common law tradition. Also the official language of the text is peculiar: English, now working as a global language, is superseded by French.

Beside these major enterprises targeted at legislation, another aspect of the academic debate and activity on European private law has grown significantly, focusing on broader cultural aspects of this process. The starting point of many European scholars is that there is not yet sufficient comparative knowledge of legal systems to form a sufficiently solid ground for a legislative endeavour, particularly if intended as a codification in the continental meaning. In this vein, the primacy of legal research (at least in terms of timing) over legislative drafting should be acknowledged, the building of a European legal culture being a prerequisite for a European legislation aspiring to be uniformly applied. Without a truly shared common culture, no black letter rule approach could really serve the purpose of convergence of legal systems. Moreover, a significant number of scholars not only deems that a Civil code is not feasible at present, but also that it is not desirable, because legal pluralism enriches, rather than limit, European law. Though with different nuances among the various groups, this "cultural" perspective is advocated by several leading projects. The Common Core of European Private Law is a project that has been launched in Trento in 1995 under the direction of Prof. Bussani (University of Trieste) and Mattei (University of Torino and Hastings, USA), which brings together nearly two hundred scholars coming from all the EU member States, Eastern European and Mediterranean countries, and from the US and Canada. It seeks to unearth the "common core" of European private law, i.e. what is already common among the different legal systems of Europe, subdividing the research area in the general categories of contracts, torts and property. The Society on European Contract Law (SECOLA) has been founded in 2001 by Prof. Bianca (university of Rome), Collins (London School of Economics) and Grundmann (Humboldt University of Berlin) in order to foster research and academic debate in the area of contract law; to this purpose it has also set up a journal, European Review of Contract Law". The Social justice group is a looser group of European scholars, whose work is often connected to some of the European comparative law projects, who advocate for a more socially-oriented development of European law. Finally, the "*Ius Commune* Casebooks for the Common Law of Europe", whose project leader is Prof. van Gerven (University of Leuven), gathers a network of scholars working on a series of textbooks devoted to specific areas of European law, which are meant to be used in University teaching and as reference materials, thus fostering the development of a common European legal culture.

Simultaneously to the developments in legal doctrine, from the end of the 1980's also the European Community institutions started expressing their interest for the harmonization of private law as a means to achieve a single market among member States. Initially, at the end of the 1980's, the driving force was the European Parliament, which voted a number of Resolutions (which are politically, not legally, binding) advocating the start of a process which could lead to a codification of European private law. The Commission joined to the Parliament initiatives in a series of Communications between 2001 and 2004, and it finally decided to finance research activities for the elaboration of a Common Frame of Reference within the Sixth Framework Programme for Research and Technological Development. Under that call, the "Joint Network on European Private Law - Network of Excellence" (CoPECL) started working in 2005, the widest research network ever created in Europe. This group gathered two among the most prestigious academic research groups in Europe, the Study Group on a European Civil Code and the Research Group on the Existing EC Private Law ('Acquis Group'), together with the Project Group on a Restatement of European Insurance Contract Law and some other supporting groups. The task of the Network was to deliver to the EU Commission the "Common Principles of European Contract Law" (CoPECL), that would constitute a possible basis for a future Common Frame of Reference of European Union law. These Principles have been published in 2009, and their drafters called them the "academic" Draft (i.e. not final) Common Frame of Reference (DCFR), in order to distinguish the results from what was termed the "political" (and final) Common Frame of Reference (CFR), i.e. the tool – whatever its form, scope and purpose – that the EU institutions could possibly adopt in the future, as a consequence of a political decision. The DCFR is in all but name a codification-like effort. Other features aside, it is sufficient to look at its scope, which is as wide as that of many national codifications, covering contractual and non contractual obligations, specific contracts and some matters relating to property of movables.

Yet, shortly after its completion it has become apparent that the DCFR would not constitute the last step nor the final word in the EU legal integration process. Indeed, the EU Commission made clear that after many years of elaboration and after having spent a large amount of European research funds, the political agenda changed to a much more limited scope of intervention. In April 2010 the EU Commission set up the Expert Group on a Common Frame of Reference in the area of European Contract Law which was entrusted with the task of carrying out a Feasibility Study and making further progress on the development of a possible future European contract law instrument, starting from the DCFR. This Feasibility Study was published on 3 May 2011 and from it the EU Commission made a Proposal for a Regulation on a Common European Sales Law (COM/2011/635 final), which was presented on 11 October 2011. This proposal for an Optional Instrument contains rules applicable to cross-border transactions for the sale of

goods, for the supply of digital contents and for related services, if the parties to a contract agree to do so. From the wide scope of the DCFR, the path towards European legal integration in the field of private law has now led to a much more limited spectrum of transactions, making thus clear that in this phase most of the DCFR will not become European legislation.

10. Inconsistencies in EU law-making activity. The new directive on consumer rights

In the field of consumer contracts the Commission proposed in 2008 an important directive which would merge and reform some of the most important directives concerning consumer contracts (COM (2008) 614 fin.). The aim of the proposed directive was to eliminate some discrepancies and gaps in the existing directives and to update them, but the most significant feature was that, in line with the most recent position of the Commission, the proposal was based on a *maximum harmonization* model, which was considered as a necessary element in order to make the internal market work (see supra, n. 7). This choice was criticized in many quarters, and the discussion among the stakeholders, the member States and the EU institutions lasted for several years. Finally, a compromise solution was found in October 2011, when directive 2011/83/EU was approved. The directive, which must be transposed by December 2013 (but the new rules will apply from June 2014), employs an approach of *selective maximum harmonization*, which means that some elements are now fully harmonized, while for others member states can still keep more protective national rules. Yet, in spite of the compromise choice for selective (targeted) full harmonization, the fundamental structure is still formulated according to it: art. 4 states that "Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive". Full harmonization concerns consumer information and the right of withdrawal in distance and off-premises contracts. These are clearly very important issues, yet the final result is far from the comprehensive application of maximum harmonization that was initially envisaged by the Commission. In the Commission's view, full harmonization increases legal certainty, because both consumers and traders can rely on a single unified regulatory framework, thereby eliminating the barriers to the working of the international market stemming from the fragmentation of legal rules. Yet, it must be remembered that all aspects that are not specifically addressed by the directive remains under national law, so harmonized rules, even those which are fully harmonized, must still be inserted in a legal framework concerning the rules applicable to contracts and obligations (such as validity, conclusion, remedies, representation, etc.) which is fragmented according to national lines.

The structure of the new directive reveals a striking lack of coordination with the DCFR, which is not even mentioned in the document, and whose solutions have not been employed in the new rules. Since the establishment of the CoPECL network and the drafting of the DCFR was officially motivated by the need to provide the EU institutions with a set of principles, definition and solutions (the "frame of reference"), a task which involved considerable work and money, this result is hard to explain and indeed puzzling.

Also in relation to the proposal on an Optional instrument for European sales law, there is a significant difference: the Directive achieves maximum harmonization only for some aspects, namely pre-contractual information and right of withdrawal, while important elements of consumer protection remain under a minimum harmonization standard, which means that the states can still keep more protective rules. On the contrary, the idea behind the Optional instrument is that the choice is only on the contractual parties: once they have opted for the European regime, the level of consumer protection is uniform and cannot be derogated by national law, which implies a sort of "*optional full harmonization*" decision. As a consequence, ensuring that the consumer makes an informed choice in opting for the European sales law becomes crucial, since it may imply renouncing to a higher level of protection guaranteed by the otherwise applicable national law[22].

11. The European Law Institute

The incoherencies and contradictions that characterize European legal integration are important materials for the scholarly discussion. It is indeed the scholarly circuit which is best equipped to analyze these problems and suggest solutions. Taking into consideration that European private law, particularly in the last decade, has been deeply influenced by the academic debate developed by European scholars, which in recent times have been directly involved in the drafting of the materials from which the EU institutions have derived new legal instruments, it is hardly surprising that scholars have advocated the creation of the *European Law Institute* (ELI)[23] in June 2011, as an independent non-governmental organization aiming at technical and cultural guidance of European legal development. For the time being, membership to ELI covers, beside distinguished legal scholars, also members of the legal profession coming from different EU member states. The ELI aims "to improve the quality of European law, understood in the broadest sense. [...] it seeks to initiate, conduct and facilitate research, to make recommendations, and to provide practical guidance in the field of European legal develop-

22 Antoniolli, *The evolution of European contract law: a brand new code, a handy toolbox or a jack-in-the-box?*, in Reifner, Nogler (eds), *Social Long-Term Contracts in European Law*, EuSoCo, forthcoming 2012.

23 See: http://www.europeanlawinstitute.eu/.

ment" [...] ; it "will study and stimulate European legal development in a global context". "Building on the wealth of diverse legal traditions, its mission is [...] the enhancement of European legal integration"[24].

It is not difficult to see behind this initiative the model of the American Law Institute. Yet, it is difficult to predict today whether the ELI will be able to achieve a role in European legal integration comparable to that of the ALI in the U.S. Moreover, both institutions are basically in the hands of law professors (although the ALI is also strongly influenced by practitioners), but one must bear into mind the different degree of unity of lawyers in the U.S.A. and in Europe. European lawyers are much more divided among themselves than their U.S. counterparties (language and cultural difference are deeply rooted in European lawyers' mentality), therefore they are a much less strong and cohesive class of "stakeholders", and much less influential in forging the EU legal development according to their visions. These are the main reasons why the resemblance between these institutions can only be superficial.

ELI activities are divided in *Projects*, *Instruments* and *Statements*.

Projects. The ELI governance system decides what projects to carry out. Any project must be at the service of the European citizen by improving the law or facilitating its application; it has to strive for practical impact through rules, comments on rules or guidelines; it must be produced through the cooperation between jurists working in academia and legal practice; and take a genuinely pan-European perspective, as well as taking into consideration the achievements of the various legal cultures.

Instruments. Projects carried out under the auspices of the ELI will often take the form of medium- to long-term projects, the added value of which is to provide, through the independence, excellence and diversity of the project teams and the on-going critical guidance by a very broad constituency of jurists, well-founded solutions that are supported by the European legal community. ELI will appoint one or more reporters, either on its own initiative or after having carried out a call for tender. It will normally appoint advisors or consultants and establish a Members Consultative Committee.

Statements. Projects carried out under the auspices of the ELI may also take the form of short-term reactions to current developments, the added value of which is to coordinate, and so far as possible to reconcile, the views taken by various European constituencies. If a quick reaction of the ELI is required, the ELI will appoint a project team, as well as advisors or consultants[25].

The establishment of this institution is relevant because it can be seen as a potential tool in the hands of the European law professors and practitioners in

24 See: http://www.europeanlawinstitute.eu and its *Manifesto* available there.

25 So far only two Statements have been published, the S-1-2012 "Statement on Case Overload at the European Court of Human Rights" of July 2012 and the S-2-2012 "Statement on the European Commission's Proposal for a Common European Sales Law" of September 2012.

order to strengthen their role as leading actors of European legal development. It is a role that they had gradually lost everywhere in Europe, after the age of national codifications. Yet, the relationship between scholars and the bureaucratic technocracy in the EU legal process is complex, and far from linear: in this situation legal doctrine is clearly a very important player, but its role in the creation of legal rules is variable and sometimes ambiguous.

12. Legal integration in the U.S.A. and in the EU: similarities and differences

This short overview enables us to sketch some comparative observations on legal integration in the two institutional settings of the EU and U.S. Despite the significant differences existing between them (a federal nation vs a supra-national *sui generis* organization like the EU), in both private and commercial law is formally a competence of the states, and this pushes towards legal fragmentation. Yet, in both cases the *mise en oeuvre* of the constitutional allocation of competences in private and commercial law has led to a substantial level of convergence. Of course, the ways used to reach this result are significantly different in the U.S.A. and in the EU, but this does not diminish the relevance of the outcome. If the institutional setting certainly directs the main lines of legal integration in any system, their analysis alone is not sufficient to explain the complexity of the phenomenon. The impact of cultural factors, such as legal language and mentality, the characteristics of legal education, the relevance of law reform, are only some of the most important cultural elements that may determine the success or failure of legal integration. It is exactly in the cultural dimension that the two experiences of legal integration that are most heterogeneous.

We have shown that the existence of a shared common and legal language in the U.S., coupled with the development of a unique legal education system, immensely facilitated the mutual understanding among lawyers of the different states. Thereby a common legal mentality, based on a common approach to the sources of law and on a strong homogeneity of lawyers (scholars, judges and practitioners), leading to the perception by U.S. lawyers of a common private and commercial law. The historical impact of cultural factors in the European region has been different. There, the cultural factors before the creation of the EU were dividing the national legal traditions: different (legal) languages, different legal education systems, a wider variety in the spectrum of the sources of the law and – above all – in their approach made the legal integration enterprise more difficult. The institutional impetus to the start in this direction has been the EC/EU internal market policy. The new institutional, supra-nation setting created in the 1950s pushed towards legal integration of private and commercial laws, because it conceived of legal diversity among member States' law as an obstacle to the economic and political goals of the EC/EU. The new institutional momentum

represented by the EC/EU for European legal integration has, in its turn, fostered and reinforced also the cultural factors that may enhance harmonization of private law in Europe. It is the case of scholarly activity, which thanks to the endorsement by the EU is increasingly sensitive to the "Europeanization" of private law and focused on a variety of "restatement-like" projects. Slowly, but steadily, European private law is emerging as a new discipline and gaining momentum in some of the more advanced university curricula throughout Europe.

This is the general context in which institutional and cultural factors operate in the two legal integration experiences, and a closer look at the technical means that have been used in the U.S. and in Europe in order to support legal harmonization reveals some differences that must be underlined and that may prove useful for further analysis. One of these is the different meaning and use of codifications and restatements of private law in the two analyzed areas. In the U.S., Restatements have been a powerful factor of unification: they clearly aim at stating "the law as it is", and not "the law as it ought to be" (and this holds true despite of the difficulty of a clear-cut delimitation between the two approaches). For this reason, and also on the basis of the prestige of their drafters, Restatements have gained the role of *de facto* authority among the sources of law, thereby producing legal integration. Differently, in Europe the most relevant Restatement-like work, i.e. the DCFR of 2009, has adopted both the "common rules" approach (i.e. a selection of the rules shared by the member States' laws) and the "best rule" approach (i.e. the formulation of a new rule by the drafter, regarded by them as the rule better fitting European needs). This has added to the ambiguity of the results of the DCFR with regard to its suitability to become "hard law". On the one hand, it is apparent that if a "Restatement" or a "Common Frame of Reference" does not reflect the commonalities existing in the region, it is not apt to gain a sufficient degree of acceptance *vis-à-vis* its addressee. On the other hand, if this instrument should be designed as model for law reform, then the rules selected on the basis merely of their existence in the EU states would not necessarily guarantee the selection of the "best" rule. This is why it has been voiced that Europeans should learn for the Americans that a clearer distinction of legal integration activities between initiatives aiming to state "the law how it is" and those aiming to state "the law how it should be" would be beneficial to EU legal integration. This holds true especially for the future ELI activities[26].

As for the relationship between codification and legal integration in Europe, it can be pointed out that codes have never been a successful means to reach legal integration; rather, they performed the function of crystallizing the legal diversity that had been emphasized by the Nineteenth century's legal ideology.

Another diversity in legal integration in the U.S. and the EU emerges if we consider the degree of involvement of scholars and other legal professionals in

26 Schulte-Nölke, *'Restatements' in Europe and in the US: Some Comparative Lessons*, in Brownsword, Micklitz, Niglia and Weatherill (eds), *The Foundation of European Private Law*, Hart, Oxford, 2011, 11 ff.

these activities. In the U.S., practitioners have taken the leadership together with law professors. In Europe it is the scholars who are currently playing a major role in legal harmonization. Yet, a more significant involvement of the legal professions and of other stakeholders would be advisable (and could be fostered in the newly created ELI), especially given the lower degree of homogeneity existing among European scholars, and in general in the legal professions, if compared to that of their U.S. colleagues.

In conclusion, in both Europe and U.S. there is a general assumption that legal integration initiatives are part of a coherent plan to support economic transactions with a legal structure that encourages commercial transactions and reduces costs. The reasons for these changes is economic, but the engine driving legal integration is essentially political and cultural, and therefore is strictly linked to the institutional setting in which legal integration operates. Moreover, it cannot be overlooked that in both the U.S. and the EU systems it is nowadays the globalized financial and business practice that really drives legal integration, moving beyond the variety of institutional settings and cultures. Especially the financial interconnection existing among the worlds' economies – recently visible in the global financial crisis – makes it clear that the new frontier of Western legal integration of private and commercial law cannot be confined to the classic regional dimensions of the U.S. and the EU, but urgently calls for a supra-regional dimension, able to promote regulations that cross the national boundaries between West and East, North and South of the world.

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The role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions

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Summary
1. Effective judicial protection as a general principle and a fundamental right in the EU legal order – 2. The role of national courts in the EU decentralised system of judicial protection – 3. The impact of the principle of effective judicial protection on national rules – 4. Conclusive remarks: current issues and future perspectives.

Abstract
The complex features of the EU system of judicial protection and its effectiveness on the side of the individual have been raising over time more and more interest among scholars. Effective judicial protection is an essential element in all legal orders, in so far as it allows individuals to enforce their rights and obtain redress. The European Union is no exception. Conferring of an increasing number of rights liable to be claimed by individuals and being characterised by a rather complex system of legal remedies, construed upon a complementary role of the Court of Justice of the European Union and national courts, the EU faces an urgent need of finding a way to ensure effectiveness of judicial protection within its legal order. Against this background, the present contribution aims at addressing the consistency and the relevance of the EU general principle which should fulfil this need. The principle of effective of judicial protection was drawn by the Court of Justice from a fundamental right enshrined in the common constitutional principles of Member

States and protected by Articles 6 and 13 ECHR, as well as by Article 47 of the EU Charter of Fundamental Rights. As interpreted and applied by the Court, such principle is intended as imposing on both Member States and EU institutions an obligation to provide the claims with adequate procedural tools, against or beyond those provided, respectively, by national and EU law. The study offers an insight on the consistency of the principle with particular reference to its impact on national law, and proposes a reconstruction where its nature as expression of a fundamental right of the individual is enhanced. After having illustrated the sources and the scope of application of the principle in general terms, the analysis turns to its various applications , elaborated over time by the Court of Justice. The core part of the contribution offers a crytical analysis of selected case–law of the Court of Justice, paying particular attention to the judicial scrutiny that the different applications of the principle may entail. The purpose is pointing out a certain evolution towards an approach where the principle of effective judicial protection seems to be intended by the Court as the source of a fundamental right of the individual, protected as such by the EU legal order. On these grounds, the conclusive remarks will point out the advantages and the challenges that this approach may imply, in terms of providing for adequate remedies for the individual while granting, at the same time, effectiveness of EU law and coherence within the different levels of judicial protection.

Keywords

EU legal order – General principles – Judicial protection – Effectiveness – Fundamental rights

1. Effective judicial protection as a general principle and a fundamental right in the EU legal order

The right to an effective judicial protection is a fundamental right recognised at international level as well as by the majority of national legal orders, and an essential element of democratic accountability[1]. This right refers to a broad concept which generally encompasses various core elements, including access to justice, the right to an effective remedy and the principles of fair trial and due process of law[2].

1 Solemn declarations of judicial protection as a core fundamental right may be found since the *Magna Charta Libertarum* of 1215 ("[40] *Nulli vendemus, nulli negabimus, aut differemus rectum aut justiciam*") in almost all the constitutional texts based on the rule of law. For a comparative analysis, see CAPPELLETTI, GARTH, *Access to justice. A world survey*, Sijthoff & Noordhoff, Alphen aan den Rijn, 1978 and BYRNES (ed.), *The right to fair trial in international and comparative perspective*, Centre for Comparative and Public Law, Hong Kong, 1997.

2 Provisions variously related to one or more of those elements may be found in most of the human rights instruments existing at international level, and notably in Article 8 of the Universal Declaration of Human Rights, in Articles 2, 9 and 14 of the International Covenant

As such, the right to an effective judicial protection is recognised in the European Union by means of Article 47 of the Charter of Fundamental Rights of the European Union, which shall be regarded, in the light of Article 6(1) TEU as reworded by the Treaty of Lisbon, as a binding provision of primary law in the EU legal order[3]. Article 47 of the Charter is included in the chapter concerning "Justice" and provides for the "Right to an effective remedy and to a fair trial". In particular, the first limb of Article 47 protects the right to an effective remedy of every individual whenever their rights and freedoms guaranteed by EU law are violated, as a result of a failing of one of the duties related to such rights on the part of a Member State, the institutions or another private party; the second limb guarantees the right to a fair trial and the principles of due process of law, including the requirement of reasonable length of proceedings; while the third limb establishes the right to be defended and the right to obtain legal aid, with reference to the need to ensure effective access to justice.

However, the Court of Justice of the European Union (hereinafter 'Court of Justice') has attributed special relevance to the right to an effective judicial protection, long before the adoption of the Charter in 2000[4]. The issue of effective judicial protection of the rights that the individual may derive from the EU legal order soon emerged in the jurisprudence of the Court of Justice, being regarded from an early stage as one of the constitutive elements of a community based on the rule of law, which the EU (at the time the European Community) ought to respect. While this approach was first established in relation to the need to ensure review of legality of measures adopted by the institutions[5], it was with reference to the role of national courts – in providing for an adequate protection of rights conferred upon the individuals by EU law – that the Court of Justice accepted the principle of effective judicial control as a general principle of EU law: a principle "which must be taken into consideration in Community law", as it "underlies the constitutional traditions common to the Member States and [...] is laid down in Articles 6 and 13 of the European Convention for the protection of human rights and fundamen-

on Civil and Political Rights and, at regional level, in Articles 6 and 13 of the European Convention on Human Rights as well as in Article 47 of the Charter of Fundamental Rights of the European Union. For an overview, FRANCIONI (ed.), *Access to justice as a human right*, OUP, Oxford, 2007.

3 According to Article 6(1) TEU "the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the Treaties".

4 The charter was drawn up by a convention consisting of a representative from each EU country and the European Commission, as well as members of the European Parliament and national parliaments. It was formally proclaimed in Nice on 7 December 2000 by the European Parliament, Council and Commission, before being amended and proclaimed a second time in December 2007, with the view of the entry into force of the Lisbon Treaty.

5 The seminal case was ECJ, *Les Verts v European Parliament*, case C-294/83, judgement of 23 April 1986, [1986] 1339.

tal freedoms"[6]. According to the Court, the requirement that individuals should enjoy the opportunity to obtain judicial protection of the rights they derive from EU law pertained to a fundamental right of the individual and thus reflected a general principle of EU law[7]. Drawn from the constitutional traditions common to the Member States[8] and from Articles 6 and 13 of the European Convention for the protection of human rights and fundamental freedoms[9] (hereinafter 'ECHR'), the content of the principle has been determined over time by the Court of Justice through its interpretative function. To that extent, the Court would use as a basis

6 ECJ, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, case C–222/84, judgement of 15 May 1986, [1985] 1651, paragraphs 1 and 2. The case related to a litigation between Mrs. Johnston and the British police corps of the Royal Ulster Constabulary, with regard to an alleged sex discrimination against the applicant. Mrs. Johnston had lodged an application challenging the decision contending that she had suffered unlawful discrimination prohibited by the British Sex Discrimination Order. In the context of the proceedings, the Chief Constable had produced a certificate issued by the Secretary of State in which the Minister himself confirmed that the decision challenged was in accordance with the Sex Discrimination Act, since it had the purpose of safeguarding national security and protecting public safety and public order. The certificate signed by the Minister under British law had to be taken as a conclusive evidence and its content could not be challenged. In this respect, Mrs. Johnston argued that this was in contrast with certain provisions of the Equal Treatment Directive (*Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*); in particular, she assumed that national law on evidence procedure infringed the provision according to which all persons which considered themselves wronged by discrimination ought to be able to pursue their claims by judicial process.

7 In the *Johnston* case, cited above, the Court of Justice referred to the right to an effective judicial remedy, stating that the the EU Directive required a judicial control which reflected a general principle of law underlying the constitutional traditions common to the Member States. According to the Court, it was the same principle laid down in articles 6 and 13 of the ECHR, which must be taken into consideration in EU law. Interpreting the Directive in the light of this general principle, the Court ruled for the incompatibility of the challenged provision. The principle was subsequently re-affirmed in the same terms in all relevant case-law.

8 Among the common traditions of Member States, the right to an effective judicial protection is commonly intended as a fundamental right as it is linked to the principles of the rule of law. Obviously, there are differences as to its recognition and its content: it is either contained in an express provision of the Constitution (Article 19(4) of the German Constitution, or Section 24 of the Spanish Constitution), or derived from a group of provisions, relating to due process, independency and impartiality of the judiciary, rights of defence (see for example Articles 24, 111 and 113 of the Italian Constitution, and Articles 36 to 38 of the Constitution of the Czech Republic); or being regarded as as a general principle, which informs the national legal order without being enshrined in a written constitution (as in the United Kingdom). For an overview, STORSKRUBB, ZILLER, *Access to justice in European comparative law*, in FRANCIONI, *Access to justice as a human right*, cited above, 177 ff.

9 In the ECHR, which is the main instrument for the protection of human rights at regional level, the right to an effective judicial protection results from the combination of Articles 6 (1) and Article 13. Article 6(1) protects the principles of due process, whereas Article 13 is an enabling provision which provides for the right to an effective remedy in the context of the enjoyment of fundamental rights and freedoms protected by the substantial provisions of the Convention.

either the common principles enshrined in the constitutional orders of Member States, or it would refer to the specific content of Articles 6 or 13 of the ECHR, as interpreted by the case law of the European Court of Human Rights[10] (hereinafter 'ECtHR'). In general terms, the principle has been construed quite broadly as comprising: access to justice[11], including the right to judicial review and access to an effective remedy with reasonable time–limits[12]; the right to a fair trial and the principles of due process[13], including the right to reasonable length of proceedings[14]; the right of defence[15], including the right to evidence[16] and the right to be represented[17]. The Court of Justice has always underlined the fact that effective judicial protection must be more than a mere formal possibility, as it must also be feasible in practical terms. Therefore, the concrete application of the principle often consisted in establishing the procedural rule which may in concrete serve as a means for strenghtening judicial protection of the individual, as to render the EU system of legal remedies overall complete and effective: either at national level, when domestic courts exercise their competences for the enforcement of rights and rules derived from EU law[18]; or in a global perspective, in order to ensure a fruitful interaction between EU and national remedies[19].

The general principle of effective judicial protection is not recognised in the terms referred to by the Court of Justice by any provision of the Treaties. The only provisions which partly deal with the principle are, on the one hand, Article 19(1) TEU, which refers to the horizontal dimension of the principle, establishing a duty upon Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law; the provision serves, in this sense, the

10 For an overview of ECtHR's case–law on Article 6 and 13, see MILANO, SUDRE, *Le droit à un tribunal au sens de la Convention européenne des droit de l'homme*, Dalloz, Paris, 2006, or refer to the commentaries contained in HARRIS, O'BOYLE, BATES, BUCKLEY, *Law of the European Convention on Human Rights*, OUP, Oxford, 2009, WHITE, OVEY (eds.), *The European Convention of Human Rights*, 5th edn, OUP, Oxford, 2010, BARTOLE, DE SENA, ZAGREBELSKY (cur.), *Commentario breve alla Convenzione europea dei diritti dell'uomo*, Cedam, Padova, 2012.

11 ECJ, *Heylens*, case C–222/86, judgement of 15 October 1987, [1987] 4097, ECJ, *Oleificio Borelli SpA*, case C–97/91, judgement of 3 dicembre 1992, [1992] I–6313 and ECJ, *Safalero*, C–13/01, judgement of 11 settembre 2003, [2003] I–8679 .

12 ECJ, *Pontin*, case C–63/08, judgement of 29 October 2009, [2009] I–10467.

13 ECJ, *Ordre des barreaux francophones et germanophones*, case C–305/05, judgement of 26 June 2007, [2007] I–5305.

14 ECJ, *Baustahlgewebe*, case C–185/95 P, judgement of 17 December 1998, [1998] I–8417.

15 ECJ, *Corus UK*, case C–199/99 P, judgement of 2 October 2003, [2003] I–11177.

16 ECJ, *Compagnie Maritime Belge*, joint cases C–395 and 396/96 P, judgement of 16 March 2000, [2000] I–1365.

17 ECJ, *Krombach*, case C–7/98, judgement of 28 March 2000, [2000] I–1935.

18 ECJ, *Peterbroeck*, case C–312/93, judgement of 14 December 1995, [1995] I–4599.

19 ECJ, *Jégo Quéré*, case C–263/02 P, judgement of 1 April 2004, [2004] I–3425.

main function of granting enforcement to rights and obligations deriving from EU law, rather than protecting a fundamental right of the individual. On the other hand, references to the need to ensure effective access to justice to the individuals are contained in some provisions concerning the action of the EU in the field of judicial cooperation in civil matters, particularly Articles 67 and 81 TFEU.

On the contrary, the content and the scope of the principle of effective judicial protection has been widely acknowledged by secondary law, as a result of a mutual interaction between the EU legislator and the Court of Justice. While on some occasions, judicial trends of the Court of Justice were incorporated in secondary law [20], on other occasions it was the legislator the one who first established procedural guarantees and remedies for the individual to seek protection for the rights conferred by the legislative act, especially in sectors of EU law where there was a particular need of protection of sensitive categories of people (such as consumers[21]) or a particular need of harmonisation of standards of protection (for example public procurement legislation[22]).

Even in the absence of an express recognition of the principle in primary or secondary law, the guarantee of the right to effective judicial protection, as a general principle of EU law, was able to enjoy from the beginning a 'constitutional' status[23]. Firstly, as a major source of interpretation of EU primary and secondary law, as well as of national provisions which may be linked to the scope of application of EU law. Secondly, as a grounds for conducting review of legality of EU provisions of secondary law or national law implementing it. Thirdly, as a principle binding on both EU institutions and Member States, meant to be observed in the context of the remedies before the Court of Justice as well as remedies before national courts for the enforcement of rights derived from (or connected to) EU law, as to render the system of legal remedies available for the individual within the EU legal order overall complete and effective.

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20 A notable example is the Free Movement Directive (*Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*), which enshrines in its Article 31 some "Procedural safeguards" already established by the Court of Justice in its earlier case-law, providing for every person "access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health".

21 See for example *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*.

22 See for example *Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts*.

23 TRIDIMAS, *The general principles of EU law*, OUP, Oxford, 2007, 4.

2. The role of national courts in the EU decentralised system of judicial protection

The EU general principle of effective judicial protection is bound to be applied within a decentralised system of remedies, based on the complementary cooperation of the Court of Justice and the national judge[24]. In fact, while the Court of Justice dictates the principles to be followed in order to ensure the individuals an effective protection of their rights, a system based on a significant decentralisation of the judicial protection instructs in first place the national judge to construe national remedies efficiently, so as to make claims of European citizens available and effective.

Long before the entry into force of the Treaty of Lisbon, which formalised this structure in the wordings of Article 19 TEU, the Court of Justice had developed a role for the national judicial systems as part of a supranational EU judicial system, as to secure enforcement of EU law at national level[25]. The system was conceived on the basis of a quite wise separation of functions, where the Court of Justice was charged with a number of specific tasks under the Treaties[26], while national courts were first in line to enforce and apply EU law within the Member States, where appropriate after obtaining a preliminary ruling from the Court of Justice itself[27]. As a result, two levels of judicial protection were provided for, characterised by the fact of having a different scope and of being basically independent one from the other.

Ever since *Van Gend en Loos*[28] the Court has consistently held that EU law creates rights which national courts must protect, upon the duty of sincere cooper-

24 A consistent study on the subject shall be found in SCHERMERS, WAELBROECK, *Judicial protection in the European Union*, 7th edn, Kluwer Law International,The Hague, 2006.

25 In its seminal judgement ECJ, *Costa v. ENEL*, case 6/64, judgement of 15 July 1964, [1964] 1129, the Court held that the Treaty (former TEC) had created "its own legal system which […] became an integral part of the legal systems of the Member States and which their courts are bound to apply" (paragraph 7). See in this regard ADINOLFI, *L'applicazione delle norme comunitarie da parte dei giudici nazionali* (2008) *Dir. Un. Eur.* 617 ff.

26 Without going into details, it may be recalled that the main competences of the Court of Justice refer in broad terms to the control over the validity of EU acts (action for annulment, Article 263 TFEU and plea of illegality, Article 277 TFEU), the rulling upon failures to act by the institutions under EU law (action for failure to act, Article 265 TFEU), as well as to the civil liability of EU institutions (action for damages, Article 340 TFEU) and to the control over the infringements of EU law by the Member States (infringement action, Article 258 TFEU). These are the so–called direct competences, which refer to actions which can be directly brought before the Court, even by individuals at certain conditions.

27 The preliminary reference procedure, established in Article 267 TFEU, allows the Court of Justice to exercise an indirect competence, aimed at ensuring the correct and uniform application and interpretation of EU law in all Member States and exercise a control over the validity of acts of institutions through the cooperation of national courts. This mechanism implies that where a national court is in doubt about the interpretation or validity of an EU provision, it may – and sometimes must – ask the Court of Justice for advice.

28 ECJ, *Van Gend en Loos*, case 26/62, judgement of 5 February 1963, [1963] 3.

ation set out in Article 4(3) TEU and the principles which rule the effectiveness of EU law in the national legal systems. The judicial authorities of the Member States were soon entrusted with the responsibility to ensure that EU law was applied and enforced in the national legal system and that no measures were taken which could jeopardise the attainment of the objectives of the Treaties. This appeared since the beginning a natural solution, as the *effet utile* of EU law implies not only that EU law must itself be applied, but also that national law is made in implementation of EU obligations: the result is that often national law contains elements of EU law, or implies a connection with EU law – and inevitably such national law would come before national courts. Accordingly, the obligation placed upon national courts to provide for "remedies sufficient to ensure effective legal protection in the fields covered by Union law", as it is today established by Article 19(1) TEU, was inherent in the doctrine of direct effect, holding Member States responsible to ensure effective judicial control as regards respect and enforcement for the rights conferred by EU law upon individuals and compliance with relevant EU provisions and with national legislation intended to give effect to them.

In the absence of general provisions on remedies and procedures imposed by EU law on Member States, a general rule was framed so that national courts should fulfil their duty to grant effectiveness to EU law and judicial protection to individuals in the fields covered by EU law in accordance to their domestic legal procedures, remedies and sanctions. Early in its case law the Court of Justice ruled that national legal systems should determine the procedural conditions governing actions and remedies intended to grant legal protection of the interests of a person adversely affected by an infringement of EU law: such a rule was enshrined in the principle of procedural autonomy, which was based on the assumption that national remedies and procedures were basically sufficient and adequate for granting the enforcement of EU law and the protection of rights conferred upon individuals[29].

As this reconstruction implied the risk that in such a system the rights which individuals may derive from EU law would differ from one Member State to another, the Court of Justice soon started to interfere with national procedures and remedies, establishing certain limits to the principle of procedural autonomy: national legal order ought to comply with the principle of equivalence, or non–discrimination, on one side[30]; as well as with the principle of effectiveness, or

29 The seminal judgement where this principle was first established is ECJ, *Rewe*, case 33/76, judgement of 16 December 1976, [1976] 1989.

30 The principle of equivalence is a specific application of the broader principle of non-discrimination, imposing an obligation upon Member States to provide for equivalent remedies in case of infringement of EU law as in case of infringement of national law. In other words, the same procedural treatment must be given to claims based on EU law as is given to similar claims based on national law. Of course it is first necessary to properly identify similar actions and the procedural rules applying to them: the principle does not imply necessarily that actions

practical possibility, on the other side[31]. In the light of these two principles, the Court of Justice started assessing the compatibility of national legal norms on procedural and jurisdictional issues which had the effect of causing a prejudice to the enforcement or rights and obligations derived from EU law. Over time, the approach of the Court on procedural autonomy has yielded from an abstract test to a stronger insistence on the effectiveness principle, which had a deeper and deeper influence on national procedural remedies: on some occasions by requiring the importance of the EU right to be weighed against the scope and purpose of the national rule[32]; and on other occasions by adopting a case by case approach, which could ensure the effectiveness of the relevant EU rule involved with the result of prevailing over important national principles[33]. This affected a range of national remedies and procedural and jurisdictional conditions, such as domestic time limits and limitation periods, rules of evidence and the burden of proof, *locus standi* rules, national conditions for reparation of loss and damage and many other remedies and sanctions; sometimes leading national courts to have great difficulties adapting existing rules[34].

The notable development in the application of the limits to the principle of procedural autonomy, with particular reference to the effectiveness clause,

based on EU law always should benefit from the most favourable procedural regime to be found in national law; it only implies that comparable claims should be treated equally, prohibiting straightforward discrimination based on the origin of the claim (national or European). Interesting applications of this principle may be found for example in ECJ, *Saldanha*, case C–122/96, judgement of 2 October 1997, [1997] I–5336 and ECJ, *Transportes Urbanos*, case C–118/08, judgement of 26 January 2010, [2010] I–0635.

31 The effectiveness principle derives from the general duty of cooperation contained in Article 4 TEU, and it implies that the conditions set out in national law could not be so framed as to render virtually impossible or excessively difficult the exercise of rights conferred by EU law. When assessing the respect of the effectiveness principle, the Court of Justice takes into account the role of the national provision in the whole national procedural system, in order to grant a balance between effectiveness of EU law and the principles which rule national procedural autonomy: see in that regard, for example, ECJ, *Van Schijndel*, joint cases C–430 and 431/93, judgement of 14 December 1995, [1995] I–4705.

32 As it happened with reference to national time–limits (see for example ECJ, *Emmott*, case C–208/90, judgement of 25 July 1991, [1991] I–4269).

33 Such as the principle of *res judicata* (see in this regard ECJ, *Fallimento Olimpiclub*, case C-2/08, judgement of 3 September 2009, [2009] I–7501).

34 The most peculiar applications of the limits of equivalence and effectiveness attracted great interest among the scholars, raising a debate which instensified over time on whether Member States could still be regarded as possessing procedural autonomy, or rather this principle was bound to be overruled. See, in this regard, HIMSWORTH, *Things fall apart: the harmonisation of Community judicial procedural protection revisited* (1997) *Eur. Law. Rev*. 291 ff., KAKOURIS, *Do the member states possess procedural 'autonomy'?* (1997) *Com. Mar. Law. Rev.*, 1389 ff., BIONDI, *The European Court of Justice and certain national procedural limitations: not such a tough relationship* (1999) *Com. Mar. Law. Rev.* 1271 ff., DOUGAN, *National remedies before the Court of Justice: issues of harmonisation and differentiation,* Hart Publishing, Oxford, 2004, ARNULL, *The principle of effective judicial protection in EU law: an unruly horse* (2011) *Eur. Law. Rev.* 51 ff.

shows the close connection existing between the effective protection of the rights of the individual and the effective enforcement of EU law: the obligation placed upon national courts, intended as a means for ensuring effectiveness of EU law at national level, turned out to be an indirect instrument for granting judicial protection to individuals, whose concern for their rights constitutes an important additional form of enforcement of EU law.

This aspect, in whose regard the preliminary reference procedure plays an important role[35], represents a core element of the role of national courts in the EU legal order from the point of view of the judicial protection of the individual: accordingly, national courts actually became the 'natural forum'[36] where individuals should seek for judicial protection of their interests in situations where the enforcement of EU law is involved, whenever their rights of freedoms are violated as a result of a failing of one of the duties generated by such rights on the part of another private party, a Member State or even the EU institutions[37].

35 Despite the features which make the preliminary reference procedure a mechanism of co-operation between judges rather than a remedy for the individual, long established case–law of the Court of Justice addressed this instrument as an indirect remedy which could fill the gaps left by the set of legal remedies available to the individual. In the Court's view, the entitlement of individuals to have their rights protected is mostly guaranteed, whenever EU law is involved, through the preliminary reference procedure, as it provides individuals with indirect access to the Court of Justice whenever other direct avenues are precluded. This approach, which was partially confirmed even by the ECtHR in a recent judgement on access to justice and due process of law (ECtHR, *Ullens de Schooten v Belgium*, No. 3989/07 and 38353/07, judgement of 20 September 2011) led to some important developments: the Court of Justice soon maintained that the effectiveness of the preliminary reference procedure should not be prejudiced by any national rule, even of a procedural nature, which has the effect of restricting the powers of the national judge to raise a preliminary question to the Court of Justice (see ECJ, *Mecanarte*, case C–348/89, judgement of 27 June 1991, [1991] I–3277, and, more recently, CJEU, *Melki*, joint cases C–188 and 189/10, judgement of 22 June 2010, [2010] I–5667 and CJEU, *Elchinov*, case C–173/09, judgement of 5 October 2010, [2010] I–8889); also, the Court ruled that the principle of State liability for the breach of EU law may also apply when claiming responsibility of the national judges who disregard the duty imposed upon them by Article 267 TFEU (the principle was first affirmed in ECJ, *Köbler*, case C–224/01, judgement of 30 September 2003, [2003] I–10239 and then re-affirmed in ECJ, *Traghetti del Mediterraneo*, case C–173/03, judgement of 13 June 2006, [2006] I–5177 and, more recently, in the context of an infringement procedure in CJEU, *Italy v. Commission*, case C–379/10, judgement of 24 November 2011, not yet published).

36 TESAURO, *The effectiveness of judicial protection and the co–operation between the Court of Justice and National Courts*, in *Festsknift til Ole Due: Liber Amicorum*, Gad, Copenhagen, 1999, 355 ff.

37 With regard to the latter, see ECJ, *UPA*, case C-50/00 P, judgement of 25 July 2002, [2002] I–6677 and ECJ, *Jégo-Quéré*, case C-263/02 P, cited above.

As a general principle binding upon EU institutions as well as upon Member States, the principle of effective judicial protection has been increasingly applied both in its vertical and in its horizontal dimension. In the first sense, it was used as a parameter to conform proceedings before the ECJ to the various fundamental rights which constitute its essence[38], as well as to render the whole set of legal remedies available to the individual in the EU legal order overall complete and effective[39]. In the second sense, it was used as a basis for judging national legal norms on remedies and procedures in order to ensure a correct enforcement of rights and obligations arising from EU law with respect to individuals. It is in this latter application that the principle showed its potential, producing a notable impact on national procedural rules as well as on the obligations placed upon national courts, and limiting procedural autonomy far beyond the common limits of equivalence and effectiveness.

A brief clarification on this point appears necessary, as the difference existing between the equivalence and effectiveness test and the effective judicial protection test is at the core of the reconstruction which follows. Both the mentioned tests have as their object the conformity to EU law of national procedural rules, which are established under a competence which exclusively pertains to Member States; however, they move from a different starting point. According to procedural autonomy, national rules are, in principle, neutral with respect to EU law, as they become significant only as a means for the enforcement of EU provisions at national level; therefore, they may be deemed incompatible with EU law only in the event that they fail to grant such enforcement: this is the case where the provisions concerned do not comply with the principles of equivalence or effectiveness as interpreted by the Court. Conversely, the same procedural rules, even without representing an obstacle to the enforcement of EU law before national courts, may be still regarded as a substantive infringement of the principle of effective judicial protection, when their application determines a restriction to one of the rights enshrined in the principle: such restriction shall be regarded as unlawful, unless it can be justified by objective and legitimate reasons.

In fact, the limits to procedural autonomy and the principle of effective judicial protection have a different scope: the former are intended to avoid obstacles to the correct enforcement of EU law, and the rights and obligations derived from its provisions; while the latter is rather intended to ensure respect of a general rule of law, reflecting a fundamental right of the individual. Accordingly, the

38 See for example ECJ, *Masdar*, case C–47/07 P, judgement of 16 December 2008, [2008] I–9761 and CJEU, *Deutsche Post AG*, joint cases C-463/10 P and C-475/10 P, judgement of 13 October 2011, not yet published.

39 See for example ECJ, *Der Grüne Punkt*, case C–385/07 P, judgement of 16 July 2009, [2009] I–6155.

principle of effective judicial protection shall find application irrespective of its effects on EU law, even in the event that the justification for the limitation caused by a national procedural rule were based upon an EU-based interest.

This difference in perspective affects the test itself: with regard to procedural autonomy, the test consists in principle in the abstract control on equivalence and effectiveness, and Member States should be generally entrusted with quite a wide margin of discretion; on the contrary, the test on effective judicial protection is ruled by a human rights-based approach, and consists in a balance between the right of the individual and the justification laid down for that particular provision under the principles of necessity and proportionality[40].

This reconstruction is also supported by case–law of the Court of Justice: in the judgement issued in the case *Alassini*[41], the Court applied separately the test of procedural autonomy and the test of effective judicial protection, reaching opposite solutions with respect to the compatibility of the same national procedural rule. The case concerned an Italian legislation under which an attempt to achieve an out-of-court settlement was a mandatory condition for the admissibility before the courts of actions in certain disputes between providers and end-users under the EU Universal Service Directive[42]. The references were submitted in the context of four disputes brought by a number consumers against certain mobile companies, regarding alleged breaches of the contracts binding the parties. In all actions brought by the applicants in the proceedings before the referring court, the defendants had argued by way of a preliminary objection that under Italian law the actions were inadmissible because the applicants had not first initiated the mandatory attempt to reach a settlement of the dispute before the competent body. In order to assess whether the establishment of a mandatory settlement procedure as a condition for the admissibility of actions before the courts was to be considered compatible with the right to effective judicial protection, the Court of Justice tested the respect of both the limits of procedural autonomy (equivalence and effectiveness) and of the principle of effective judicial protection[43]. While founding, in principle, no violation of the principles of equivalence and effectiveness, provided that certain conditions were respected[44],

40 As "it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed". This approach, first established in landmark case *Hauer*, case 44/79, judgment of 13 December 1979, [1979] 3727, was often referred to also with regard to the principle of effective judicial protection.

41 CJEU, *Alassini*, joint cases C-317 to 320/08, judgement of 18 March 2010, [2010] I-2213.

42 *Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services*.

43 CJEU, *Alassini*, cited above, paragraph 47.

44 CJEU, *Alassini*, cited above, paragraphs 50 to 60.

the Court conversely recognised the existence of a restriction to the principle of effective judicial protection, maintaining that national legislation introduced an additional step for access to the courts which might prejudice judicial protection of the individuals. Such a restriction was nevertheless found admissible in the light of the principles of necessity and proportionality[45].

Unfortunately, the differences which have just been outlined, that may appear so sharp in abstract terms, are often faint in the case-law of the Court of Justice. The concrete application of the principle of effective judicial protection could not avoid in quite a number of cases producing an interaction with the limits of equivalence and effectiveness: as a result, the principle has been applied in different ways, being the test, on some occasions, very similar to that of procedural autonomy, while following, on other occasions, the different path of a human rights-based approach, with different results in terms of protection of the individual and impact on national procedural rules. This reconstruction is supported by the analysis which has been conducted on relevant case-law of the Court of Justice, where it was possible to identify, with respect to the role and consistency of the principle of effective judicial protection, four co-existing main approaches of the Court of Justice, which shall be briefly outlined as follows.

A first approach regards the principle of effective judicial protection merely as an additional means for ensuring the *effet utile* of EU law in Member States. As such, the principle is not used in order to protect a fundamental right of the individual, but rather to grant a minimum standard of effectiveness of EU law at national level, and as a ground to strenghten the limits of equivalence and effectiveness against procedural autonomy. A notable example of this approach may be found in the *Unibet* case[46], where the Court of Justice referred to the general principle of effective judicial protection as a parameter for determining the content of the principles of equivalence and effectiveness. The facts of the case may be summarised as follows. Unibet was an English company offering gaming and betting services on the web. In November 2003, it had purchased advertising space in a number of different Swedish media with a view to promoting its gaming services on the internet. However, in accordance with the Swedish law on

45 CJEU, *Alassini*, cited above, paragraph 63. According to the Italian Government, the aim of the national provisions at issue was the quicker and less expensive settlement of disputes relating to electronic communications and a lightening of the burden on the court system, representing legitimate objectives in the general interest. Those objectives were shared also by EU law, since the directive itself fostered the prevision of alternative mechanisms for the out-of-court settlement of consumer disputes so as to reduce the cost of settling consumer disputes and the duration of the procedure. According to the Court of Justice , the imposition of an out-of-court settlement procedure such as that provided for under the national legislation at issue, did not seem – in the light of the detailed rules for the operation of that procedure – disproportionate in relation to the objectives pursued: no less restrictive alternative to the implementation of a mandatory procedure existed, since the introduction of a merely optional out-of-court settlement procedure would not be as efficient in achieving those objectives.

46 ECJ, *Unibet*, case C-432/05, judgement of 13 March 2007, [2007] I–2271.

lotteries, all activities relating to games in which the possibility of gain is based on chance, such as betting, bingo games, slot machines and roulette machines, required an administrative licence issued by the competent authorities at local or national level; without this licence, it was not permitted, in commercial operations or otherwise for gain, to promote participation in unlawful lotteries organised domestically or in lotteries organised abroad. In accordance to this law, the Swedish State took a number of measures, including obtaining injunctions and commencing criminal proceedings, against those media which had agreed to provide Unibet with advertising space. No administrative action or criminal proceedings were brought against Unibet, which, before being addressed by any measure, brought an action against the Swedish State claiming its right, pursuant to Article 56 TFEU (freedom to provide services), to promote its gaming and betting services in Sweden, and claiming damages suffered as a result of that prohibition on promotion as well as interim relief for the measures and sanctions applied by Sweden to its media partners. However, all claims were bound to be rejected in the absence of a specific legal relationship between Unibet and the Swedish State, as seeking for an abstract review of a legislative provision was not admissible under Swedish law. Doubting on the compatibility of this interpretation of national law with EU law, the Swedish judge referred to the Court of Justice, asking in essence whether the principle of effective judicial protection of an individual's rights under EU law required it to be possible to bring a free-standing action for an examination as to whether national provisions are compatible with the EU freedom to provide services, considering that there were other legal remedies which permitted the question of compatibility to be determined as a preliminary issue. The Court moved from the consideration that the need to ensure effective judicial protection, read in the light of the principle of procedural autonomy and its limits, is not intended as to create new remedies in the national courts to ensure the observance of EU law, other than those already laid down by national law; this would be the case "only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law"[47]. Accordingly, the content of the principle of effective judicial protection should essentially consist in imposing on national courts an obligation "to interpret the procedural rules governing actions brought before them […] in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective […] of ensuring effective judicial protection of an individual's rights under Community law"[48]. The test on the respect of the right to effective judicial protection was therefore modelled on the application of the principles of equivalence and effectiveness, as to ensure a minimum standard of protection under which

47 ECJ, *Unibet*, cited above, paragraph 41.

48 ECJ, *Unibet*, cited above, paragraph 44.

national procedural rules should not preclude *any* reasonable opportunity for the individuals to claim their rights derived from EU law at national level[49].

A different interpretation of the principle of effective judicial protection results from the analysis of certain cases where the Court of Justice applied the principle on a case-by-case basis, in the light of a need to provide for a special protection to the rights of the individual, by virtue of the specific circumstances of the claim or considering the particular features of the sector of EU law involved. Two judgements may be recalled as examples of this approach.

Impact[50] is a case where the application of the principle of effective judicial protection was very much influenced by the specific circumstances of the claim. The judgement arose from a preliminary reference which was made in proceedings brought by the Irish trade union Impact, acting on behalf of Irish civil servants, against the government departments were these servants were employed. The litigation concerned conditions applied to fixed-term workers which, according to Impact, were discriminatory in nature with respect to the conditions applicable to permanent workers and so incompatible with certain provisions of a EU Directive[51]. Among other grounds of review, Impact had claimed that national law infringed the principle of effective judicial protection: national law implementing (late) the EU Directive, while transposing incorrectly some of its provisions, had created a special Commissioner but had limited its jurisdiction to adjudicating on complaints based on domestic law; as a result, individuals could not directly rely upon provisions of the Directive before this Commissioner, even if they were unconditional and sufficiently precise (meaning that they had direct effect), but they could only bring a proceedings before the ordinary judge, but with higher costs and obstacles to bring the action. The alleged violation in the specific case was due to the fact that some of the claims brought by the

49 Specifically, the fact that Swedish law did not provide for a self-standing action seeking primarily to dispute the compatibility of a national provision with EU law did not infringe the principle according to the Court, provided that the principles of equivalence and effectiveness were observed in the domestic system of judicial remedies by virtue of the existence of other rules. The Court found no violation of the equivalence principle, since Swedish law did not provide for such a free-standing action, regardless of whether the higher-ranking legal rule to be complied with was a national rule or a EU rule (paragraph 48); neither it found violation of the effectiveness principle, because of the existence of other remedies for the purpose of challenging the validity of the provision under EU law, particularly the possibility to file a claim for damages before the ordinary courts, where Unibet would have the opportunity to dispute the compatibility of those provisions with EU law (paragraph 53). Considering all the above, the Court of Justice maintained that Unibet had legal remedies available which ensured effective judicial protection of its rights under EU law. A different solution would be required only if, on the contrary, Unibet had been forced to undergo administrative or criminal proceedings (and any penalties that may result) as the sole form of legal remedy for disputing the compatibility of the national provision at issue with EU law.

50 ECJ, *Impact*, case C-268/06, judgement of 15 April 2008, [2008] I–2483.

51 *Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP*.

applicants were based upon situations which took place in the period between the deadline for transposing the directive and the date on which the transposing legislation entered into force: as a result, according to national law, they should have brought at the same time an action before the Commissioner based on national implementing legislation, and a separate action before an ordinary court, in order to assert the rights which they could derive directly from the EU Directive for the period preceding the date on which the national implementing legislation entered into force. In this case, the Court of Justice linked the principle of effective judicial protection to the responsibility of national courts under article 4 TEU to provide for the legal protection which individuals may derive from provisions of EU law and to ensure that those rules are fully effective[52]. Stressing the importance of effectiveness of judicial protection of rights derived from EU law allowed the Court to consider that in this case the existence of a remedy available to the individual to invoke provisions of the EU Directive was not sufficient. The Court therefore suggested the opportunity of extending the special Commissioner's jurisdiction, as to avoid that individuals in the situation of the complainants would suffer from procedural disadvantages, in terms, *inter alia*, of cost, duration and respect of the rules of representation, that would render excessively difficult the exercise of their rights.

This approach is likely to be adopted by the Court of Justice also in cases where in special fields of EU law more or less detailed procedural guarantees are provided for by the applicable legislation, as a result of a choice of legislative policy. The *Boxus* case[53] concerns the sector of environmental law, which is a field where a standard of judicial protection, aimed at establishing procedural rights which ensure the participation of individuals in the definition of policies which may have an impact on the environment, is imposed at international level[54] and then transposed in EU law. The case originated in the course of proceedings brought by persons living near Liège-Bierset and Brussels South Charleroi airports and the Brussels to Charleroi railway line against the *Région Wallonne* (Walloon Region). The applicants had challenged before the *Conseil d'État* a series of authorisations adopted by the competent administrative authorities concerning the carrying out of works or the operation of installations in connec-

52 ECJ, *Impact*, cited above, paragraphs 42 and 43.

53 CJEU, *Boxus*, joint cases C-128, 131, 134 and 135/09, judgement of 18 October 2011, not yet published.

54 In particular by the United Nations Economic Commission for Europe (UNECE) *Convention on access to information, public participation in decision-making and access to justice in environmental matters*, signed at Aarhus in 1998. All Member States are part of the Convention, which was officually ratified by the EU in 2005. The Convention lays down a set of basic rules to promote citizens' involvement in environmental matters and improve enforcement of environmental law. In particular, it grants public access to environmental information, provides for participation in environmental decision-making, and allows the public to seek judicial redress when environmental law is infringed.

tion with those airports and transport links to them. While those actions were pending before the *Conseil d'État*, a Decree of the Walloon Parliament of 17 July 2008, which is a legislative act adopted by the Walloon Parliament and approved by the government of the Walloon Region, 'ratified' those authorisations, meaning that they validated them on the basis of 'overriding reasons in the general interest'. After the issue of the Decree, the applicants argued that, since an act of a legislative nature had replaced the contested administrative acts and that legislative act could be challenged only before the *Cour constitutionnelle*, the effect of the adoption of the abovementioned decree deprived the *Conseil d'État* of jurisdiction and deprived them of their interest in the annulment of the administrative acts. According to the applicants, the only possible action against that legislative act, which would be an action for annulment before the *Cour constitutionnelle*, did not comply with their rights to be heard, inasmuch as the *Cour constitutionnelle* had only a limited power of review, and was therefore unable to assess compliance with all the provisions of national environmental law, and of the applicable procedural rules. The claim was based upon some provisions of a EU Directive on 'Environmental Impact Assessment' (EIA)[55], interpreted in the light of the principles embedded in the Aarhus Convention, according to which each person having sufficient interest should have access to a review procedure before a court or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission affecting the rights conferred upon them by the Convention itself. The preliminary reference raised by the national court essentially concerned the question whether Article 9 of the Aarhus Convention and certain provisions of the EIA Directive were compatible with the choice to implement a project by a legislative act against which, under national law, no substantial review procedure was available. In this case, in order to ensure the procedural rights granted to individuals, the Court found it necessary to entrust any national court of the power of exercising a review on the legislative act contested by the applicants, although this power was *not* envisaged by national law[56].

55 *Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment*, which requires Member States to carry out assessments of the environmental impact of certain public and private projects before they are allowed to go ahead. The aim of the Environmental Impact Assessment process is to ensure that projects which are likely to have a significant effect on the environment are assessed in advance so that people are aware of what those effects are likely to be.

56 According to the Court of Justice "Article 9 of the Aarhus Convention and Article 10 of Directive 85/337 would lose all effectiveness if the mere fact that a project is adopted by a legislative act […] were to make it immune to any review procedure for challenging its substantive or procedural legality within the meaning of those provisions" (paragraph 53). The Court therefore did not hesitate to draw the conclusion that "if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous paragraph and, as the case may be, drawing the necessary conclusions by disapplying that legislative act" (paragraph 55).

This solution shows that the existence of an EU legislative provision granting certain procedural rights to individuals may expand the impact of the principle of effective judicial protection on national procedural law: in such cases, the application of the principle, whose content is autonomously determined by the Court, may go to the extent of requiring the existence in each Member State of a remedy able to grant the specific standard of protection imposed by EU law.

The cases examined so far represent applications of the principle of effective judicial protection which appears mainly linked to the effectiveness of EU law: in other words, they reflect the principle embedded in art. 19(1) TEU, under which the obligation to ensure effective remedies is placed upon national courts as a means to grant effectiveness of EU law – or rights and obligations originated from such law – at national level. This reconstruction stays steady irrespective of the impact that the principle may have on national rules: either a simple limit, beyond equivalence and effectiveness, to national procedural autonomy, or a means for granting success to the specific claim of the individual or the effectiveness of an specific rule of procedural nature which may be derived from EU law. Even when the test is more penetrating and may have a more relevant impact on national rules, with the possible consequence of improving the level of judicial protection of the individual, the principle serves mainly the effectiveness of EU law[57] and is far from being applied as pertaining to a fundamental right of the individual – not to mention the fact that in those cases where the Court of Justice chooses a case-by-case approach, this entails the risk of undermining legal certainty.

However, in a number of recent judgements where the principle of effective judicial protection was applied, the Court appeared to be more committed to grant effectiveness of the right of the individual to judicial protection as such, rather than linking its reasoning to the effectiveness of EU law. In such cases, the application of the principle was linked to a fundamental right and implied a balance between competing interests.

In this respect, different situations may be outlined, variously affecting the consistency of the principle.

The first scenario relates to a conflict between a right derived from EU law opposed to a national procedural rule which has the effect of denying it. This situation occurred in the *DEB* case[58], which concerned the compatibility with the principle of effective judicial protection of a national rule granting legal aid to legal persons and entities only in such cases where the failure to pursue or defend the action would run counter to the public interest. The issue was raised by a company seeking to bring an action to establish that Germany had incurred in

57 E.g. freedom to provide services in the *Unibet* case, equal treatment directive in the *Impact* case, EIA directive in the *Boxus* case.

58 CJEU, *DEB*, case C-279/09, judgement of 22 December 2010, [2010] I–13849.

State liability under EU law[59]. Being uncertain on whether the refusal of legal aid to DEB for the pursuit of an action seeking to establish State liability under EU law was consistent with the principles of that law, the national appeal court raised a preliminary reference to the Court of Justice. The object of the reference was, in a nutshell, whether the fact that a legal person was unable to qualify for legal aid rendered the exercise of its rights impossible in practice and precluded its right of access to a court. The Court solved the question on the basis of the right of a legal person to effective access to justice and interpreted the principle of effective judicial protection in the light of the scope of application and the wording of Article 47 of the Charter, taken in conjunction with the constitutional traditions of Member States and ECtHR's case-law on Article 6 ECHR. In the absence of a common principle, from all these provisions the Court drew, adopting a "constitutional" approach, some criteria on how the right to be granted legal aid to have effective access to justice might be extracted and interpreted: leaving to the national court the duty "to ascertain whether the conditions for granting legal aid constituted a limitation on the right of access to the courts undermining the very core of that right, whether they pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve"[60]; and establishing at the same time some criteria which could be taken into consideration in the light of this assessment[61].

The second scenario may refer, conversely, to a case where a right related to judicial protection granted by national law has the effect of limiting the effectiveness of EU law. An interesting example is the recent case *Belvedere Costruzioni*[62]. The case concerned an Italian legislation adopted in 2010[63], under which proceedings that had been pending before the Central Tax Court (Commissione

59 In particular, the company was seeking reparation from Germany for the delay in the transposition of certain directives concerning common rules for the internal market in natural gas, intended to make non-discriminatory access to the national gas networks possible (*Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC*). DEB submitted that, as a result of that delay, it was unable to obtain access to the gas networks of the German network operators and was therefore obliged to forgo profits amounting to approximately EUR 3.7 thousand million under contracts with suppliers for the supply of gas. Owing to its lack of income and assets, DEB – which had no employees or creditors – was unable to make the necessary advance payment of court costs required by German procedural law, nor to pay for representation by a lawyer, whose instruction was compulsory in the main proceedings. However, the German Court had refused to grant legal aid on the ground that the conditions laid down in the German procedural code were not satisfied.

60 CJEU, *DEB*, cited above, paragraph 60.

61 CJEU, *DEB*, cited above, paragraphs 61–62.

62 CJEU, *Belvedere Costruzioni*, case C-500/10, judgement of 29 March 2012, not yet published.

63 Decree-Law No 40/2010 of 25 March 2010, converted, with amendments, into Law No 73/2010 of 22 May 2010.

Tributaria Centrale) for more than 10 years at the date of its entry into force, were bound to be concluded without an examination of the appeal where the State tax authorities had been unsuccessful at first and second instance. This provision was introduced with the view to reducing the length of tax proceedings and thus observing the principle that judgement must be given within a reasonable time, within the meaning of Article 6 ECHR. According to this legislation, proceedings pending were automatically concluded, including the tax litigation concerned in the specific case. This would have the consequence of rendering the decision of the court of second instance final and binding, and the debt claimed by the tax authorities extinguished, but would result at the same time in a breach of some EU directives on VAT as interpreted by the Court of Justice. In essence, this was a case where a procedural rule aimed at granting the right of the individual to a reasonable lenght of proceedings would prejudice the correct application of EU law. In its judgement, following a preliminary reference of the national court judging on the merits, the Court of Justice maintained that the effectiveness of EU law on VAT could not be interpreted as running "counter to compliance with the principle that judgement should be given within a reasonable time, which, under the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, must be observed by the Member States when they implement European Union law, and must also be observed under Article 6(1) of the ECHR"[64]. The Court of Justice thus ascertained that the limit imposed to the effectiveness of EU law should be justified in the light of the need to ensure the right of the individual, with due respect of the principles of necessity and proportionality[65].

A third scenario may be envisaged in situations where applicable EU law is neutral with respect to effective judicial protection and the principle is applied as to offer an interpretation of domestic law on remedies and procedure capable of ensuring a fair level of judicial protection to the parties in the main proceedings. The judgement of the Court in *Lindner*[66] shall be referred to as an example. The case originated from a litigation between a Czech bank and Mr. Lindner, a German national, who was required to pay arrears on the mortgage loan which was granted pursuant to a contract between the parties. At the time when the contract was concluded, Mr Linder was deemed to be domiciled in Czech Republic. The bank had brought the action before the 'court with general jurisdiction over the

64 CJEU, *Belvedere Costruzioni*, cited above, paragraph 23.

65 In fact, Italian law prescribed the conclusion solely of tax proceedings which, at the date of the entry into force of that provision, had lasted for more than 10 years since the application at first instance was made, and that it pursued the objective, as is apparent from its very wording, of remedying the breach of the reasonable time requirement in Article 6(1) of the ECHR. In the light of these considerations, the Court considered the Italian rule "an exceptional provision", of a specific and limited nature, which did not create significant differences in the way in which taxable persons are treated as a whole (paragraphs 26–27).

66 CJEU, *Lindner*, case C-327/10, judgement of 17 November 2011, not yet published.

defendant', as to say the court were Mr. Lindner was domiciled. However, when the payment order was adopted by the national court, Mr. Lindner was not staying at any of the addresses known to the referring court. Unable to establish any other place of residence for the defendant in the Czech Republic, the court, in application of the national procedural law, considered the applicant to be a person whose domicile was unknown and assigned to him a guardian *ad litem*. Among other issues, related to the interpretation of certain provisions on jurisdiction contained in a EU Regulation[67], the court referred to the Court of Justice the question whether a provision of national law of a Member State enabling proceedings to be brought against persons whose domicile was unknown would be precluded by EU law, as it entailed the risk of a prejudice to the defendant's rights. In this case, the Court of Justice applied the principle of effective judicial protection with the view to ensuring a fair balance between the rights of the applicant and those of the defendant. The Court moved from a fundamental rights perspective, referring several times to the guarantees connected to effective judicial protection as subjective rights of the parties which need protection: the right of the applicant to bring proceedings, the right of defence of the defendant, and even a general right to effective judicial protection[68]. According to the Court, "the requirement that the rights of the defence be observed, as laid down also in Article 47 of the Charter of Fundamental Rights of the European Union, must be implemented in conjunction with respect for the right of the applicant to bring proceedings before a court in order to determine the merits of its claim"[69]. In the light of this consideration, the Court held that a court having jurisdiction might reasonably continue proceedings, in the case where it has not been established that the defendant has been enabled to receive the document instituting the proceedings, only if all necessary steps have been taken to ensure that the defendant can defend his interests. Even if the possibility of taking further steps in the proceedings without the defendant's knowledge, by means of notification of the action served on a guardian *ad litem* appointed by the court, constitutes a restriction of the defendant's rights of defence, that restriction may, however, be justified in the light of an applicant's right to effective protection, given that, in the absence of such proceedings, that right would be meaningless[70]. In that respect, the Court of Justice pointed out that "in contrast to the situation of the defendant, who, when deprived of the opportunity to defend himself effectively, will have the opportunity to ensure respect for the rights of the defence by opposing recognition of the judgement issued against him, the applicant runs the risk of being deprived of all

67 *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.*

68 CJEU, *Lindner*, cited above, paragraphs 45, 49 and 53 respectively.

69 CJEU, *Lindner*, cited above, paragraphs 49–50.

70 CJEU, *Lindner*, cited above, paragraph 53.

possibility of recourse"[71]. According to the Court, such solution would avoid "situations of denial of justice", which constitutes an "objective of public interest"[72].

4. Conclusive remarks: current issues and future perspectives

As the proposed case–law analysis tried to illustrate, the approach of the Court of Justice in interpreting and applying the general principle of effective judicial protection when judging national law on remedies and procedures may consistently vary, depending upon the specific circumstances of the case and the result that the Court is willing to achieve. Therefore, the consistency of the principle of effective judicial protection, as well as its impact on national rules, remains quite a complex issue.

Case–law shows in fact how effectiveness of judicial protection may at the same time be intended by the Court as a means to ensure *effet utile* of EU law, as a ground to strenghten EU procedural rights or as a tool to ensure protection to subjective rights of the individual – implying different consequences as to how this can affect the role of national courts and the application of domestic rules on remedies and procedure.

Nonetheless, a certain evolution of the judicial trend of the Court of Justice on this matter towards a more defined human rights–based approach may be inferred from certain recent decisions which have been commented. This is the case where the Court derives from the principle subjective rights pertaining to the individual, whose protection requires a *positive* role of national courts, while interpreting and applying domestic law on procedure and remedies. Accordingly, effective judicial protection becomes more than a general principle informing the EU legal order, to be *observed* by both Member States and EU institutions, rather turning into a peculiar source of self–standing rights which need to be *protected* and granted effectiveness by the Court itself and by national courts within the field of application of EU law[73].

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71 CJEU, *Lindner*, cited above, paragraph 54.

72 CJEU, *Lindner*, cited above, paragraph 53.

73 It must be noted that such qualification of the principle entails some theoretical issues, in the light of the distinction traced in EU law between 'rights' and 'principles'. As clarified in the explanation to Article 52(5) of the Charter, "according to that distinction, subjective rights shall be respected, whereas principles shall be observed […]. Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities". An interesting analysis referred to the right to a hearing, concerning its funcion in the EU legal order and the varying degrees of judicial scrutiny that it may entail, is to be found in TRIDIMAS, *The general principles of EU law*, cited above. More generally, on the position of the individual with respect to general principles, see ARNULL, *The general principles of EEC law and*

On the one hand, such evolution would ideally lead to the application of a test which appears more consistent with the need to ensure a balance between the fundamental rights linked to the principles of effective judicial protection and due process of law, on one side, and the competing EU or national interests, on the other side. This approach, typically characterising a fundamental rights perspective, would grant more coherence and legal certainty, also avoiding further ambiguity in terminology.

On the other hand, as recent case-law shows, the interest of the Court of Justice in ensuring effectiveness of EU law – even when this may lead to the detriment of the fundamental rights enshrined in the principle of effective judicial protection and conferred to the benefit of other subjects – might give rise to delicate issues of coordination with respect to both ECtHR and national jurisprudence.

First, with regard to coordination between the Court of Justice and the ECtHR, it is interesting to note how the two courts reached opposite conclusion with respect to the compatibility with the requirements of effective judicial protection of certain national laws implementing the EU Asylum Directive[74], which provided for an accelerated procedure to examine asylum application, granting low standards of protection as to the applicant's right to defence, participation in the proceedings and review of legality. The Court of Justice, in its judgement in the case *Samba Diouf*[75], regarded such national provisions as overall compatible with the principle of effective judicial protection, as the restrictions they may entail were proportionate to the legitimate aim pursued[76]; whereas the ECtHR ruled in a later judgement for their incompatibility with Article 13 ECHR, taken in conjunction with Article 3: according to the Strasbourg Court, although pursuing the legitimate objective of rendering faster judgements, the limitation imposed on the applicant's right to judicial review by the procedure on accelerated treatment of applications to international protection were disproportionate and incompatible to the right to an effective remedy, as they had the effect of depriving applicants from the enjoyment of basic procedural guarantees[77].

Secondly, referring to a potential conflict between the principle of effective judicial protection as interpreted by the Court of Justice and right to effective judicial

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the individual, Leicester, University Press, Leicester, 1990, GAJA, *Identifying the status of general principles of European Community law*, in *Scritti in onore di G.F. Mancini*, II, Giuffré, Milano, 1998, 445 ff. and BERNITZ, NERGELIUS (eds.), *General principles of European Community law*, Kluwer Law International, The Hague, 2000.

74 *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*.

75 CJEU, *Samba Diouf*, case C-69/10, judgement of 28 July 2011, not yet published.

76 Which was "to ensure that unfounded or inadmissible applications for asylum are processed more quickly, in order that applications submitted by persons who have good grounds for benefiting from refugee status may be processed more efficiently" (CJEU, *Samba Diouf*, cited above, paragraph 65).

77 ECtHR, I.*M. v France*, No. 9152/09, judgement of 2 February 2012.

protection as it may be interpreted by national courts, an interesting case which is worth to recall is *Chartry*[78]. The case concerned a tax litigation between Mr. Chartry and the Belgian tax authority. Mr. Chartry claimed for an interpretation of national tax law, while the administration claimed for the opposite interpretation. At some point in the course of the proceedings, the legislator had adopted a law which supported the interpretation given by the administration for reasons of public interests, and which was intended to have effect also on pending proceedings. This fact obviously affected individuals' rights of defence in pending proceedings; still, the Belgian constitutional court maintained that since the national law was pursuing an objective of general interest, this restriction of the individuals' right of defence was justified and proportionate. Not convinced of such an interpretation, the national court before which Mr. Chartry had brought his action had referred to the Court of Justice, to ask whether this retroactive law was compatible with the EU right to an effective judicial protection. Before the fact that the case concerned a purely internal situation, which had no connection with EU law, the Court had to reject the reference, as obviously the application of the EU general principle of effective judicial protection is limited to situations which fall within the field of application of EU law. The case nonetheless appears interesting, if one starts wondering how the Court would have ruled the question, if the claim of Mr. Chartry were based on EU tax law and the reference had been admissible: presumably, a conflict could arise between the interpretation given by a national constitutional court to the right to an effective remedy and the content of the EU principle of effective judicial protection.

Indeed these are challenges which would need to be faced if the EU general principle of effective judicial protection were to be applied as a self–standing right, likely to be claimed by the individual as such – in the field of application of EU law – both before the Court of Justice and before national courts. Still, this would appear a coherent solution, which would value the principle of effective judicial protection as a means to ensure individuals' rights in the EU legal order as a whole, also in the light of the pressing calls for a more prominent role of the Court of Justice for the protection of human rights within the field of application of EU law[79].

78 CJEU, *Chartry*, case C-457/09, order of 1 March 2011, not yet published.

79 See, in this regard the joint communication from Presidents Costa and Skouris, issued after the meeting of 17 January 2011 of the delegations from the ECtHR and the Court of Justice of the European Union, concerning the application of the Charter of Fundamental Rights of the European Union and the accession of the European Union to the ECHR. Full text of the communication is available at http://www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication__CEDHCJUE__EN.pdf.

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Patto di famiglia e tutela individuale del legittimario* §

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Sommario

1.1 Principi regolatori del sistema successorio italiano. – 1.2 Legge n. 55/2006 e ratio del provvedimento. – 1.3 Disciplina del patto di famiglia e divieto di patti successori. – 2.1 Aspetti problematici e individuazione delle parti essenziali del contratto. – 2.2 Tesi della struttura bilaterale del patto di famiglia. – 2.3 Tesi della struttura plurilaterale del patto di famiglia. – 2.4 Adesione alla tesi della necessaria partecipazione dei legittimari al patto di famiglia. – 2.5 Modalità di liquidazione dei legittimari non assegnatari.

Abstract

Law 55/2006 (entitled "Amendments to the Civil Code dealing with "Patto di Famiglia"), which came into force on March 16th 2006, amended the Italian Civil Code by creating the legal institute of "patto di famiglia", which aims at allowing the transfer of enterprise or shareholdings during the life of the enterpreurner and entails an exception to inheritance rules.

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§ This paper has been submitted to an external referee.

*Many interpretative problems arise from the unclear phrasing of the new regulation; among these the most relevant one - both in theory and in practice - relates to the identification of the necessary parties of the "patto di famiglia", whose defect of consent leads to voidness of the contract. In particular, it is not certain whether the spouse and the persons entitled by law to a share of the deceased's estate to whom the enterprise and/or the shares are not assigned must participate to the contract. Namely, since the first paragraph of article 768-*quater *CC, provides that "the spouse and any person who would be entitled by law to a share of the deceased's estate existing at the time of the conclusion of the agreement must participate to the agreement", some authors argue that the persons entitled by law to a share of the deceased's estate should give their consent to the "patto di famiglia", while, according to others, those have just to be informed of its conclusion.*

Three theories were formulated with regard to articles 768 bis, *768* quater, *paragraph 1 and 768 paragraph 1 CC. According to both first and second theory, the persons entitled by law to a share of the deceased's estate must be a party to the "patto di famiglia", however, while according to the former their participation is not essential, for the latter the lack of the participation of the persons entitled by law to a share of the deceased's estate existing at the time of the conclusion of the agreement makes the contract void.*

A third point of view assumes the 'patto di famiglia' as a special contract for the benefit of third parties: the participation to the contract of any person who is not assignee of the enterprise and/or the shares and would be entitled by law to a share of the deceased's estate is considered to be required by art. 768 quater *CC for a different purpose than the participation of the disposing ascendant and assignee descendant (art. 768* bis*). Namely, whilst the presence of the latters is necessary for the validity of the contract, the agreement of the persons who would be entitled by law to a share of the deceased's estate and are not assignees is required in order to make the agreement enforceable towards them and to convert the share of the testator's estate reserved by law for certain heirs into the right to receive its monetary value, which has to be calculated considering the enterprise and/or the shareholdings' value.*

This paper analyses the matter above and the role of the persons who would be entitled by law to a share of the deceased's.

The research leads to the conclusion that the participation of the persons entitled by law to a share of the deceased's estate non-assegnees is required for the validity of the contract.

The regulation of "patto di famiglia" appears to be inspired by the criterion of the compulsory involvement at law of all persons entitled by law to a share of the deceased's estate existing at a given time, because of the relevancy of the their interests at stake: far from being considered mere parties of the contract, they must be regarded as essential parties instead, whose consent is necessary for the validity of the "patto di famiglia" (Art. 1418, paragraph 1, of the Civil Code). Therefore, if one of the persons entitled by law to a share of the deceased's estate cannot or does not want to participate to the agreement, it will not be possibile to conclude the "patto di famiglia" ; instead, the enterprises's and/or the enterprises shareholdings' transfer should be guaranteed by using different kinds of contractual agreements.

This conclusion also seems to be confirmed by the unsuccessful attempts made to amend the Italian "patto di famiglia" regulation over 2011 and 2012. Namely, all the legislative

initiatives providing the amendment of Art. 768, letter d) CC, concerning the "participation" to the 'patto di famiglia', layed out the possibility for the agreement to be drawn up also without the presence of all the persons entitled by law to a share of the deceased's estate. Such proposals seem to confirm the fact that the regulation now in force subordinates the validity of the "patto di famiglia" to the consent of the persons entitled by law to a share of the deceased's estate.

Keywords

Succession - Transfer of business assets - Family agreement (Patto di famiglia) - Prohibition of succession agreement – Protection of persons entitled by law to a share of the deceased's estate - Collation - Claim to distributive share - Settlement of persons entitled by law to a share of the deceased's estate

1.1. Principi regolatori del sistema successorio italiano

La normativa italiana in materia di successioni è caratterizzata da rigorosi limiti alla libertà dispositiva del testatore posti a tutela dei congiunti più stretti: così insegna già l'art. 42, IV comma, Cost., il quale espressamente recita "*La legge stabilisce le norme ed i limiti della successione legittima e testamentaria e i diritti dello Stato sull'eredità*", e l'art. 457, III comma, cod. civ.[1], a mente del quale il disponente ha limitati poteri di autodeterminazione.

Il sistema successorio italiano è, infatti, imperniato sulla centralità della legittima: determinate quote del patrimonio ereditario devono essere necessariamente destinate ad una particolare categoria di successori individuata tra i più stretti familiari del *de cuius* (c.d. legittimari) che, secondo l'art. 536, primo comma, cod. civ., sono il coniuge, i figli legittimi e naturali e gli ascendenti legittimi.

L'intangibilità della legittima è garantita dall'azione di riduzione (*ex* artt. 553 e ss.[2]) e dal divieto posto al testatore di imporre pesi o condizioni sulla quota spettante ai legittimari (art. 549 cod. civ.).

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1 L'art. 457, III comma, cod. civ. così dispone: "*Le disposizioni testamentarie non possono pregiudicare i diritti che la legge riserva ai legittimari*".

2 Occorre rilevare che, sebbene le disposizioni sulla legittima siano qualificabili come norme cogenti, la violazione delle stesse non determina la nullità del negozio, come vorrebbe l'art. 1418 cod. civ., ma la minor sanzione della impugnabilità negoziale. Le clausole testamentarie poste in violazione dei diritti inderogabili dei legittimari sono valide, ma questi soggetti hanno il diritto di impugnare il negozio di ultima volontà tramite l'azione di riduzione, la quale, se ritenuta fondata, si concluderà con una sentenza che comprimerà le disposizioni ritenute lesive per quanto necessario al fine di reintegrare la quota di riserva oggetto di domanda. Cfr. L. Mengoni, *Successioni per causa di morte. Parte speciale. Successione legittima*, 4 ed., in *Tratt. di Diritto civile e Commerciale*, diretto da A. Cicu e F. Messineo, Milano, 1990, 8.

Tradizionalmente il sistema italiano ammette come uniche fonti per il regolamento della delazione ereditaria la successione *ope legis* o quella testamentaria, escludendo che essa possa essere affidata a strumenti di natura contrattuale. L'invalicabilità di detto limite viene garantita dall'art. 458 cod. civ., che enuncia il divieto di patti successori[3].

Il sistema successorio italiano, perlomeno fino ad oggi, ha inoltre mostrato, nel rispetto del principio di unità, disinteresse per la natura dei beni che costituiscono il patrimonio. Da ciò la conseguenza che le norme relative alla trasmissione ereditaria sono rimaste sempre le stesse indipendentemente dalla natura del bene destinato a cadere in successione.

In particolare, con specifico riferimento all'azienda, è stata trascurata un'importante esigenza, sempre più avvertita nella realtà imprenditoriale, consistente nella preservazione del valore dell'impresa, che potrebbe essere seriamente pregiudicato qualora la stessa venisse trasmessa, per esempio, ad un successore incapace di provvedere all'esercizio di un'attività d'impresa e di porsi alla guida di una società.

A questa esigenza l'ordinamento italiano ha recentemente dato rilievo prevedendo un nuovo istituto: il patto di famiglia, il quale cambia lo scenario, consentendo all'imprenditore di programmare e definire per tempo la successione nella gestione dell'azienda, salvaguardando nel contempo l'unità della famiglia.

1.2. Legge n. 55/2006 e *ratio* del provvedimento

Con la legge n. 55 del 14 febbraio 2006, recante "*Modifiche al codice civile in materia di patto di famiglia*", entrata in vigore il 16 marzo 2006, il legislatore italiano ha così introdotto nel nostro ordinamento l'istituto del patto di famiglia. Alla disciplina del patto di famiglia sono state dedicate sette disposizioni (artt. 768 *bis* – 768 *sexies*) contenute nel nuovo capo V-*bis*[4] del codice civile, inserito tra le norme dedicate all'annullamento e alla rescissione in materia di divisione e quelle in materia di donazioni.

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3 Fatto salvo quanto disposto dagli articoli 768-*bis* e seguenti è nulla ogni convenzione con cui taluno dispone della propria successione. È del pari nullo ogni atto col quale taluno dispone dei diritti che gli possono spettare su una successione non ancora aperta, o rinunzia ai medesimi.

4 Il capo è stato correttamente nominato V *bis* anziché VI, come previsto dalla circolare della Presidenza del Consiglio dei Ministri del 20 aprile 2001 dal titolo "*Regole e raccomandazioni per la formulazione dei testi legislativi*", che ha sostituito le circolari delle Presidenze delle Camere del 28 febbraio 1986 e circolare con identico testo della Presidenza del Consiglio dei Ministri del 25 febbraio 1986, pubblicate nella Gazzetta Ufficiale del 29 maggio 1986, n. 123, S.O. n. 40. La circolare del 20 aprile 2001 è stata adottata con identico testo da Camera e Senato e seguita dalla circolare della Presidenza del Consiglio dei Ministri del maggio 2001 dal titolo "*Guida alla redazione dei testi normativi*" (Circolare n.1/1.1.26/10888/9.92, pubblicata nel Supplemento Ordinario n. 105 del 3 maggio 2001 della Gazzetta Ufficiale della Repubblica italiana n. 101 del 3 maggio 2001). Cfr. S. Delle Monache, *Spunti ricostruttivi e qualche spigolatura in tema di patto di famiglia*, in *Riv. notar.*, 2006, 889 e G. Bonilini, *Patto di famiglia e diritto delle successioni mortis causa*, in *Fam., pers. e succ.*, 2007, 390.

La novella si prefigge l'obiettivo di facilitare il trapasso generazionale dell'impresa evitando che le vicende successorie compromettano l'operatività dell'attività economica ed assicurando altresì una certa stabilità all'operazione[5]. A tal fine il legislatore ha introdotto la possibilità per l'imprenditore, ancora in vita, di individuare quello fra i suoi discendenti che abbia le capacità per succedergli nella conduzione dell'attività imprenditoriale iniziata.

Si è così previsto che l'imprenditore, ovvero il titolare di partecipazioni societarie, possa stipulare, con il coniuge e i soggetti che sarebbero legittimari, ove in quel momento si aprisse la propria successione, un contratto con cui trasferire, in tutto o in parte, ad uno o più discendenti l'azienda o le proprie quote. Per assicurare l'effetto della "stabilità" la nuova normativa prevede, a fronte di una liquidazione a favore dei legittimari non beneficiari, l'esenzione da riduzione e collazione per le liberalità effettuate dal disponente.

L'obiettivo perseguito dal legislatore con la legge n. 55/2006 non rappresenta una novità nell'ordinamento giuridico: in Europa si registra da tempo l'esigenza di introdurre un assetto normativo che tenda ad assicurare la continuità dell'impresa e ad evitare lo smembramento del complesso produttivo nella fase del passaggio generazionale[6].

Già nella comunicazione del luglio 1994[7], la Commissione europea aveva identificato quattro problemi tipici dei trasferimenti delle piccole e medie imprese: (1) garantire la continuità delle società di persone e delle imprese individuali; (2) preparare i trasferimenti attraverso l'adozione della forma giuridica più appropriata; (3) incoraggiare i trasferimenti a favore dei terzi e (4) facilitare i trasferimenti nell'ambito della famiglia tramite adeguate misure fiscali.

Sempre la Commissione Europea, con la raccomandazione 94/1069/CE[8] relativa alla successione nella piccole e medie imprese, emanata in seguito ad un'indagine svolta sulle disposizioni nazionali che intralciano la costituzione, la crescita e la successione nelle imprese - dalla quale era emerso che *"ogni anno diverse migliaia di imprese sono obbligate a cessare la loro attività a causa di difficoltà insormontabili inerenti alla successione"*, con ripercussioni negative sul tessuto

5 Circa gli obiettivi della l. 55 del 14.02.2006, cfr. tra i più recenti L. Genghini e C. Carbone, *Il patto di famiglia*, in *Le successioni per causa di morte*, Padova, 2012, 1558; G. De Nova, in *Commentario del Codice Civile – Delle Successioni*, III, a cura di V. Cuffaro e F. Delfini, *sub* art. 768 *bis*, Torino, 2010, 376; G. Oberto, in *Codice delle successioni e delle donazioni*, I, a cura di M. Sesta, *sub* art. 768 *bis*, Milano, 2011, 1851.

6 M. Bernardini, *Il patto di famiglia tra adozione e successione*, in *Studi in onore di Giorgio Cian*, I, Padova, 2010, 215.

7 Comunicazione della Commissione sul trasferimento di imprese. Azioni a favore delle PMI, pubblicata in Gazzetta ufficiale C 204, del 23.7.1994, 1-23.

8 Raccomandazione della Commissione Europea sul trasferimento delle piccole e medie imprese, pubblicata in Gazzetta ufficiale L 385 del 31.12.1994, 14-17. Cfr. sul tema E. Lucchini Guastalla, *Gli strumenti negoziali di trasmissione della ricchezza familiare: dalla donazione si praemoriar al patto di famiglia*, in *Studi in onore di Giorgio Cian*, II, Padova, 2010, 1473.

economico delle imprese, nonché sui loro creditori e lavoratori - sollecitava gli Stati membri "*ad adottare le misure necessarie per facilitare la successione nelle piccole e medie imprese al fine di assicurare la sopravvivenza delle imprese ed il mantenimento dei posti di lavoro*".

Con la Comunicazione 98/C 93/02[9], la Commissione suggeriva, soprattutto agli Stati membri ove i patti successori sono vietati (Italia, Francia, Belgio, Spagna, Lussemburgo), di considerare l'opportunità di introdurre nel proprio ordinamento, al fine di agevolare la continuità dell'impresa, patti d'impresa o accordi di famiglia.

In Italia, la prima proposta volta ad inserire nel sistema un istituto denominato "patto di famiglia" si deve ai risultati della ricerca promossa dal CNR negli anni 1996-1997, in tema di "*Successione ereditaria dei beni produttivi*", coordinata dal Prof. Pietro Rescigno e dal Prof. Antonio Masi[10].

Tale ricerca aveva dato vita a due proposte di riforma del codice civile, volte rispettivamente ad introdurre l'art. 734 *bis* sul patto di famiglia, diretto a disciplinare la successione nell'impresa individuale[11], e l'art. 2355 *bis* sul patto di impresa, finalizzato a disciplinare la successione nell'impresa collettiva[12].

La proposta è poi confluita, senza sostanziali modifiche[13], nel disegno di legge n. 2799 del 2 ottobre 1997, XIII Legislatura, recante "*Nuove norme in materia di patti*

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9 Comunicazione della Commissione Europea relativa alla trasmissione delle piccole e medie imprese, pubblicata in Gazzetta Ufficiale C 93 del 28.3.1998, 2-21.

10 I risultati della ricerca sono stati esposti al convegno su "*Successioni nell'impresa e società a base familiare*", tenutosi a Macerata il 24.03.1997. A riguardo si veda la relazione del convegno maceratese di M. Ieva, *Il trasferimento dei beni produttivi in funzione successoria: patto di famiglia e patto di impresa. Profili generali di revisione del divieto dei patti successori*, in *Riv. notar.*, 1997, 1371 ss.

11 L'art. 734 *bis* prevedeva: "*L'imprenditore può assegnare, con atto pubblico, l'azienda a uno o più discendenti. Al contratto devono partecipare oltre all'imprenditore i discendenti che sarebbero legittimari ove in quel momento si aprisse la successione. Coloro che acquistano l'azienda devono corrispondere agli altri discendenti legittimari e non assegnatari, ove questi non vi rinunzino in tutto o in parte, una somma non inferiore al valore delle quote previste dagli articoli 536 e seguenti. Quanto ricevuto dai contraenti non è soggetto a collazione o riduzione. All'apertura della successione, il coniuge e gli altri legittimari che non vi abbiano partecipato possono chiedere il pagamento della somma prevista dal terzo comma, aumentata degli interessi legali, a tutti i beneficiari del contratto*". Sull'argomento: M. Ieva, *Il patto di famiglia*, in *Trattato breve delle successioni e donazioni*, diretto da P. Rescigno, coordinato da M. Ieva, II, Padova, 2010, 319 ss; A. Zoppini, *Il patto di famiglia (linee per la riforma dei patti sulle successioni future)*, in *Diritto Privato 1998*, Padova, 1999, 255 ss.

12 Sull'argomento: M. Stella Richter Jr, *Il patto di impresa nella successione dei beni produttivi*, in *Diritto Privato 1998*, Padova, 1999, 267.

13 Le uniche modifiche significative riguardano la circostanza che il testo non parla più di contratto, bensì di donazione e viene introdotta la possibilità per il disponente di trasmettere non solo l'azienda, ma anche le partecipazioni societarie che, invece, nel progetto elaborato dal gruppo di lavoro costituivano oggetto dei patti di impresa di cui all'art. 2355 *bis* cod. civ: "*Art. 734- bis. -* (Patto di famiglia) . – *L'imprenditore può assegnare, con atto di donazione, l'azienda a uno o più discendenti. Al contratto devono partecipare anche i discendenti che sarebbero legittimari ove in quel momento si aprisse la successione; possono parteciparvi, ai soli effetti di cui al sesto comma, il coniuge dell'imprenditore e coloro che potrebbero divenirne legittimari a seguito di modificazioni del suo stato familiare. Gli assegnatari dell'azienda devono liquidare gli altri partecipanti al contratto, ove questi non vi rinunzino*

successori relativi all'impresa" e nei successivi disegni[14] sfociati nel testo finale della legge n. 55 del 2006.

1.3. Disciplina del patto di famiglia e divieto di patti successori

L'art. 768 *bis* cod. civ., rubricato "*Nozione*", prevede che: "*È patto di famiglia il contratto con cui, compatibilmente con le disposizioni in materia di impresa familiare e nel rispetto delle differenti tipologie societarie, l'imprenditore trasferisce, in tutto o in parte, l'azienda e il titolare di partecipazioni societarie trasferisce, in tutto o in parte, le proprie quote ad uno o più discendenti*".

Da tale norma è possibile ricavare alcuni degli elementi caratterizzanti la struttura del patto di famiglia[15]: esso è un contratto avente ad oggetto il trasferimento totale o parziale dell'azienda da parte dell'imprenditore, ovvero delle partecipazioni societarie da parte del titolare, in favore di un discendente. Si tratta di un contratto avente una sua funzione tipica di natura complessa, irriducibile a quella dei tipi contrattuali già disciplinati nel codice civile.

Dal punto di vista soggettivo, tale norma accenna solamente alla presenza, da un lato, del disponente imprenditore o titolare delle quote e, dall'altro, di uno o più beneficiari discendenti. È un nuovo strumento che rompe con le categorie tradizionali e innova il panorama della successione "anticipata" nella titolarità dei beni produttivi.

Il patto di famiglia è un contratto; anche se collocato nel libro II del codice civile (Delle Successioni) e in particolare nel titolo IV dedicato alla divisione, non

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in tutto o in parte, con il pagamento di una somma corrispondente al valore delle quote previste dagli articoli 536 e seguenti; i contraenti possono convenire che la liquidazione, in tutto o in parte, avvenga in natura. Salvo patto contrario, i beni assegnati con lo stesso contratto agli altri partecipanti non assegnatari dell'azienda, secondo il valore attribuito in contratto, sono imputati alle quote di legittima ad essi spettanti; l'assegnazione può essere disposta anche con successivo contratto che sia espressamente dichiarato collegato al primo e purché vi intervengano i medesimi soggetti che hanno partecipato al primo contratto o coloro che li abbiano sostituiti. Quanto ricevuto dai contraenti non è soggetto a collazione o riduzione. All'apertura della successione dell'imprenditore, il coniuge e gli altri legittimari che non vi abbiano partecipato possono chiedere ai beneficiari del contratto il pagamento della somma prevista dal terzo comma, aumentata degli interessi legali. Il presente articolo si applica anche alle partecipazioni sociali".

14 Disegno di legge n. 3870 approvato dalla camera dei Deputati il 25 luglio 2005 e passato al Senato come disegno di legge n. 3567, nel quale è confluito il disegno di legge n. 1353 ed approvato definitivamente il 31.01.2006. Si veda sul punto, I. Ambrosi e F. Basile, *Le nuove norme in materia di Patto di famiglia*, in *Fam., pers. e succ.*, 2006, 375; G. Oberto, *Il Patto di famiglia*, Padova, 2006, 37 ss.

15 Come rilevato da C. Caccavale (*Appunti per uno studio sul patto di famiglia: profili strutturali e funzionali della fattispecie*, in *Notariato*, 2006, 289) *"A dispetto delle illusioni suscitate dal suo titolo e dal carattere definitorio della regola che vi è espressa, l'interprete deve constatare, tuttavia, dopo averla più volte riletta, - quasi incredulo della sua lacunosità -, che la norma si mantiene su un piano di assoluta genericità e non riesce a specificare quali siano attributi e proprietà della fattispecie che valgano a caratterizzarla, non solo rispetto all'alternativa dell'onerosità o gratuità, ma anche, per l'appunto, in relazione alla dicotomia funzionale, che qui soprattutto può interessare, degli atti inter vivos e degli atti a causa di morte".*

è, infatti, un testamento, bensì una convenzione la cui particolarità è quella di andare ad incidere sulle regole della successione dell'imprenditore.

L'art. 768-*bis* cod. civ. contiene la definizione di patto di famiglia, ma l'essenza del patto di famiglia non risiede in tale vicenda traslativa *inter vivos*, quanto piuttosto nella disciplina dettata dai successivi articoli, che prevedono l'imputazione delle attribuzioni patrimoniali ricevute alle quote di legittima (art. 768-*quater*, comma 3, cod. civ.) e - a fronte della "liquidazione" dei legittimari da effettuarsi con lo stesso o con successivo contratto - il non assoggettamento a collazione e riduzione della liberalità effettuata al discendente; realizzando conseguentemente un particolare "effetto di stabilità" del trasferimento dell'azienda o delle partecipazioni sociali[16].

Si tratta di una disciplina profondamente innovativa che deroga parzialmente al divieto dei patti successori, contenuto nell'art. 458 cod. civ.[17]: disposizione, quest'ultima, che è stata anch'essa modificata dalla legge 55/2006, facendo salvo per l'appunto quanto disposto dagli artt. 768-*bis* cod. civ. e seguenti.

Occorre analizzare la portata effettiva di questo inciso, precisando fin da subito che il patto di famiglia non integra un patto successorio istitutivo, difettandone, sotto un triplice profilo, la natura di atto *mortis causa*[18].

In primo luogo, il patto di famiglia produce effetti traslativi immediati e definitivi, non collegati cioè all'apertura della successione: l'azienda o le partecipazioni sociali entrano immediatamente nel patrimonio dell'assegnatario (con correlativa perdita del potere di disposizione in capo all'imprenditore disponente); ed un tanto vale anche per le attribuzioni patrimoniali a favore dei legittimari.

Secondariamente, quale riflesso di tale efficacia immediata, l'oggetto del contratto è determinato con riferimento al momento della stipulazione, essendo irrilevanti successive modifiche nella consistenza o nel valore dei beni attribuiti (il patto successorio istitutivo, al contrario, ha per oggetto l'*id quod superest* al momento dell'apertura della successione).

Da ultimo, i beneficiari delle attribuzioni patrimoniali sono individuati con riguardo al momento in cui il patto si perfeziona, e non con riferimento al momento della morte: il che significa che nel caso di premorienza dell'assegnatario al disponente, i beni assegnati, già entrati definitivamente nel suo patrimonio, faranno parte della sua successione, e non di quella del disponente.

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16 G. Oberto, in *Codice delle successioni e delle donazioni*, I, a cura di M. Sesta, *sub* art. 768 *bis*, cit., 1853.

17 Nel diritto italiano la nozione di patto successorio è molto ampia: oltre agli accordi con cui si dispone della propria successione, dunque dei diritti che saranno nella disponibilità del *de cuius* dal momento della morte (patti istitutivi), l'art. 458 cod. civ. vieta anche gli atti di disposizione sulla successione altrui non ancora aperta (patti dispositivi o rinunciativi). Nei patti destinati a regolare una successione futura rientrano, pertanto, atti strutturalmente e causalmente eterogenei: vi rientrano sia atti tra vivi (la rinuncia ad un'eredità futura o la rinuncia ad avvalersi dell'azione di riduzione) sia atti *mortis causa*, sia patti che atti unilaterali.

18 Sul punto cfr. L. Genghini e C. Carbone, *Il patto di famiglia*, in *Le successioni per causa di morte*, cit., 1572.

Si è ipotizzata, invece, la qualificazione del patto di famiglia come patto successorio dispositivo[19], con il quale i legittimari dispongono dei loro diritti sulla successione del disponente, non ancora aperta. In effetti, il patto di famiglia contiene tipicamente una "liquidazione dei legittimari", realizzata a mezzo di un'attribuzione patrimoniale nei loro confronti, ed effettuata – *ex* art. 768-*quater*, comma 2, cod. civ. – dall'assegnatario dell'azienda o delle partecipazioni. Quest'ultima attribuzione patrimoniale non costituisce, di per sé sola, atto di disposizione relativo a beni o diritti facenti parte della futura successione; tuttavia, dal lato dei legittimari, l'accettazione dell'attribuzione patrimoniale "a tacitazione" delle quote di legittima rappresenta certamente una disposizione di diritti derivanti dalla successione del disponente.

Nel caso, invece, in cui il legittimario rinunzi in tutto o in parte alla liquidazione dei propri diritti (come ammesso dall'art. 768-*quater*, comma 2, cod. civ.), si è in presenza di un vero e proprio patto successorio rinunciativo, in deroga all'art. 458 cod. civ[20].

2.1. Aspetti problematici e individuazione delle parti essenziali del contratto

Nonostante si sia pervenuti all'emanazione della normativa sul patto di famiglia dopo molti anni di discussione, il testo dell'istituto attualmente in vigore non si distingue per chiarezza e precisione tecnico-giuridica: il testo licenziato, anche a detta del suo stesso relatore parlamentare, necessita di alcuni correttivi tecnici, ancorché a tale esigenza – si legge nella citata relazione – si potrebbe supplire attraverso un'adeguata attività interpretativa in funzione suppletiva[21].

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19 Secondo A. Merlo (*Il patto di famiglia*, in *CNN Notizie*, 14 febbraio 2006, 5) *"il patto successorio dispositivo è ravvisabile nel fatto che il donatario (o assegnatario), in vita del de cuius, anticipa ai suoi fratelli o sorelle ed all'altro genitore quanto di loro spettanza sui beni, oggetto del patto, che altrimenti cadrebbero in successione".*

M.C. Lupetti *(Patti di famiglia. Note a prima lettura*, in *CNN Notizie*, 14 febbraio 2006, 7 ss.) rinviene nel negozio in esame, e specificamente nella liquidazione dei diritti di legittima a favore dei legittimari partecipanti al patto, la natura di patto successorio, come tale volto a definire, da subito, tra i contraenti, i futuri assetti successori. Cfr. L. Genghini, *Il patto di famiglia*, in *Le successioni per causa di morte*, cit., 1572.

20 Così G. Bonilini, *Patto di famiglia e diritto delle successioni mortis causa*, cit., 392; G. Petrelli, *La nuova disciplina del patto di famiglia*, in *Riv. not.*, 2006, 408; A. Pischetola, *Prime considerazioni sul "patto di famiglia"*, in *Vita not.*, 2006, 460. Analogamente A. Merlo (*Il patto di famiglia*, cit., 7) per il quale "*qualora i non assegnatari rinuncino alla liquidazione, si realizza un patto successorio rinunciativo, poiché, in sostanza, tali soggetti rinunciano preventivamente a diritti di legittima che gli possono spettare sulla successione del genitore non ancora aperta".*

21 Relazione Semeraro in Commissione Giustizia del Senato in sede deliberante del 26 gennaio 2006: "(..) è stato espresso dagli auditi un convinto sostegno circa l'opportunità della riforma e, in particolare, apprezzamento sull'articolato approvato dall'altro ramo del Parlamento, pur sottolineandosi l'opportunità di introdurvi alcuni correttivi tecnici; esigenza che peraltro potrebbe anche essere superata attraverso un'adeguata attività interpretativa in funzione suppletiva".

Questo lavoro si soffermerà su due questioni che, alla luce dei primi interventi ermeneutici, apparsi all'alba dell'entrata in vigore della legge, sono sembrate essere fra quelle più controverse e di maggiore rilievo sul piano pratico-applicativo. In particolare, si ritiene opportuno affrontare il problema relativo all'individuazione di quali siano le parti essenziali del contratto e quali siano i soggetti tenuti alla liquidazione in favore dei legittimari non assegnatari.

Occorre così in primo luogo chiedersi se tra le parti essenziali del contratto vadano annoverati anche il coniuge e tutti coloro che sarebbero legittimari ove in quel momento si aprisse la successione nel patrimonio dell'imprenditore e quali siano le conseguenze derivanti dalla mancata partecipazione di tali soggetti.

Dalla lettura dell'art. 768 *bis* cod.civ., si potrebbe, in prima battuta, affermare che il patto di famiglia abbia una struttura bilaterale e che possa essere validamente stipulato in presenza del solo imprenditore o del titolare di partecipazioni societarie con uno o più discendenti.

Alla figura dei legittimari si riferiscono gli artt. 768 *quater* e 768 *sexies* cod. civ.. Il primo comma dell'art. 768 *quater* cod.civ., attualmente in vigore, prevede, in particolare, che "*Al contratto devono partecipare anche il coniuge e tutti coloro che sarebbero legittimari ove in quel momento si aprisse la successione nel patrimonio dell'imprenditore*". Tale norma, contenuta nell'articolo rubricato "*Partecipazione*", sembra, contrariamente a quanto sopra affermato, attribuire al contratto in questione la qualifica di negozio plurilaterale e pattuire l'obbligatorietà, della partecipazione al contratto di tutti quei soggetti che sarebbero legittimari se in quel momento si aprisse la successione nel patrimonio del disponente, senza peraltro prevedere alcuna specifica sanzione per l'inosservanza del disposto.

Il primo comma dell'art. 768 *sexies* cod.civ. dispone, inoltre, che *"All'apertura della successione dell'imprenditore, il coniuge e gli altri legittimari che non abbiano partecipato al contratto possono chiedere ai beneficiari del contratto stesso il pagamento della somma prevista dal secondo comma dell'articolo 768-quater, aumentata degli interessi legali"*. Questa disposizione, disciplinando espressamente l'ipotesi in cui uno o più legittimari non prendano parte al patto di famiglia, complica ulteriormente il quadro normativo. Da tale previsione potrebbe desumersi, infatti, che il coniuge e i legittimari non siano obbligati a partecipare al patto di famiglia, posto che quest'ultimo, nonostante la loro assenza, sarebbe comunque valido, tornando quindi alla prima interpretazione circa la struttura bilaterale del patto di famiglia.

L'assenza di un qualsivoglia riferimento alla posizione dei legittimari nella nozione fornita dal legislatore, in uno con l'apparente contrasto creato delle norme ora riportate, ha dato origine ad un problema interpretativo di notevole importanza[22].

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22 C. Bauco - V. Capozzi (*Il patto di famiglia*, Milano 2007, 39) affermano che i problemi attinenti alla figura dei legittimari costituiscono l'aspetto maggiormente controverso delle nuova disciplina. N. Di Mauro (*I necessari partecipanti al patto di famiglia*, in *Fam., pers. e succ.*, 2006, 534) similmente rileva che "*La nuova normativa in tema di patto di famiglia pone rilevanti problemi ermeneutici in virtù del non chiaro dettato legislativo: tra questi assume notevole importanza sul piano teori-*

La dottrina ha formulato, per quanto concerne la posizione e il ruolo dei legittimari, soluzioni assai diverse e contrastanti che possono essere ricondotte a due grandi filoni, all'interno dei quali vi è tra l'altro un'estrema varietà di posizioni[23]: secondo il primo filone (struttura bilaterale) i legittimari devono intervenire alla stipulazione del patto di famiglia, ma la partecipazione non è requisito strutturale del contratto stesso[24]; secondo l'altro, invece, la mancata partecipazione da parte dei legittimari esistenti al momento della stipulazione del patto di cui all'art. 768 *bis* e ss. rende lo stesso invalido (struttura plurilaterale)[25].

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co e su quello applicativo il problema relativo all'individuazione di quali siano le parti essenziali, a pena di nullità, del contratto di patto di famiglia e, in particolare, se siano tali il coniuge e i legittimari non assegnatari dell'azienda e/o delle quote societarie". Lo stesso legislatore – avvertita come pressante l'esigenza di consentire, per ragioni d'economia, che le nuove norme entrassero subito in vigore – ha esortato l'interprete a riempire le lacune attraverso *"un'adeguata attività interpretativa in funzione suppletiva":* così la relazione al Senato nella seduta n. 552 del 26 gennaio 2006.

23 La difficoltà di catalogare le diverse opinioni sostenute dai commentatori della nuova disciplina è già stata sottolineata; cfr. G. Amadio, *Divieto di patti successori ed attualità degli interessi tutelati*, in AA.VV., *Patti di famiglia per l'impresa*, a cura della Fondazione italiana per il notariato, Milano, 2006, 83, nota 2.

24 In tal senso: A. Angrisani - S. Sica, *Il patto di famiglia e gli strumenti di successione dell'impresa*, Torino, 2007, 67; M. Atelli, *Prime note sul patto di famiglia*, in *Obbl. e contr.*, 2006, 6; M. Avagliano, *Patti di famiglia e impresa*, in *Riv. notar.*, 2007, 26; Cfr. M. Bernardini, *Il patto di famiglia tra adozione e successione*, in *Studi in onore di Giorgio Cian*, I, cit., 240; C. Caccavale, *Appunti per uno studio sul patto di famiglia: profili strutturali e funzionali della fattispecie*, cit., 289; Id, *Divieto di patti successori ed attualità degli interessi tutelati*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 38; A. Di Simone – C. Forino, *Gli effetti della mancata partecipazione di un legittimario al patto di famiglia*, in *Notariato*, 2006, 703; G. Petrelli, *La nuova disciplina del patto di famiglia*, cit. 432; G. Oberto, *Lineamenti essenziali del patto di famiglia*, in *Fam. e dir.*, 2006, 415; G. Recinto, *Il Patto di famiglia*, in AA.VV., *Diritto delle successioni*, a cura di R. Calvo e G. Perlingeri, Napoli, 2008, 630; G. Sicchiero, Art. 768 *sexies. Il Patto di famiglia*, commentario a cura di S. Delle Monache, in *Nuove leggi civ. comm.*, 2007, 84; A. Valeriani, *Il patto di famiglia e la riunione fittizia*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 135.

25 G. Amadio, *Divieto di patti successori ed attualità degli interessi tutelati*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 73; ID, *Patto di famiglia e funzione divisionale*, in *Riv. notar.*, 2006, 886; I. Ambrosi-F. Basile, *Le nuove norme in materia di patto di famiglia*, cit., 2006, 378; M.C. Andrini, *Il patto di famiglia: tipo contrattuale e forma negoziale*, in *Vita not.*, 2006, 40; L. Balestra, Art. 768 *bis. Il Patto di famiglia*, commentario a cura di S. Delle Monache, cit., 25; ID, *Il patto di famiglia a un anno dalla sua introduzione*, in *Riv. trim. dir. e proc. civ.*, 2007, 733; ID, *Prime osservazioni sul patto di famiglia*, in *Nuova giur. civ. comm.*, 2006, 382; G. Baralis, *Attribuzione ai legittimari non assegnatari dell'azienda o delle partecipazioni sociali*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 223; G. Bonilini, *Manuale di diritto ereditario e delle donazioni*, Torino, 2011, 171; G. Capozzi, *Il patto di famiglia*, in *Successioni e donazioni*, Milano, 2009, 1467; F. Delfini, *Articolo 2 (art. 768 quater)*, in De Nova, Delfini, Rampolla, Venditti, *Il patto di famiglia*, Milano, 2006, 25; S. Delle Monache, *Spunti ricostruttivi e qualche spigolatura in tema di patto di famiglia*, cit., 893; N. Di Mauro, *sub* art. 768 bis, in N. Di Mauro, E. Minervini, V. Verdicchio, Le nuove leggi civili. *Il patto di famiglia. Commentario alla legge 14 febbraio 2006, n. 55*, a cura di E. Minervini, Milano, 2006, 45; F. Gazzoni, *Appunti e spunti in tema di patto di famiglia*, in *Giust. civ.*, 2006, 220; M. Ieva, *Profili strutturali del patto di famiglia*, in AA.VV., *Donazioni, atti gratuiti, Patti di famiglia e trusts successorii*, Bologna, 2010, 469; ID, Art. 768 *quater. Il Patto di famiglia*, commentario a cura di S. Delle Monache, cit., 53; ID, *La disciplina del patto di famiglia e l'evoluzione degli strumenti di trasmissione dei beni produttivi (ovvero del tentativo di rimediare a ipotesi di malfunzionamento dei meccanismi di riduzione e collazione)*, in *Riv. notar.*, 2009, 1089; B. Inzitari, *Il*

Secondo il primo orientamento, il patto di famiglia può essere validamente concluso anche solo con taluni dei legittimari esistenti al momento della conclusione del contratto. I sostenitori di tale tesi muovono dall'assunto che il patto di famiglia, delineato nella nozione contenuta nell'art. 768 *bis* cod. civ., si presenta come un contratto bilaterale, dove solo l'accordo tra l'imprenditore e l'assegnatario assume un ruolo essenziale; il riferimento al testo dell'art. 768 *quater* cod. civ. non può essere di per sé sufficiente al fine di attribuire alla presenza dei legittimari la qualifica di elemento essenziale a pena di nullità del patto. Si ritiene che il *"devono"* non sia elemento decisivo: tante volte la doverosità di un intervento negoziale non si giustifica con la necessità della partecipazione volitiva alla perfezione ed alla validità dell'atto[26]. La norma imporrebbe un mero obbligo a carico dell'imprenditore o dell'assegnatario di convocazione all'atto del coniuge e degli altri legittimari non assegnatari: dal che discenderebbe che, adempiuto tale obbligo, l'assenza o il rifiuto di costoro sarebbe irrilevante ai fini del perfezionamento del contratto, non essendo questi parti essenziali e ciò anche in virtù della loro diversa qualificazione normativa quali "partecipanti" (art. 768 *quater* cod.civ.).

Tra i sostenitori di tale tesi occorre, però, distinguere coloro i quali ammettono che gli effetti tipici del patto di famiglia possano spiegarsi anche nei confronti dei non intervenuti e quanti ritengono, invece, che gli effetti tipici del patto di famiglia si produrrebbero solo nei confronti delle parti del contratto, permanendo a favore dei non intervenuti le tutele previste dalle regole ordinarie del diritto successorio.

Secondo i primi, se i legittimari sono stati convocati, anche se non vi hanno partecipato, sarà loro opponibile la quantificazione decisa dai contraenti; nel

Patto di famiglia, Negoziabilità del diritto successorio con la legge 14 febbraio 2006, n. 55, Torino, 2006, 105; F. Magliulo, *L'apertura della successione:imputazione, collazione e riduzione*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 285; P. Manes, *Prime considerazioni sul patto di famiglia nella gestione del passaggio generazionale della ricchezza familiare*, in *Contr. e impr.*, 2006, 549; A. Mascheroni, *Divieto di patti successori ed attualità degli interessi tutelati*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 21; A. Merlo, *Divieto di patti successori ed attualità degli interessi tutelati*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 102; F. Nobili, *Imprese di famiglia e passaggio generazionale*, Milano, 2008, 31; A. Pischetola, *Il patto di famiglia a raffronto con gli istituti alternativi al testamento*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 301; C. Puligheddu, *Donazioni e patto di famiglia: due figure a confronto*, in AA.VV., *Donazioni, atti gratuiti, Patti di famiglia e trusts successorii*, cit., 516; F. Tassinari, *Il patto di famiglia: presupposti soggettivi, oggettivi e requisiti formali*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 162; A. Zoppini, *L'emersione della categoria della successione anticipata*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 277.

26 Si osserva che ci sono almeno due utilizzazioni codicistiche del "devono" in senso assolutamente differente: il "devono" della divisione del testatore e il "devono" dell'art. 1113 cod. civ., in cui i soggetti ivi indicati devono essere chiamati ad intervenire alla divisione, ma soltanto perché questa abbia effetti nei loro confronti: U. La Porta, *La posizione dei legittimari sopravvenuti*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 302.

caso in cui invece il disponente non abbia provveduto a sollecitare il loro intervento, la valutazione operata dai contraenti sarà loro inopponibile[27].

Secondo l'altra impostazione, invece, la partecipazione dei legittimari è richiesta al fine di rendere il sistema creato dal patto di famiglia opponibile anche nei confronti di questi ultimi[28]: la vincolatività del patto opera solo nei confronti dei legittimari che prendono parte al contratto, anche in un successivo momento, e dei soggetti sopravvenuti che non hanno potuto partecipare, nei limiti di cui all'art. 768 *sexies* cod.civ.[29]. Per contro, coloro che non solo stati coinvolti nella stipulazione del patto, ovvero l'hanno rifiutata, non sono vincolati alla disciplina prevista dal legislatore e possono liberamente avvalersi della collazione ed esperire l'azione di riduzione anche nei confronti dell'impresa o delle partecipazioni societarie oggetto di trasferimento[30].

2.3. Tesi della struttura plurilaterale del patto di famiglia

Altra parte della dottrina, in particolare quella che intravede nel patto di famiglia una funzione divisionale – distributiva[31], afferma che il patto di famiglia sareb-

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27 Tale impostazione è affermata da coloro che configurano il patto di famiglia quale donazione modale. La natura di donazione modale dell'attribuzione compiuta con il patto di famiglia è affermata, inoltre da: C. Caccavale, *Appunti per uno studio sul patto di famiglia: profili strutturali e funzionali della fattispecie*, cit., 304; A. Merlo, *Divieto di patti successori ed attualità degli interessi tutelati*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 102 e M.C. Lupetti, *Il finanziamento dell'operazione:family buy out*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 370. Quest'ultimo autore, in realtà, parla di donazione modale in senso atecnico e ne limita la configurabilità alla sola ipotesi in cui sia l'assegnatario discendente a liquidare i legittimari.

28 G. Di Giandomenico, *Divieto di patti successori ed attualità degli interessi tutelati*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 146;G. Petrelli, *La nuova disciplina del patto di famiglia*, cit. 432; G. Oberto, *Lineamenti essenziali del patto di famiglia*, cit., 415; G. Recinto, in *Il Patto di famiglia*, in AA.VV. *Diritto delle successioni*, cit., 2008, 630; A. Valeriani, *Il patto di famiglia e la riunione fittizia*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 135.

29 Su tale punto divergono, tuttavia, le posizioni degli stessi autori della tesi ora riportata. Cfr. G. Oberto, *Lineamenti essenziali del patto di famiglia*, cit., 415, l'autore, infatti, basando le sue argomentazioni sul disposto di cui all'art. 768 *sexies* cod.civ., esclude che i legittimari sopravvenuti possano essere vincolati alle previsioni del patto e al sistema da questo imposto. L'inopponibilità, quindi, varrebbe anche nei confronti dei legittimari che non abbiano potuto partecipare al contratto in quanto sopravvenuti.

30 In questo senso v. G. Petrelli, *La nuova disciplina del patto di famiglia*, cit., 429, l'autore afferma che tale ricostruzione permette di salvaguardare anche il principio di intangibilità della legittima, poiché questa sarebbe sacrificabile, per i legittimari esistenti al momento della stipula del contratto, solo previo loro consenso.

31 Affermano la plurilaterità del patto di famiglia anche autori che non riconoscono al patto di famiglia una funzione propriamente e/o esclusivamente divisionale: L. Balestra, *Il patto di famiglia a un anno dalla sua introduzione* (parte prima), in *Riv. trim. dir. e proc. civ.*, 750; ID, *Prime osservazioni sul patto di famiglia*, *Nuova giur. civ. comm.*, 377; G. Baralis, *Attribuzione ai legittimari non assegnatari dell'azienda o delle partecipazioni sociali*, in AA.VV., *Patti di famiglia per l'impresa*, cit.,

be valido ed efficace solo se ad esso effettivamente partecipino tutti i soggetti nominati nell'art. 768 *quater* cod. civ., ossia, oltre all'imprenditore disponente e ai discendenti beneficiari, anche coloro che sarebbero legittimari se in quel momento si aprisse la successione nel patrimonio dell'imprenditore.

La ragione di questa impostazione si rinviene nella circostanza che il patto di famiglia, da un lato, rappresenta una sorta di anticipazione della distribuzione del patrimonio del disponente rispetto al momento dell'apertura della successione, mentre, dall'altro, esclude quanto ne è oggetto dall'azione di riduzione e dalla collazione.

Si osserva come non ci si possa limitare alle sole indicazioni contenute nell'art. 768 *bis* cod. civ. che, in quanto generica definizione dell'istituto, escludono ogni riferimento ai legittimari[32]. Occorre, invece, tener presente la formulazione dell'art. 786 *quater* cod. civ.: tale norma non permette di poter accogliere quelle interpretazioni che, pur nell'intento di ampliare l'ambito di applicazione del nuovo istituto, appaiano contrarie al canone ermeneutico imposto dall'art. 12 delle preleggi[33].

L'antinomia, descritta nei paragrafi precedenti, tra il testo dell'art. 768 *quater*, che impone la presenza dei legittimari, e l'art. 768 *sexies*, che disciplina l'ipotesi della mancata partecipazione dei legittimari, dovrebbe essere risolta, secondo tale ricostruzione, riconoscendo che i soggetti richiamati dall'art. 768 *sexies* sono solo coloro che non abbiano potuto partecipare alla stipulazione del patto di famiglia, perché non esistenti, ignoti o non ancora investiti della qualifica di legittimari al momento della conclusione del contratto[34].

223; S. Delle Monache, *Spunti ricostruttivi e qualche spigolatura in tema di patto di famiglia*, cit., 893; N. Di Mauro, *sub* art. 768 *bis*, in N. Di Mauro, E. Minervini, V. Verdicchio, *Le nuove leggi civili. Il patto di famiglia, Commentario alla Legge 14 febbraio 2006, n. 55*, a cura di E. Minervini, cit., 52; A. Merlo, *Divieto di patti successori ed attualità degli interessi tutelati*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 101; F. Tassinari, *Il patto di famiglia: presupposti soggettivi, oggettivi e requisiti formali*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 166.

32 L. Balestra, *Art. 768 bis. Il patto di famiglia*, Commentario a cura di S. Delle Monache, cit., 25; ID, *Il patto di famiglia a un anno dalla sua introduzione*, cit., 751; L. Carota, *Commentario del Codice Civile – Delle Successioni*, III, a cura di V. Cuffaro e F. Delfini, *sub* art. 768 *quater*, cit., 425; S. Delle Monache, *Funzione, contenuto ed effetti del patto di famiglia*, Aa.Vv., in *Tradizione e modernità nel diritto successorio: dagli istituti classici al patto di famiglia*, a cura di S. Delle Monache, Padova, 2007, 330.

33 G. De Nova, *Commentario del Codice Civile – Delle Successioni*, III, a cura di V. Cuffaro e F. Delfini, *sub* art. 768 *bis*, cit., 382. *Contra* U. La Porta, *Il patto di famiglia*, Torino, 2007, 190, l'autore osserva che la "doverosità" di cui all'art. 768 *quater* cod. civ. può essere spiegata anche soltanto in riferimento a norme, tra le quali ad esempio l'art. 1113 cod. civ., che richiedono un dovere di intervento per soggetti terzi rispetto al negozio ai soli fini dell'efficacia relativa del contratto.

34 Così L. Balestra, *Il patto di famiglia a un anno dalla sua introduzione*, cit., 755; G. Bonilini, *Manuale di diritto ereditario e delle donazioni*, cit., 178; F. Delfini, *Articolo 2 (art. 768 quater)*, in G. De Nova, F. Delfini, S. Rampolla, A. Venditti, *Il patto di famiglia. Legge 14 febbraio 2006, n. 55*, cit., 25. Nello stesso senso anche G. Baralis, *Attribuzione ai legittimari non assegnatari dell'azienda o delle partecipazioni sociali*, in AA.VV., *Patti di famiglia per l'impresa*, cit., 223; S. Delle Monache, *Spunti ricostruttivi e qualche spigolatura in tema di patto di famiglia*, cit., 894; N. Di Mauro, *sub* art. 768 bis, in N. Di Mauro, E. Minervini, V. Verdicchio, *Il patto di famiglia*, cit., 49; F. Gazzoni, *Appunti e spunti in tema di patto di famiglia*, cit., 223; B. Inzitari, *Il Patto di famiglia*, cit., 119; M.C. Lupetti, *Il finanziamento*

Tele impostazione trova giustificazione, oltre che nel riferimento letterale all'art. 768 *quater*, anche nei lavori preparatori[35] ove si afferma che il patto di famiglia *"deve essere obbligatoriamente sottoscritto dal coniuge e dai legittimari"* e dalla circostanza che, nel corso della seduta della Commissione Giustizia del Senato del 31 gennaio 2006, sia stato respinto un emendamento che ammetteva la valida stipulazione del patto di famiglia anche in assenza dei legittimari, col che si è voluto chiaramente far intendere che non sia ammissibile, e quindi valido, il patto di famiglia nel quale non fossero intervenuti tutti i legittimari.

Secondo i sostenitori di tale orientamento, il patto di famiglia è un negozio complesso all'interno del quale l'assegnazione dei beni dell'impresa al beneficiario e la liquidazione in favore dei non assegnatari costituiscono entrambi elementi che concorrono ad integrare l'accordo contrattuale[36]. La causa del contratto può dirsi realizzata solo quando vengano soddisfatti i contrapposti interessi e tutelate le rispettive istanze; devono, pertanto, essere assicurati gli interessi del disponente a trasferire i beni aziendali o le partecipazioni societarie, gli interessi del beneficiario a vedersi attribuire con efficacia immediata i beni del disponente e gli interessi dei legittimari non assegnatari a vedersi liquidata la propria quota di legittima sull'impresa. I legittimari devono intervenire per salvaguardare i propri diritti e, in particolare, per concorrere alla determinazione del valore dell'azienda o delle partecipazioni e quindi, di riflesso, delle quote ad essi spettanti; per ottenere, consequenzialmente, la liquidazione in denaro delle loro quote; per procedere alla eventuale rinuncia totale o parziale a detta liquidazione; per assentire a che detta liquidazione avvenga in tutto o in parte in natura, piuttosto che in denaro[37].

La partecipazione dei legittimari attuali deve essere, secondo questa impostazione, considerata qualificante del contratto stesso e indispensabile per realizzare quell'equilibrio di interessi[38]: in assenza di tali soggetti il contratto posto in essere non può assumere la qualifica di patto di famiglia[39].

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dell'operazione:family buy out, in AA.VV., *Patti di famiglia per l'impresa*, cit., 360; C. Puligheddu, *Donazioni e patto di famiglia: due figure a confronto*, in AA.VV., *Donazioni, atti gratuiti, Patti di famiglia e trusts successorii*, cit., 516. *Contra* U. La Porta, *Il patto di famiglia*, cit., 301, secondo l'autore *"è assolutamente da dimostrare che il legittimario non partecipante, cui l'art. 768 sexies cod. civ. si riferisce, sia soltanto "quello sopravvenuto" e non pure, più genericamente e più rispettosamente verso la rubrica dell'articolo, quello che, ancorché esistente non abbia partecipato alla stipula del patto, restando, rispetto ad esso, appunto terzo, ossia estraneo…"*.

35 Ne dà atto anche G. Petrelli, *La nuova disciplina del "patto di famiglia"*, cit., 429.

36 L. Carota, *Il contratto con causa successoria, Contributo allo studio del patto di famiglia*, Padova, 2008.97.

37 N. Di Mauro, *sub* art. 768 *bis*, in N. Di Mauro, E. Minervini, V. Verdicchio, *Il patto di famiglia*, a cura di E. Minervini, cit., 49.

38 L. Carota, *Commentario del Codice Civile – Delle Successioni*, III, a cura di V. Cuffaro e F. Delfini, *sub* art. 768 *quater*, cit., 436.

39 La funzione del notaio è diretta proprio a garantire la tutela dei diritti dei legittimari con la verifica della loro necessaria partecipazione all'atto. Si osserva che il ruolo del notaio sarà

2.4. Adesione alla tesi della necessaria partecipazione dei legittimari al patto di famiglia

Diversi sono gli elementi che portano a ritenere necessaria la partecipazione di tutti i legittimari al patto di famiglia.

La tesi opposta trascura, in primo luogo, la formulazione delle norme. Il dato letterale insegna, infatti, che i legittimari non si debbono limitare a prestare il loro consenso ai trasferimenti decisi dal disponente, ma debbono rivestire il ruolo di contraenti all'interno della vicenda caratterizzante il patto di famiglia. In tal senso fanno propendere sia il primo comma dell'art. 768 *quater* cod. civ., sia l'uso, nell'ultimo comma del medesimo articolo, del termine *"contraenti"*, il quale fa riferimento non solo ai discendenti assegnatari, ma anche gli altri legittimari, nei confronti dei quali si estende la previsione dell'esenzione da collazione e riduzione per i beni a loro trasferiti a titolo di liquidazione, sia, infine, il primo comma dell'art. 768 *quinquies* cod. civ. che permette a tutti i *"partecipanti"*- non solo al disponente e al beneficiario - di impugnare il patto di famiglia.

L'opinione, inoltre, che ammette la preterizione di uno o più legittimari si scontra con la circostanza che dalla medesima fattispecie discendono effetti tra loro incompatibili: se si accogliesse la tesi della inopponibilità del patto ai legittimari esclusi dal contratto, dovrebbe, infatti, logicamente accettarsi che il medesimo fatto dovrebbe essere qualificato e produrre gli effetti tipici della liberalità per i pretermessi, mentre dovrebbe produrre effetti opposti e inconciliabili per i legittimari che hanno concluso il patto di famiglia. Tale soluzione, però, appare incoerente sul piano logico e giuridico.

In un sistema, come quello italiano, dove il legislatore ha introdotto una disciplina eccezionale rispetto alle norme generali del diritto successorio, sembra doversi richiedere il consenso di tutti i legittimari esistenti al momento del contratto, al fine di poter attribuire una validità alle attribuzioni effettuate dal disponente.

Appare così necessario, in coerenza con il precipuo scopo della legge, richiedere l'intervento nel contratto costituente il patto di famiglia di tutti coloro che vanterebbero diritti (come legittimari) sulla successione dell'imprenditore se la stessa si aprisse al momento della stipula del patto. I diritti dei legittimari, con il patto di famiglia, senza il loro intervento nella predisposizione del regolamento negoziale, potrebbero venire lesi, sacrificati da accordi tesi a tal fine tra imprenditore e assegnatari.

È opinione oramai consolidata, nella dottrina italiana, quella secondo la quale le norme poste a tutela dei diritti dei legittimari siano da considerarsi come

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pertanto quello di verificare preliminarmente la sussistenza di tutti i requisiti essenziali del patto di famiglia, e quindi l'intervento alla stipula dell'atto di tutti i legittimari esistenti in quel dato momento storico, nessuno escluso; in tal senso G. Capozzi, *Il patto di famiglia*, in *Successioni e donazioni*, cit., 1460; N. Di Mauro, *sub* art. 768 *bis*, in N. Di Mauro, E. Minervini, V. Verdicchio, *Il patto di famiglia*, a cura di E. Minervini, cit., 52.

cogenti in quanto inderogabili dalle parti prima dell'apertura della successione, rappresentando le stesse un'estrinsecazione di un principio di ordine pubblico[40].

Appare chiaro, pertanto, che l'incidenza del patto di famiglia sui diritti dei legittimari non assegnatari non può che postulare, a pena di nullità, la necessaria partecipazione di questi ultimi al patto di famiglia, la cui struttura è pertanto essenzialmente a carattere plurilaterale.

Escludere la partecipazione dei legittimari dai requisiti essenziali del contratto se, da un lato incoraggia l'utilizzo dell'istituto, dall'altro finisce in concreto per depotenziarlo perché perde ogni vantaggio rispetto ad una normale donazione con dispensa da collazione.

Il beneficiario si vedrebbe infatti costretto, ai sensi del disposto del secondo comma dell'art. 768 *quater* cod. civ., a liquidare gli altri legittimari non assegnatari, senza tuttavia evitare, al momento dell'apertura della successione, l'esercizio della comune tutela da parte dei legittimari che, seppur liquidati, non accettino le disposizioni effettuate dal disponente. Il discendente assegnatario, tenuto alla liquidazione dei legittimari, otterrebbe una disattivazione dei meccanismi di tutela, limitatamente ai partecipanti al patto e, in quanto tale, insufficiente a rendere definitivo il valore della sua attribuzione o stabile l'attribuzione stessa.

Pare, pertanto, doversi concludere che oggi le parti essenziali, a pena di nullità, del patto di famiglia siano:

1) l'imprenditore e/o il titolare di partecipazioni societarie (art. 768 *bis* cod. civ.) o disponente;
2) uno o più discendenti del soggetto di cui sopra (art. 768 *bis* cod. civ.), definiti anche assegnatario o assegnatari (art. 768 *quater* cod. civ.) o anche beneficiario o beneficiari (art. 768 *sexies*, primo comma, cod. civ.);
3) il coniuge dell'imprenditore che sia tale al momento della conclusione del contratto (art. 768 *quater*, primo comma, cod. civ.);
4) coloro che sarebbero legittimari dell'imprenditore, ove al momento della conclusione del contratto si aprisse la successione di quest'ultimo (art. 768 *quater,* primo comma, cod. civ.).

Se uno dei legittimari non assegnatari non può o non vuole intervenire all'atto, non potrà procedersi alla conclusione del contratto di patto di famiglia e si dovrà,

40 Sul punto cfr. in termini G. Bonilini, *Manuale di diritto ereditario e delle donazioni*, cit., 123, secondo cui il nostro ordinamento giuridico ha da sempre salvaguardato l'esigenza di assicurare la legittima caratterizzando come cogenti le norme sulla successione necessaria; in quanto inderogabili rivelano un'opzione di fondo che conforma un principio di ordine pubblico; L. Mengoni, *Successioni per causa di morte*, *Successione necessaria*, in *Tratt. di Diritto civile e Commerciale,* già diretto da A. Cicu e F. Messineo e continuato da L. Mengoni, XLIII, 2, Milano, 2000, 89, nt. 1, secondo cui l'intangibilità della legittima è un principio di ordine pubblico non solo interno, ma anche di diritto internazionale privato *ex* art. 16, l. 31.5.1995, n. 218; C.M. Bianca, *Diritto civile*, 2, *Le successioni,* Milano, 2005, 537-538, 670.

pertanto, ricorrere all'utilizzo di altro strumento negoziale per assicurare la trasmissione dell'azienda e/o delle partecipazioni societarie.

In tal senso pare debbano leggersi anche i tentativi legislativi, non andati a buon fine, succedutesi nel corso degli anni 2011 e 2012, per la modifica della disciplina del patto di famiglia.

Sia l'anno 2011 che il 2012, si sono caratterizzati, infatti, per un rinnovato interesse delle istituzioni italiane nei confronti della normativa del patto di famiglia: in primo luogo, la materia è stata incisa dalla prima versione del Decreto sviluppo n. 70/2011, approvato dal Governo in data 5 maggio 2011, ma successivamente cancellata quando il decreto è approdato al Quirinale[41], presumibilmente in quanto non rispondente ai criteri di urgenza propri del decreto legge ed altresì in considerazione del fatto che *"un argomento così delicato e sentito necessita di un adeguato approfondimento"*[42]. È stata poi recuperata nella proposta di legge C. 4463, presentata il 28 giugno 2011, assegnata alla II Commissione Giustizia in sede Referente il 20 luglio 2011 e, infine, nella bozza del Decreto sviluppo dell'ottobre 2011, anche questo poi non approvato. Nel 2012, invece, la riforma del patto di famiglia è stata presentata sotto forma di emendamento, poi ritirato, durante la fase di conversione in legge del Decreto legge 22 giugno 2012, n. 83, recante misure urgenti per la crescita del Paese (C. 5312 Governo).

Soffermandosi sull'aspetto maggiormente interessante ai fini del presente lavoro, e tralasciando i limiti di natura tecnica delle proposte[43], tutte le iniziate legislative prevedevano la modifica dell'art. 768 *quater* cod. civ. dedicato alla "*Partecipazione*".

La nuova formulazione dell'art. 768 *quater* cod. civ. prevedeva, infatti, la possibilità che l'atto venisse redatto anche senza la presenza di tutti i legittimari[44].

Donde conferma ulteriore al rilievo che, secondo la disciplina ancora ad oggi in vigore, la stipulazione del patto non sia possibile qualora non vi partecipino tutti i legittimari esistenti al momento in cui viene stipulato il patto di famiglia. Se il testo attuale, infatti, fosse da interpretare nel senso esposto della struttura bilaterale del patto, il legislatore non avrebbe sentito la necessità di modificare le norme ammettendo espressamente la possibilità che il contratto possa esse-

41 La versione definitiva del Decreto è stata adottata in data 13 maggio 2011 ed è stato convertito con Legge 12 luglio 2011 n. 106.

42 Si veda l'*incipit* della Proposta di Legge n. 4463 presentata alla Camera dei Deputati in data 28.06.2011.

43 Sul punto, per una prima analisi, M. Ieva - A. Zoppini, *Brevissime note sulla proposta di modifica del patto di famiglia inserita nel testo originario del decreto sviluppo*, in *Riv. notar.*, 2011, 1457.

44 La proposta di modifica aggiungeva che, nel caso di mancata partecipazione di uno dei legittimari, il disponente dovesse notificargli, entro trenta giorni dalla conclusione del contratto, il relativo contenuto, per l'eventuale accettazione del beneficiario o il suo rifiuto, nelle forme dell'art. 768 *bis* cod. civ. (probabilmente il richiamo era all'art. 768 *ter*, dedicato alla forma e non all'art. 768 *bis* dedicato alla nozione del patto di famiglia). Nei casi di mancata partecipazione al contratto di tutti i legittimari, inoltre, il valore dell'azienda o delle partecipazioni doveva essere oggetto di perizia giurata da parte di un esperto nominato dal Tribunale.

re concluso anche in assenza di uno dei legittimari e prevedendo una disciplina particolare per tale eventualità.

Da ultimo, in data 25 luglio 2012, è stato presentato un Ordine del Giorno con il quale la Camera ha impegnato il Governo a valutare l'opportunità di intervenire, mediante gli opportuni atti normativi, sulla disciplina del patto di famiglia al fine di rendere facoltativa la partecipazione al contratto di tutti quei soggetti in capo ai quali è attualmente previsto un obbligo alla partecipazione, e affinché fosse previsto un obbligo di notifica, da parte del disponente, dell'intenzione di stipulare il patto, nell'intento di conferire stabilità nel tempo agli effetti del trasferimento patrimoniale mediante lo strumento del patto di famiglia.

2.5. Modalità di liquidazione dei legittimari non assegnatari

Sono tre le possibili modalità attraverso le quali l'assegnatario dell'azienda o delle partecipazioni societarie può estinguere l'obbligazione di liquidazione in favore dei potenziali legittimari non beneficiari[45].

La prima modalità è costituita dall'adempimento immediato dell'obbligazione da parte del beneficiario mediante il pagamento delle somme risultanti dovute all'esito della valutazione dei beni e della determinazione delle quote di legittima[46]. L'art. 768 *quater* permette, inoltre, al beneficiario, in caso di accordo tra i contraenti, di liquidare i legittimari attraverso il trasferimento dei beni in natura[47].

La seconda modalità è costituita dalla rinuncia, totale o parziale, dei legittimari non assegnatari a quanto di loro spettanza[48]. La rinunzia può essere contenuta nel patto di famiglia, o in un atto separato, anche successivo al patto di famiglia. Nel caso di rinunzia con atto separato, la stessa deve essere formalizzata per atto pubblico, per simmetria con la disposizione dell'art. 768 *ter* cod. civ.

La rinunzia può essere pura e semplice o verso corrispettivo: il legittimario può rinunziare, cioè, alla liquidazione della propria quota verso pagamento di

45 Cfr. G. Capozzi, *Il patto di famiglia*, in *Successioni e donazioni*, cit., 1481.

46 Il beneficiario potrà fare ricorso all'indebitamento in forme nuove e peculiari quali il *family buy-out*. Cfr. M. Bernardini, *Il patto di famiglia tra adozione e successione*, in *Studi in onore di Giorgio Cian*, cit., 239.

47 Per quanto riguarda il consenso che deve essere prestato ai fini della liquidazione in natura, si ritiene che non sia necessario che venga reso da tutti i contraenti essendo sufficiente l'accordo dell'assegnatario e del legittimario da tacitare in natura. Tali due soggetti, infatti, indipendentemente dal consenso delle altre parti contrattuali possono convenire una *datio in solutum ex* art. 1197 cod. civ. Sul punto si veda nota n. 20, F. Delfini, in AA.VV, *Commentario del Codice Civile – Delle Successioni*, a cura di F. Delfini e V. Cuffaro, *sub* art. 768 *bis*, cit., 389; Id., *Struttura e patologia del patto di famiglia*, in *Studi in onore di Giorgio Cian*, cit., 755.

48 In questo caso si configura un patto successorio rinunziativo, eccezionalmente legittimato dall'art. 768 *quater*, II comma, cod. civ., in deroga al divieto previsto dall'art. 458 cod. civ.

una somma di denaro o verso trasferimento di altri beni, provenienti da qualsiasi soggetto, anche lo stesso disponente o un terzo[49].

Occorre rilevare che la rinunzia alla liquidazione produce il venir meno del diritto dei legittimari non assegnatari ad esperire l'azione di riduzione o a poter chiedere la collazione dell'impresa. La rinunzia è, pertanto, equiparabile alla liquidazione; i legittimari non assegnatari, infatti, che hanno rinunziato alla propria quota, nonostante nulla abbiano ricevuto dal patto di famiglia, qualora intendano agire in riduzione perché lesi, dovranno comunque imputare alla quota di legittima ad essi spettante sul patrimonio del disponente al momento dell'apertura della successione, quanto astrattamente avrebbero avuto il diritto di ricevere sul valore del bene attribuito con il patto.

La terza modalità di liquidazione è, secondo il disposto dell'art. 768 *quater*, terzo comma, parte seconda, cod. civ., il differimento della liquidazione ad un momento successivo. La norma, infatti, prevede che *"l'assegnazione disposta in favore degli altri partecipanti non assegnatari può essere fatta anche con successivo contratto che sia espressamente dichiarato collegato al primo con il quale si procede all'assegnazione dell'azienda, e purché vi intervengano i medesimi soggetti che hanno partecipato al primo contratto o coloro che li abbiano sostituiti*[50]*"*.

Con tale previsione il legislatore ha voluto favorire la liquidazione da parte del discendente assegnatario, concedendogli la facoltà di corrispondere quanto dovuto agli altri legittimati in momenti successivi rispetto alla stipula del patto di famiglia: è facilmente prevedibile, infatti, che l'assegnatario non disponga, al momento della conclusione del contratto di cui all'art. 768 *bis*, delle sostanze necessarie per liquidare le quote dei non beneficiari[51].

Ai fini della validità delle successive assegnazioni, è necessario che si proceda alla stipula di un successivo contratto, espressamente dichiarato collegato al primo, nel quale devono rivestire il ruolo di parti tutti i soggetti che hanno partecipato al primo contratto o coloro che li abbiano sostituiti. Il patto di famiglia e gli eventuali successivi contratti, collegati al primo[52], vengono a far parte di un un'unica operazione negoziale finalizzata all'esecuzione del patto di famiglia.

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49 L. Genghini e C. Carbone, *Il patto di famiglia*, in *Le successioni per causa di morte*, cit., 1601.

50 G. Capozzi (*Il patto di famiglia*, in *Successioni e donazioni*, cit., 1482) chiarisce che l'espressione *"a coloro che li abbiano sostituiti"* si riferisce agli eredi, legittimi, testamentari o per rappresentazione degli originari partecipanti al patto che siano nel frattempo deceduti. G. Capozzi osserva, inoltre, che nel caso in cui al legittimario non siano subentrati altri legittimari nessuna assegnazione dovrà essere eseguita a favore dei suoi eredi. Nello stesso senso anche M.C. Lupetti, *Patti di famiglia. Note a prima lettura*, cit., 9.

51 Rileva il problema della difficoltà nel reperimento della provvista da parte del discendete assegnatario F. Delfini, in AA.VV., *Commentario del Codice Civile – Delle Successioni*, a cura di F. Delfini e V. Cuffaro, *sub* art. 768 *bis,* cit., 388.

52 Nel senso che la fattispecie delineata nel testo rappresenti un'ipotesi di collegamento negoziale: cfr. P. Manes, *Prime considerazioni sul patto di famiglia nella gestione del passaggio generazionale della ricchezza familiare*, cit., 561; G. Rizzi, *I patti di famiglia. Analisi dei contratti per il trasferimento*

La fattispecie base del patto di famiglia è, dunque, quella della liquidazione da parte dell'assegnatario delle quote di legittima degli altri legittimari, ma questa soluzione non pare escludere l'ammissibilità di sistemazioni del patrimonio familiare in vita con carattere più ampio.

Si discute, infatti, circa la possibilità per il disponente di provvedere personalmente, al posto del discendente assegnatario, alla liquidazione dei legittimari da lui non prescelti quali beneficiari del patto di famiglia[53]. Secondo parte della dottrina, il terzo comma dell'art. 768 *quater* andrebbe inteso nel senso che i partecipanti al contratto non assegnatari possano ricevere dal disponente la soddisfazione dei propri diritti[54]. Tale variante del patto di famiglia, lasciata all'autonomia delle parti, troverebbe la sua *ratio* sia nella volontà di agevolare l'esecuzione del patto di famiglia, superando le eventuali difficoltà economiche dell'assegnatario che si veda costretto a versare ingenti somme di denaro agli altri legittimari, sia *"nella volontà dell'ascendente di assecondare non solo la vocazione di impresa di uno dei discendenti, ma magari altresì le vocazioni non imprenditoriali degli altri legittimari"*[55].

I sostenitori di tale tesi ritengono plausibile che sia lo stesso disponente ad attribuire beni e somme di denaro tratte dal suo patrimonio agli altri partecipanti al patto, realizzando in tal modo una sorta di contratto successorio avente natura divisoria[56]. Codesta possibilità potrà trovare fondamento implicito nel terzo e nel quarto comma dell'art. 768 *quater* cod. civ. Il terzo comma parla, infatti, di assegnazione di beni agli altri partecipanti non assegnatari dell'azienda, prevedendo, anche per essi, il principio della stima del valore concordata al momento della stipulazione del patto. La norma può disciplinare il caso in cui l'assegnazione di beni venga fatta da parte del discendente assegnatario di azienda, ma non disciplina esclusivamente tale ipotesi. Vi rientra anche quella, qui ipotizzata,

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dell'azienda e per il trasferimento di partecipazioni societarie, Padova, 2006, 22. Se i due contratti sono collegati ne deriva che le eventuali vicende patologiche che riguardino uno dei contratti in questione, sono destinate a riverberarsi anche sull'altro accordo: così, a titolo esemplificativo, eventuali cause d'invalidità che riguardino uno dei contratti, potranno comportare anche l'invalidità dell'altro; cfr. L. Genghini - C. Carbone, *Il patto di famiglia*, in *Le successioni per causa di morte*, cit., 1593.

53 Dubbi sostanzialmente analoghi si sono posti in dottrina circa la possibilità che la liquidazione provenga dal patrimonio di un terzo, come nel caso frequente nella prassi in cui il coniuge del disponente attribuisce un determinato bene, o una somma di denaro, ai figli che non hanno ricevuto l'azienda, L. Genghini - C. Carbone, *Il patto di famiglia*, in *Le successioni per causa di morte*, Padova, cit., 1599.

54 L. Balestra, *Il patto di famiglia a un anno dalla sua introduzione*, cit., 745; L. Carota, *Il contratto con causa successoria. Contributo allo studio del patto di famiglia*, cit., 200 ss. Cfr. anche di recente P. Matera, *Il Patto di famiglia*, in *I rapporti patrimoniali, L'impresa familiare, Il patto di famiglia*, Torino, 2011, 627.

55 Così F. Delfini, *Articolo 2 (art. 768 quater)*, in G. De Nova, F. Delfini, S. Rampolla, A. Venditti, *Il patto di famiglia*, cit., 25.

56 B. Inzitari, *Il Patto di famiglia. Negoziabilità del diritto successorio con la legge 14 febbraio 2006, n. 55*, cit., 171.

che sia lo stesso ascendente ad assegnare tali beni non costituenti l'azienda agli altri legittimari: infatti solo rispetto a quest'ultima ipotesi assume significato pregnante quanto previsto nell'ultimo comma dell'articolo 768 *quater* cod. civ.. Il quarto comma del predetto articolo, disponendo che quanto ricevuto dai contraenti non è soggetto a riduzione e a collazione, fa riferimento al caso in cui il disponente abbia effettuato delle assegnazioni a favore di tutti i contraenti: non avrebbe, infatti, senso parlare di una soggezione a collazione o a riduzione rispetto ad assegnazioni di beni fatte dal discendente assegnatario di azienda.

La possibilità rappresentata, ovvero quella di assegnazioni diverse dall'azienda da parte dell'ascendente, pare trovare conferma nei lavori preparatori: nella seduta in Commissione del 23 settembre 2003 - ma la stessa affermazione è stata ripetuta anche nella seduta del 21.07.2005 - l'on. Buemi precisava che con le norme proposte veniva disciplinata *"l'ipotesi che l'imprenditore mediante il patto di famiglia o con successivo contratto ad esso collegato, assegni beni agli altri figli non assegnatari dell'azienda, in tal caso il valore di detti beni dovrà essere imputato alle loro quote di legittima"*.

In tal senso milita, inoltre, l'esigenza di consentire all'autonomia privata di disporre di incentivi per ottenere quella partecipazione al patto da parte di tutti i legittimari. Per evitare dunque il verosimile insuccesso pratico del tentativo di conclusione di un patto di famiglia, si dovrebbe ritiene possibile l'intervento perequativo dello stesso disponente a favore di tutti i legittimari.

Tale soluzione trova ulteriore conferma nei tentativi di riforma della disciplina del patto di famiglia, sopra richiamati, presentati nel corso del 2011 e del 2012. Tutti i testi, infatti, prevedevano che alla liquidazione dei non assegnatari potesse prevedere direttamente l'imprenditore o il titolare delle partecipazioni societarie, in denaro o con beni in natura, anche mediante imputazione di pregresse donazioni disposte a loro favore, previa rivalutazione del valore delle stesse alla data del patto[57].

57 Da ultimo, nell'ordine del giorno presentato dalla Camera in data 25.07.2012 (Ordine del Giorno di data 25.07.2012 presentato da Savino in assemblea, 9/05312/180, testo modificato nel corso della seduta), si è chiesto l'impegno del Governo a valutare l'opportunità di intervenire sulla disciplina del patto di famiglia anche per modificare le disposizioni relative alla liquidazione dei legittimari, posto che i soggetti sui quali attualmente ricade tale obbligo sovente non sono in grado di provvedervi.

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Capacity and Contract: National Law and Proposal for a Common European Sales Law §

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SUMMARY

INTRODUCTION. – 1. OUTLINE: INVALIDITY OF THE CONTRACT FOR MENTAL INCAPACITY. – 2. ITALIAN, FRENCH AND ENGLISH LAW: PERSON'S COMPETENCY NOT LIMITED BY ANY PROTECTIVE MEASURE. – 3. ITALIAN, FRENCH AND ENGLISH LAW: JUDICIAL MEASURE WHICH LIMITS THE PERSON'S CAPACITY. – 4. LIMITS TO THE RULE: LOWER LIMIT. – 5. LIMITS TO THE RULE: UPPER LIMITS. – 6. INCAPACITY AND THE CESL: LACK OF ANY SPECIFIC RULE. – 7. CESL AND UNFAIR EXPLOITATION. – 8. FINAL REMARKS.

ABSTRACT

The paper concerns the topic of contracts entered into by a person suffering from mental incapacity. The matter is analysed considering the rules of invalidity given in three legal systems (Italy, France and United Kingdom) and their limits as well as the broader framework where incapacity has to be seen (CESL). It is argued that the special rules of invalidity and the traditional distinction between capacity and incapacity will lose their importance in the light of the attention paid by the new instruments to bargaining power abuse.

KEYWORDS

MENTAL INCAPACITY - INCOMPETENCY - CONTRACT - INVALIDITY - PROTECTIVE MEASURES - LIMITS TO THE RULE OF INVALIDITY - EVERYDAY LIFE CONTRACTS - GIFTS - CESL - UNFAIR EXPLOITATION

§ This paper has been submitted to an external referee.

Introduction

This presentation deals with contracts entered into by a person suffering from mental incapacity, in the context of Italian, French and English law as well as the new Proposal for a Common European Sales Law.

We will discuss this through four key points.

First, we will provide an overview of the rules of invalidity linked to mental incapacity of one contracting party in the three legal systems and their general features.

Second, we will consider in greater depth the invalidity conditions under Italian, French and English law.

Third, we analyze the limits of the rule: both the lower limit, given by everyday life contracts, and the upper ones, regarding whether an absolute mental incapacity can lead to a different kind of invalidity and the special rule given under Italian law in the context of gifts.

Finally, the fourth part deals with mental incapacity in the light of the broader framework of 'bargaining power abuse', also considered by the new Proposal for a Common European Sales Law.

1. Outline: Invalidity of the contract for mental incapacity

We are now going to consider the first point, i.e. an overview of the consequences linked to contract entered into by a person who lacks capacity.

Generally speaking, under Italian, English and French law a contract entered into by a person suffering from mental incapacity is invalid, provided that certain conditions are met.

Whilst the examined legal systems refer to such invalidity using different terminology and approaches (with the civil law systems seeing such invalidity as the rule and common law referring to it as an exception), the kinds of invalidity provided share a number of common features.

Specifically, the aim of the invalidity rule is to protect the person of unsound mind. This is why only the person considered incapable is allowed to exercise the rights associated with the status.

Moreover, a distinction can be drawn between a general and a special regime of invalidity of the contract, depending on whether the person is subject to any protective measure (though in the common law such distinction is not expressly drawn by doctrine).

In Italy this issue is regulated by article 428 of the *codice civile* (entitled "Acts made by a mentally disordered person"), the second and third paragraph of article 427, which deal with situations where the person is subject to a protective

measure and someone else should have acted on his behalf or assisted him, and article 412 which addresses the case of 'amministrazione di sostegno'[1].

Under French law, the relevant provisions are found in the *code civil* with article 414-1 setting a general regime, and special rules being provided by articles 435, from 464 to 466 and 488[2].

In contrast to the aforesaid systems, in the United Kingdom the matter is almost entirely regulated by case law. The only relevant statutory provision is section 7 of the Mental Capacity Act 2005. The most relevant precedents are found in: in re Walker (1904); Imperial Loan Company Ltd v Stone (1892) and Hart v O'Connor (1985)[3].

2. Italian, French and English law: Person's competency not limited by any protective measure

If we now turn to the second point and consider the conditions for such invalidity under Italian, French and English law, we firstly have to say that each of the legal systems under consideration provides a different regime regarding the conditions for contractual invalidity depending on whether the person is subject to a protective measure or not. In other words, different provisions apply for legal incompetency (*incapacità legale* in Italy, *incapacité légal* in France) and mental incapacity (*incapacità naturale* in Italy; *insanité d'esprit* in France).

First considering the general case, i.e. the case where the person's competency has not been limited by any protective measure but he was *non compos mentis* at the moment the contract was concluded, we observe two approaches.

On the one hand, Italian and English law establish that the contract is voidable at the insane person's will on the condition that the other party was aware of his mental impairment at the time of the contract.

Conversely, under French law the contract can be declared void at the request of the mentally incapable person without the need of any further requirement but the proof of the mental incapacity. The other party's awareness is therefore irrelevant for the determination of invalidity of the contract.

The Italian courts have interpreted the second paragraph of Article 428 of the Italian *codice civile* as allowing the mentally incapable party to avoid the contract

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1 For an overview, see Pescara, *Tecniche privatistiche e istituti di salvaguardia dei disabili psichici*, in *Trattato di diritto privato Rescigno*, III, 4, 2nd edn, Utet, Torino, 1997, 839 ff.; Pietrobon, *Incapacità naturale*, in *Enciclopedia giuridica*, XVIII, Treccani, Roma, 1989.

2 Dubois-Paillet, «*Incapable Majeurs*», in *Encyclopédie Juridique Dalloz, Repertoire de droit civil*, VI, Dalloz, France, *mise a jour* 2012; Starck-Roland-Boyer, *Droit civil. Les obligations, 2. Contrat*, 16th edn, Litec, Paris, 1998, 157 ff.

3 In re *Walker* [1905] 1 Ch 160; *Imperial Loan Company Ltd v Stone* [1892] 1 Q.B. 599; *Hart v O'Connor* [1985] 1 A.C. 1000.

on the basis of his mental impairment if the other party was in bad faith, which generally consists in the knowledge of the party's incapacity. However, it has to be said that the interpretation of the article has been a matter of considerable debate. In fact, if we read the first paragraph of article 428 *codice civile*, it refers to the discipline of acts made by a mentally incapable person and provides that the act can be avoided if it causes a prejudice to the mentally impaired party. Now, if we remember that a contract is in the first instance an act, we could argue that a contract can be avoided only if both conditions (bad faith and a prejudice suffered by the incapable person) are met. Such argument is supported by a large part of the doctrine, whilst on the contrary jurisprudence does not require the existence of any prejudice.

Similarly, under English law a contract entered into by a person suffering from mental incapacity is voidable if the other party was aware of his lack of capacity at the moment the contract was concluded. The rule was issued in Imperial Loan Company Ltd v Stone (1892)[4]. Besides, voidability does not depend upon a prejudice suffered by the party, understood as unfairness of the bargain, as shown in Hart v O'Connor (1985). Lastly, at English law a contract is also voidable if any reasonable man would have realized that the person was incapable, which is argued against by Italian authors.

Both Italian and English law try to find a balance between the protection of the person of unsound mind and the protection of the other party's reliance on the contract. In particular, the reason for the bad faith requirement for avoidance is to safeguard the sane party reliance on the contract.

On the other hand, French law does not afford similar protection to the other party's reliance on the contract and is more favorable to the mentally incapable person. In fact, article 414-1 *code civil* does not require that the other party be aware of the incapacity for declaring the contract 'nul' (that means void). Instead, the proof of mental insanity is sufficient. Despite the term used to refer to such invalidity, which is 'nullité' and could be translated with 'voidness', the kind of invalidity provided by French law is similar to Italian voidability.

The same favor to the incapable can be seen as the basis of a further rule. In the French legal system a contract (and, more generally, an act) entered into by a person during the two years preceding the commencement of proceedings for subjecting that person to a protective measure can be declared void just if he proves that he was unable to defend his own interests and he suffered a prejudice from the act (article 462 *code civil*).

This framework raises the question as to how one deals with cases where the mental incapacity is not easily recognizable by the other party.

This could occur in at least two situations.

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4 For English law, see *Treitel's The Law of Contract*, 13th edn, Sweet&Maxwell, London, 2011, 586 ff.; Clarke, *Vitiating Factors*, in Furmston (ed), *The Law of Contract*, 4th edn, Part of Butterworths Common Law Series, United Kingdom, 2010, 857 ff.; Hale, *Mental Health Law*, Sweet&Maxwell, London, 2010.

The first is when no symptom is easily perceptible - we can think about an old person who seems alert at first sight, but who actually suffers from Alzheimer and forgets events after a short time.

A second potential scenario is when the contract is concluded without the physical presence of the parties, for example by means of the internet - for instance a person suffering from a mental incapacity who buys some rare stamps on E-bay -. In such cases, under a domestic point of view, assuming an objective meaning of bad faith might be a helpful approach. The reference to a prejudice ensuing from the act to the incapable contained in the second paragraph of article 428, could be considered sufficient to raise a presumption of bad faith thereby creating the possibility for avoiding the contract. To put it differently, a flexible application of statutory rules could lead to a better protection for the mental incapable. At English law, the courts' concern with not interfering with the freedom of contract means that it is unlikely they would grant voidability of the contract. On the contrary, in France the declaration of voidness simply requires the proof of the mental impairment, meaning that such questions do not arise and the mental insane will always be protected.

3. Italian, French and English law: judicial measure which limits the person's capacity

Moving on to the second hypothesis, this is the case the court has found the person permanently insane and has consequently rendered a judicial measure which limits the person's capacity to act for himself (in Italy the relevant legal institutes are *interdizione*, *inabilitazione* and *amministrazione di sostegno*; in France they are *tutelle*, *curatelle* and *sauveguarde de justice*; the United Kingdom does not have the same legal institutes, however section 16 of the Mental Capacity Act 2005 provides that the court could make the decision on his behalf in relation to certain matters or appoint a 'deputy' to make decisions on the person's behalf). In this context, all of the systems under consideration provide for a higher level of protection for the incapable person.

In particular, two issues are worth highlighting.

Firstly, since an evaluation of the person's capacity to understand and act in accordance with his own interests is made *ex ante* by the court, invalidity is not subject to the verification of the lack of mental capacity in the specific case. A non-rebuttable legal presumption of fact applies (that means that the other party is not permitted to prove the contrary).

Turning to the second point, the filing system provided by each legal system enables anyone to be aware of the judicial measure the incapable person is subjected to. Therefore one could argue that the reliance the other party could have had on the contract does not deserve further protection since he has the possibility of taking knowledge of the incapacity.

In fact, the Italian *codice civile* provides that any act the incapable person makes without the necessary assistance or legal representation of the guardian (the so called 'curatore' in the first case and 'tutore' in the second one) is voidable without any need for effective knowledge of the party's incapacity (article 427, second and third paragraph).

Similarly, in the United Kingdom if the person's property is subject to the control of the court, the contract through which he disposes of the property does not bind him, but binds the other party. However, it is unclear whether the rule extends also to contracts unrelated to the disposition of property.

The French system differs from the ones examined and is more complex. If a person is subject to *sauvegarde de justice* or other measure and he personally made an act he should have been legally represented for, the act is voidable (*nullité* relative, provided by articles 435, 465, n. 3 *code civil*). If the person should have been only assisted for acting, the contract can be avoided if a prejudice ensued from it to the incapable (article 465, n. 2 *code civil*).

With regard to those acts for which the person subject to a protective measure retains capacity, the general rules seem to apply in each of the legal systems considered.

However, the French system provides a more flexible regime. Such acts can still be avoided in virtue of the general rule of art. 414-1 *code civil*, but can otherwise be "rescinded for overreaching on the ground of enormous disproportion between the prestations of the parties" or "reduced for excess" (art. 425, 465, n. 1 *code civil*). In such cases the court must consider the usefulness of the act for the person, the other party's good or bad faith and the importance or consistence of the insane person's property.

4. Limits to the rule: Lower limit

After analyzing the conditions in which operates the invalidity rule, we have now to examine the third aspect, which concerns the lower and upper limits to the afore examined rules of invalidity.

The lower limit deals with everyday life contracts concluded by the person subject to a protective measure. These are referred to as 'atti' or 'contratti' 'minimi' in Italy, 'actes de la vie courant' in France and 'contracts for necessaries' in the United Kingdom. The question is whether the regime of invalidity we have seen applies to such contracts, or, on the other hand, the need for securing necessary goods and services to the person of unsound mind justifies a different approach.

Although Italian statutory law does not provide any special rule for the case, it is believed that the person subject to a protective measure retains a minimum freedom of contracting in relation to everyday life necessities. Therefore such contracts are to be considered valid, provided that they are not prejudicial (as the general rule provided by article 428 *codice civile* still applies).

Similarly, in France the same approach has been supported by the authors in the absence of any statutory provision. Before 1968, the reason for the rule was found in the existence of an implied mandate in favor of the incapable person. Since then the courts have relied upon the analogic application of the *code civil* rules concerning minors that grant a limited capacity in relation to everyday life acts.

Under English law, the rule applying to this kind of contracts has been set out in Statute. Namely, section 7 of the Mental Capacity Act 2005 provides that if the contract refers to the supply of necessary goods and services, the person who lacks capacity to contract must pay a reasonable price for them. For this purpose, "'necessary' means suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied". In other words, in such cases, even if it is not directly stated that the contract is valid, the law allows the supplier a remedy at common law for recovering a reasonable price.

In brief, the aim of these rules is to find a balance between the interests of the mentally impaired to secure necessary goods and services at fair terms - avoiding the risk of social exclusion and exploitation -, and the interest of the other party to enter into valid contracts, - avoiding the risk of precariousness of the effects -, or at least to obtain payment.

5. Limits to the rule: Upper limits

Moving on to the upper limits, two aspects have to be considered.

Firstly, it has to be examined whether an absolute lack of mental capacity excludes the existence of an effective consent and therefore leads to voidness / nullity of the contract (rather than voidability) for lack of one of its essential elements.

The aforesaid argument used to be supported in the past but appears to have lost its persuasiveness as of recent.

In France, until the 1968 reform, authors referred to mental incapacity as an element excluding effective consent, required by article 1108 *code civil* for the validity of the contract.

In Italy the argument had some followers under the previous *codice civile* 1865, whilst since then it has been generally accepted that article 428 *codice civile* has set an organic discipline (only isolated authors still argue that the contract entered into by a person in state of absolute lack of mental capacity is void for defect of consent).

Secondly, special rules are provided by Italian and English law for gifts, therefore the general rule requiring proof of the other party's awareness for avoiding the contract does not apply to such contracts (anyway, it has to be said, gift is not a contract according to English law). Instead, a gift is voidable to the mentally incapable donor choice if he only gives proof of his mental impairment. The reason for such rule is clear: the reliance of the donee can be sacrificed in favor to the mentally disordered donor interests according to the gratuity of gift.

6. Incapacity and the CESL: Lack of any specific rule

One last point has to be tackled: the one concerning the broader framework where incapacity has to be seen.

A comparative analysis of the subject "mental capacity and contract" is certainly useful in any case that presents elements of extraneousness, which is becoming more and more frequent as a result of increased mobility and of weakening of the connection between trade and national territory.

Where an element of extraneousness exists international private law rules apply: namely, with reference to domestic law, article 13 of Regulation Rome I (n° 593/2008) on the law applicable to contractual obligations, and the second paragraph of article 23 of Italian law n° 218/1995 on the reform of Italian international private law indicates which law to apply in case of one party's incapacity.

However, comparison is not sufficient for an exhaustive analysis of the topic of mental incapacity and contract. In fact, it cannot fail to consider the broader dimension, in which the phenomenon has to be framed namely European law.

In particular, although mental incapacity stands out from its object, it is useful to refer to the new proposal for a regulation on a Common European Sales Law, dated October 2011, which was born from the revision of the Draft Common Frame of Reference and provides an optional regime for sale contracts.

The choice for excluding specific rules about mental incapacity from the proposal (also expressed in recital n° 27 of the proposal) is consistent with the traditional European and international policy as well as with soft law instruments. Namely, an identical exclusion is made, among others, by Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters and Regulation Bruxelles I (n° 2001/44/EC) on the same matter and by the PECL (Principles of European Contract Law, art. 4:101) and the Unidroit Principles (edition 2010: chapter 3, art. 3.1.1.) as soft law instruments.

Two reasons could explain this exclusion.

The first is the subsidiarity and proportionality principles that guide the European Union's intervention.

The second reason relates to the Regulation's objective matter, the means contracts are more frequently concluded by and the nature of the parties. In fact, the proposed regulation does not only consider natural persons but also small and medium sized enterprises, to which no question of mental incapacity arises. Moreover, the regulation covers cross-border contracts. This implies that the more frequent hypothesis will be the one where the purchase is concluded without the physical presence of the parties, thus it is unlikely that one of them will be aware of the mental incapacity of the other. Finally, as regards contracts whose parties are a trader and a consumer, the lower limit of the invalidity rule could come into consideration; in fact, those contracts would normally provide for everyday life needs.

However, although mental incapacity is not considered by the Proposal for a Common Sales Law, the interests of someone who is mentally impaired could be protected in two different ways.

Firstly, remedies provided for consumer contracts apply if the impaired person acts as a consumer, and not as an entrepreneur. Specifically, in the case where the contract is concluded without the physical presence of the parties provisions for distance contracts could apply. That means that the consumer who is mentally impaired could exercise the right of withdrawal provided by each Member State's statutory law after directive 97/7/EC, which was recently amended by directive 2011/83 on consumer rights (and to which Member States should comply with by December 2013).

Secondly, a wider provision could absorb the importance of mental capacity provisions. Namely Article 51 of the proposal, which regulates unfair exploitation, a legal institute linked to the bargaining power abuse of one party to the detriment of the other.

The rule provides that a party may avoid a contract if two conditions are met at the time of the conclusion of the contract: "(a) that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and (b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage."

Avoidance can be reached extra-judicially, by giving notice of it to the other party (according to Article 52) within one year from when the party becomes aware of the relevant circumstances or becomes capable of acting freely. The mechanism was already provided for by the Unidroit Principles (article 3.2.11), but it remains unknown to domestic law.

From an internal point of view, the rule on unfair exploitation has some features in common with rescission for overreaching on the ground of enormous disproportion between the parties' performances (art. 1448 *codice civile*). However, while the latter requires a certain disproportion between performances, unfair exploitation rescinds from it: the attribution of an unfair advantage is substantially sufficient for presuming the agreement to be harmful for the incapable person or, in any case, for rebalancing contractual positions by providing the mentally impaired the right to avoid the contract.

8. Final remarks

In conclusion, it appears that special rules on mental incapacity could lose a great deal of their importance in the light of the attention paid by the new instruments to bargaining power abuse.

This will be especially true in each case the person of unsound mind would be able to make use of easier accessible remedies provided for situations of contractual power inferiority.

In other terms, the system resulting from the new provisions will be more complex and flexible and will lead to the overcoming of the traditional distinction between capacity and incapacity, this means that protection would be also granted to persons suffering from modest incapacity and undergoing abuse.

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The Gaza Situation as a Test Bench for International Justice

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SUMMARY

1. General overview of Gaza situation. – 2. Operation Cast Lead. – 3. The Goldstone Report and the call for accountability. – 4. Failure of the domestic proceedings. – 5. Palestine knocking at the International Criminal Court's door. – 6. Recourse to the principle of universal jurisdiction.

ABSTRACT

The Israeli military operation against the Gaza Strip of 27 December 2008 – 18 January 2009 (so-called Operation Cast Lead) started a critical debate at the international level on the alleged war crimes and crimes against humanity committed in Gaza. In September 2009 the UN Fact Finding Mission on the Gaza Conflict presented its results: the Goldstone Report, named after the president of the mission, found that grave violations of international law, humanitarian law and human rights had been committed by both sides of the conflict, but in particular by the Israeli side. The report also denounced the possible commission of war crimes and crimes against humanity and called for proper accountability mechanisms at the national and international level. The report's conclusions and recommendations were endorsed by the UN Human Rights Council and by the General Assembly amidst high political pressure. In case of lack of proper domestic investigations and prosecutions, it was recommended the recourse to international justice mechanisms, and in particular to the ICC. The ICC Prosecutor in fact had opened a preliminary exami-

nation of the situation, but difficulties arose because of the uncertain status of Palestine under international law. In the meanwhile, the principle of universal jurisdiction seems to represent the only available, although difficult, option in the search for justice and accountability. The Gaza situation can be seen as a test case for international justice and sheds a light on the role of international institutions in the difficult mix of law and politics that is the feature of international justice.

Keywords

International Criminal Law - International Humanitarian Law - International Criminal Court – Gaza - Goldstone Report - War Crimes.

1 – General overview of Gaza situation

The Gaza Strip is part of the occupied Palestine territory and, according to the Oslo Accords[1], forms a unitary territory with the West Bank. In fact, as a consequence of Israeli long-standing policy, the West Bank and Gaza are nowadays two separated territories (almost impermeable for their respective residents that cannot move for one territory to the other). Gaza in particular has been subjected for many years to a persistent closure imposed by Israel, which controls all Strip's border crossing (along with its sea and aerial space), with the exception of the southern border crossing with Egypt (Rafah).

Over the course of the occupation the process of economic and political isolation imposed by Israel on the Gaza Strip was progressively reinforced. The closure policy was initially enacted on specific occasions as a form of collective punishment in response to attacks committed by Palestinians in Israel, or to political incidents. It involved the complete closing of all border crossings to both people and goods. These closures lasted for periods ranging from days, to weeks, or even months. This had a devastating impact given that the Palestinian economy had become increasingly dependent on Israel, which was a major source of employment, and the origin and destination of the majority of goods. Israel also imposed a dramatic reduction of the fishing zone (from the original 20, to 12, to 6, to the current 3 nautical miles) and a 'buffer zone' all along the Strip's borders, which considerably reduces the land available for agriculture and industry (up to 35% of Gaza's agricultural land are off limits, according to UN sources). Both the naval and the land restrictions are implemented through the recourse to live fire, which often results in civilian causalities.

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1 The "Oslo Accords", which were eventually signed in Washington, consisted of two parts, both of which were in fact the product of secret negotiations in the Norwegian capital: the *Declaration of Principles on Interim Self-Government Arrangements* was signed on 13 September 1993 between the State of Israel and the Palestine Liberation Organization (PLO); the *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip* was signed on 28 September 1995.

The current total closure of Gaza has been imposed continuously since June 2007, after Hamas takeover. The closure (called siege by the Palestinians) not only prevents Gazans from leaving the territory or exporting anything to the outside world, but also prevents the import of most of the goods, comprised the primary necessity ones. It basically only permits the import of a narrowly-restricted number of humanitarian goods. Since September 2007, when it officially declared Gaza a 'hostile entity', Israel has also reduced the supply of fuel and electricity, which made the Gaza power plant run out of fuel. The effects of the power cuts have been disastrous, in particular on hospitals. In general the closure of Gaza has devastating socio-economic effects and has resulted in the emergence of a humanitarian crisis. The entire 1,7 million population of the Gaza Strip has been forced to survive thanks to an underground economy, dependent upon a system of tunnels along the Egyptian border. The tunnels are the only remaining means of survival, everything comes through them, and without them life in Gaza would be simply unimaginable.

The closure is a violation of numerous international human rights and humanitarian law principles; it infringes upon a number of fundamental human rights starting from the right to freedom of movement to the right to life. The closure indiscriminately affects the Gaza's civilian population; indeed it constitutes a form of collective punishment in violation, *inter alia*, of article 33 of the 4th Geneva Convention[2]. The Goldstone Report (see *infra*) concluded that this policy of closure might well amount to the crime against humanity of persecution.

2 – Operation Cast Lead

It is in this framework that Israel decided to conduct the military offensive on the Gaza Strip (the so-called operation Cast Lead), which lasted for three weeks, from 27 December 2008 until 18 January 2009. Israel's announced objective was to respond to the threat represented by the launching of rockets from the Gaza Strip and to defeat Hamas. Since 2001 Palestinian armed groups had launched about 8000 rockets and mortars into southern Israel, which caused injures to civilians, damaged houses, schools and cars.

However, the way the Israeli operation was conducted sparked immediately a wave of criticism within the international community, in particular for the extensive destruction inflicted on the Palestinian civilian population. In order to grasp the dimension of the attack's lethal effects, it is worth recalling that more than 1,400 individuals were killed, and over 5,300 injured, many of them very se-

2 According to Article 33 of the Convention (IV) relative to the *Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited."

riously, as a direct result of the attacks. It is estimated that the overwhelming majority of the casualties were civilians not taking part in hostilities, among which 326 were children and 111 were women. The civilian infrastructure of Gaza was also subject to extensive destruction and damage: 2,864 housing units were completely destroyed and 5,014 rendered uninhabitable, displacing approximately 50,000 individuals. Hospitals, schools, mosques, and factories were also targeted and in some cases destroyed beyond repair.

As for the losses on the other side, 9 Israeli soldiers were killed during the combat operations inside Gaza, 4 of whom from friendly fire. Moreover, 4 persons were killed in southern Israel by rockets launched from Gaza, among whom one soldier and 3 civilians.

Numerous investigations and reports by national and international independent human rights organizations, as Amnesty International, Human Rights Watch, B'Tselem, PCHR, the Arab League Report, provided compelling evidence indicating grave violations of international law by both sides, but in particular, by the Israeli armed forces (IDF). The tactics used by the IDF were consistent with previous practices, used most recently during the Lebanon war in 2006. A concept known as the *Dahiya doctrine* emerged then, involving the application of disproportionate force and the causing of great damage and destruction to civilian property and infrastructure and suffering of civilian population. Statements issued by Israeli representatives as "destroy 100 homes for every rocket fired" indicated the possibility that Israel was resorting to reprisal against civilians, which is prohibited under international law.

3 – The Goldstone Report and the call for accountability

Given the seriousness of the allegations, the UN Human Rights Council (HRC) established the *United Nations Fact Finding Mission on the Gaza Conflict* (FFM) with the mandate to "investigate all violations of international law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during and after". The FFM was led by the South African Judge Richard Goldstone, and composed by other three well-respected experts in international humanitarian, human rights and military law. The mission interpreted its mandate as requiring it to place the civilian population of the region at the centre of its concerns regarding the violations of international law. The normative framework adopted was general international law, international humanitarian law, international human rights law and international criminal law.

The FFM based its work on independent and impartial analysis and on inclusive approach to gathering information: the mission reviewed 300 reports from different sources; conducted 188 individual interview with victims and witness-

es and several site visits; analysed 30 video 1200 photos and satellite imagery, medical reports, forensic analysis of weapons and ammunitions; held public hearings. However, the FFM did not obtain the cooperation of the government of Israel and it only managed to enter Gaza from the Rafah crossing with Egypt. Since the mission was prevented to enter Israel and thus also the West Bank, it had to hold meetings with the Palestinians in Amman. The refusal by the Israeli authorities also prevented the mission to meet with victims in Israel and in the West Bank; public hearings were thus broadcasted live, to enable the victims to speak directly to the FFM. The mission also submitted comprehensive lists of questions to government of Israel, the Palestinian Authority in the West Bank and to the Gaza authorities, but no replies were provided by Israel.

The 'Goldstone Report'[3] – a detailed and very accurate document (which amounts to almost 600 pages) - was issued on 25 September 2009. The mission concluded that there are serious indications that war crimes and crimes against humanity have been committed by the Israeli forces and, on a different scale, by Palestinian armed groups. On the one side, the Mission found that the Palestinian rocket attacks constitute indiscriminate or deliberate attacks upon the civilian population and may therefore amount to war crimes; it also highlighted the commission of human rights violations by the Palestinian factions in the course of the 2006-2007 intra-Palestinian violence. On the Israeli side, the mission denounced the disregard of the fundamental principles of necessity, proportionality and distinction. The mission investigated in particular 36 incidents, which occurred in Gaza and are only indicative of the overall offensive; the report in fact does not purport to be exhaustive in documenting the very high number of incidents that happened in the relevant period.

It is impossible to summarize such a long and detailed report in few sentences but in my view among the most important findings of the Goldstone Report, it can be recalled in particular that:

- "The Mission concludes that what occurred in just over three weeks at the end of 2008 and the beginning of 2009 was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability";

and that:

- "Whatever violations of international humanitarian and human rights law may have been committed, the systematic and deliberate nature of

3 Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009.

the activities described in this report leave the Mission in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations."

The Mission, "in view of the gravity of the violations of international human rights and humanitarian law and possible war crimes and crimes against humanity", recommended that the UN HRC should request the UN Secretary General (SG) "to bring this report to the attention of the Security Council under Article 99 of the UN Charter so that the Security Council may consider action according to the Mission's relevant recommendations"; and that the UN HRC should formally submit this report to the Prosecutor of the International Criminal Court" (Report, par. 1968).

Indeed one the most significant achievements of the Goldstone Report lies in its final recommendations, which envisage concrete judicial responses to the allegations of war crimes and other violations of international law committed by the parties to the conflict. The FFM called for the criminal accountability of all those suspected of the commission of war crimes (and possible crimes against humanity). As the report concluded: "Investigations and, if appropriate, prosecutions of those suspected of serious violations are necessary if respect for human rights and humanitarian law is to be ensured and to prevent the development of a climate of impunity". In particular, the mission recommended the UN Security Council that in the absence of good-faith investigations that are independent and in conformity with international standards having been undertaken or being under way within six months of the date of the resolution by the appropriate authorities (both Israel and Gaza), the UN Security Council acting under Chapter VII of the UN Charter, refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to article 13 (b) of the Rome Statute[4].

The Goldstone Report and its recommendations were endorsed by the UN HRC and by the UN General Assembly (GA). With resolution 64/10 dated 5 November 2009 and again with resolution 64/254 of 26 February 2010, the GA called both sides "to conduct investigations that are independent, credible and in conformity with international standards into the violations of international humanitarian law and international human rights law reported by the Fact-Finding Mission towards ensuring accountability and justice". Notably such resolutions established a very precise time frame (3 months initially, further extended to 5 months more) in order for the domestic authorities to cope with

4 Pursuant to Article 13 of the Rome Statute: "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15."

their obligation to conduct proper investigations. However, it can be anticipated that more than three years after the events no accountability or justice for the victims has been achieved.

4 – Failure of the domestic proceedings

It is a fact that neither the Palestinian authority not the Israeli government conducted proper investigations pursuant to international law standards, as was requested by the UN. The HRC established an *Independent Committee of Experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the government of Israel and the Palestinian side*, "including the independence, effectiveness, genuiness of these investigations and their conformity with international standards" (HRC Resolution n. 13/9 of 25 March 2012)[5]. The Committee of Experts (COE) was presided by the emeritus international law professor Tomuschat of the Humboldt University of Berlin, and presented its report on 27 September 2010 (a follow-up report was presented in March 2011 under the presidency of the American judge McGowan Davis).

With regard to the Palestinian side, the COE's report acknowledged that the Palestinian Authority in the West Bank established an 'Independent Investigative Committee', which had conducted "independent and impartial investigations in a comprehensive manner that squarely addressed the allegations in the FFM report". However, it shall be noted that – as the European Court for Human Rights clarified - in order to be effective, investigations must be capable of leading to the identification and punishment of those responsible: this was certainly not the case with regard to the West Bank investigations. The Gaza authorities, although claiming that they had also established an 'International Investigative Commission', failed to submit any substantial result to the COE. Thus ultimately both the West Bank and the Gaza authorities failed to conduct any proper investigations on the alleged crimes committed by Palestinians.

It shall be further noted that according to the terms of the 1995 Israel-Palestine Interim Agreement on the West Bank and the Gaza Strip, the Palestinian National Authority (PNA) does not have jurisdiction over Israelis. This would explicitly remove Israeli citizens, and members of its armed forces, from the jurisdiction of the PNA; no Israeli may be brought before a Palestinian court. This restriction (although legally questionable in the light of the doubtful current value of such Israel-Palestine interim agreements) effectively removes the Palestinian judicial system from the ambit of legal options available to Palestinian victims of Israeli crimes.

5 For all the documentation and follow-up to the "Goldstone process", see Meloni, Tognoni (eds), *Is there a Court for Gaza? A test bench for International Justice*, T.M.C. Asser/Springer, The Hague, 2012.

On the other hand, after reviewing Israel's system of investigation and prosecution of serious violations of human rights and humanitarian law, in particular of suspected war crimes and crimes against humanity, the COE stressed that: "the Mission found major structural flaws that, in its view, make the system inconsistent with international standards." In particular,

> Israel has not conducted investigations into decisions made at the highest levels about the design and implementation of the Gaza operations. A core allegation in the FFM report was that the systematic and deliberate nature of the destruction in Gaza left the Mission *in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations*. Those alleged serious violations go beyond individual criminal responsibility at the level of combatants and even commanders, and include allegations aimed at decision makers higher up the chain of command. (Par. 64 first COE Report)

In other words, the Israeli system – as it relates to Palestinian victims of Israeli violations – does not meet necessary international standards with respect to the effective administration of justice. The Israeli authorities' presumption that all Palestinians are 'enemy aliens' or 'potential terrorists' has evident implications regarding the impartiality of the judiciary, the presumption of innocence, and the right to a fair trial. The hierarchical nature of the military, the ineffective manner in which investigations are conducted, and the lack of civilian oversight – as epitomized by the wide margin of discretion awarded by the Israeli Supreme Court – all combine to fundamentally frustrate the pursuit of justice.

The same conclusion was already contained in the Goldstone Report:

> […] there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law. […] the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult (Par. 1832 Goldstone report).

Given the reality of the situation in the occupied Palestinian territory and Israel, and the inability or unwillingness of the respective national courts to conduct genuine investigations and prosecutions, the practical pursuit of accountability necessarily has to focus on the triggering of international judicial mechanisms, and notably in the first place on the intervention of the International Criminal Court.

The International Criminal Court (ICC)[6] is the first supranational, permanent and independent criminal tribunal. It was established through a treaty – the Rome Statute of 1998 – which entered into force in July 2002. The Court has jurisdiction over genocide, crimes against humanity and war crimes committed on the territory or by national of State parties (which are currently 121, but with notable absences, as the USA, Russia, China and India). The jurisdiction of the ICC is thus not universal, but rather bound to territorial or national links; the only exception to this jurisdictional limitation is represented by those cases which are referred to the Court by the Un Security Council. According to its Statute, the ICC Prosecutor can open an investigation on alleged crimes everywhere committed, and by any State national, if those crimes have been referred by resolution of the UN SC. The investigations before the Court can also be triggered by a State's referral, or initiated *proprio motu* by the Prosecutor (but, in the last case, only after an authorization by the Pre-Trial Chamber).

A declaration under article 12(3) of the ICC Statute was lodged by the Palestinian government, in the person of the Minister of Justice, back in January 2009. Article 12(3) of the Statute provides that a State, which is not a party to the Rome Statute, can accept the Court's jurisdiction on an *ad hoc* basis. The Palestinian declaration was thus accepting the jurisdiction of the Court for the purpose of "identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002."

Following this declaration the ICC Prosecutor opened a 'preliminary examination' of the situation in Palestine but the actual opening of an investigation was put on hold, allegedly due to the unclear jurisdiction of the Court on the facts at stake. In fact Israel is not a State Party of the Court and Palestine is currently not in a position to ratify the Statute either. However, whereas the statehood status of Palestine remains uncertain for the purpose of international law generally speaking, a convincing argument had been made by eminent international law professors[7], in favour of the Palestine's declaration: according to a functional interpretation of the concept of statehood, thus for the sake of the jurisdiction of the Court only, a determination by the ICC that Palestine is a State that can be under the jurisdiction of the ICC would be valid and in line with the Statute's requirements.

6 All the documentation about the International Criminal Court can be found at: http://www.icc-cpi.int/.

7 See for all, Pellet, *The Effects of Palestine's Recognition of the International Criminal Court's jurisdiction*, in Meloni, Tognoni (eds.), *Is There a Court for Gaza*, cited above, 409 ff. where he argues that the Court did not need to pronounce in theory on the issue whether "in absolute" Palestine is or not a State; rather the Court had just to acknowledge the for the purpose of the Rome Statute the Palestine's declaration can have the effects to activate the jurisdiction of the Court. The paper was written as a legal opinion and submitted to the Court in 2009 co-signed by forty international law professors/individual authorities.

For more than three years the Prosecutor seemed to be actively dealing with the question of Palestine and encouraged scholars, NGO's, victims legal representatives to submit documentation to the Office for the purpose of the preliminary examination. However on 3 April 2012 a two-pages ambiguous 'Update' by the Office of the Prosecutor (OTP) concluded that the Prosecutor had no authority to decide on the issue because "the Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term 'State'".

The Office has assessed that it is for the relevant bodies at the UN or the ICC Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of the Rome Statute and thereby enabling the exercise of jurisdiction by the Court and that the ICC could potentially "consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue" regarding Palestine's member status.

The 3 April 2012 OTP statement meant the closing of the preliminary examination: despite the deceptive title, it is in fact not a 'update' but a 'decisions not to investigate', pursuant to article 15 of the Statute. Following these two pages, after 39 months, the *situation Palestine* disappeared indeed from the list of the preliminary examinations before the ICC.

Some substantial questions arise over the fairness of the procedure adopted by the then Prosecutor, Luis Moreno Ocampo, in dealing with the Palestine situation. Certainly the OTP never affirmed that there was no reasonable basis for the investigation. In other words, the Prosecutor never alleged that the available information did not provide a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed in Gaza/Palestine (as he did, on the contrary, in the other 2 situations, Iraq and Venezuela, where it was decided not to open the investigation). Nor the decision was based on the (lack of) gravity of the crimes. Rather, the decision was presented as a problem of preconditions to the exercise of the jurisdiction, and in this sense as a mere procedural issue. However the procedural problem was based on a substantive issue, i.e. the interpretation of the term 'State' for the purposes of the ICC jurisdiction, and in particular according to article 12(3) ICC Statute. Thus, the question is: if it was not for the Prosecutor to interpret the term 'State' for the purposes of the Statute, and therefore to decide on the admissibility of the declaration lodged by the Palestinians, who is the competent organ in this regard?

In the 3 April 2012 decision the Prosecutor alleged that it must be either for the UN Secretary General (SG) or the Assembly of the States Parties (ASP) to decide. It shall be noted, however, that delegating the decision to political bodies undermines the independence of the Court and that a judicial determination of the issue by the ICC judges would have been the best option. In this sense speak also the words of the Registrar of the Court, Silvana Arbia, who, when issuing receipt of the Palestinian declaration, on 23 January 2009, noted that a conclusive determination on its applicability would have to be made by the judges at an appropriate moment.

Therefore it is contended that the Prosecutor could and should have referred the question to the judges. Pursuant to article 19(3) of the Rome Statute: "[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility", a process that can only be commenced by the Prosecutor.

In theory the ICC door is not completely closed: should Palestine get recognition at the international level the Court could definitely reconsider the opening of the investigation. It is certainly not easy to make any prediction on what will happen in this regard. Although Palestine has been recognised by 130 States, the status of Palestine at the UN level is still to be determined. However, regardless of how the Palestinian bid to the UN will end, it is surprising that the Prosecutor did not take into serious consideration the fact that Palestine has been already admitted by a UN agency, notably the UNESCO, which is one of the guidance criteria used by the UN SG, in his role as the depositary of international treaties (upon which the Prosecutor relied), in managing the problem of the indeterminacy of the question of statehood status. In this sense it has been maintained by authoritative scholars[8] that the UNESCO acceptance would have been enough for the Prosecutor to accept Palestine's article 12 ICC Statute declaration.

6 – Recourse to the principle of universal jurisdiction

Given the impasse of the International Criminal Court on the issue, the only way that – although difficult - seems currently to be available for the Palestinians in order to pursue justice, is the recourse to the principle of universal jurisdiction.

The principle of universal jurisdiction is a longstanding component of international law. This principle holds that international crimes – such as grave breaches of the Geneva Conventions and other war crimes, genocide, crimes against humanity, and torture (the so called 'core crimes') – are of such seriousness that they affect the international community as a whole. Universal jurisdiction "means that there is no link of territoriality or nationality between the State and the conduct of the offender, nor is the State seeking to protect its security or credit. In other words, despite the lack of a direct link to the crime, third States' national courts are granted jurisdiction over international crimes "on behalf" of the international community. Although the issue is still controversial, under the principle of *absolute* universal jurisdiction – which is recognised in some countries as for instance Germany, Swiss, or Chile – it is not even required that the

8 See Schabas, *Relevant Depositary Practice of the Secretary-General and its Bearing on Palestinian Accession to the Rome Statute*, 3 November 2011, at http://humanrightsdoctorate.blogspot.com.au/2011/11/relevant-depositary-practice-of.html. For a updated comprehensive analysis of the issue see Meloni, *Palestine and the ICC: Some Notes on Why It Is Not a Closed Chapter*, 25 September 2012, at http://opiniojuris.org/2012/09/25/palestine-and-the-icc-some-notes-on-why-it-is-not-a-closed-chapter/.

suspect be present in the state exercising jurisdiction in order to open the proceedings and take investigative measures[9].

In this regard the Goldstone Report recommended:

> [...] that the States parties to the Geneva Conventions of 1949 should start criminal investigations in national courts, using universal jurisdiction, where there is sufficient evidence of the commission of grave breaches of the Geneva Conventions of 1949. Where so warranted following investigation, alleged perpetrators should be arrested and prosecuted in accordance with internationally recognized standards of justice.

However, universal jurisdiction cases have given rise to significant political controversy. Criminal proceedings based on the principle of universal jurisdiction go to the very heart of inter-States' relationships because they typically involve the highest echelons of the political and military establishment – those 'most responsible' – of a foreign State. International crimes indeed, for their systematic or widespread character, are normally perpetrated with the support of the political apparatus.

Lawyers recurring to the principle of universal jurisdiction have thus been accused of manipulating international and criminal law principles for political purposes, and in some instances a court's decision to affirm its competence on the basis of universal jurisdiction has led to an aggravation of inter-State tension. Such political tension and the consequent pressure exerted on the governmental authorities of the State exercising universal jurisdiction has sometimes resulted in drastic consequences, for example in the changing of national legislation in order to restrict the scope of universal jurisdiction.

This was the case also with regard to the issuance in 2009 of an arrest warrant against former Israeli Foreign Minister Tzipi Livni in the UK, for her responsibility regarding the alleged crimes committed by Israeli forces during Operation Cast Lead. The claim was made that ideological or political goals were behind this move. However, as noted by Daniel Machover, a UK solicitor working on universal jurisdiction cases, "[t]here is not a single example of the current system in Britain failing to filter out cases that are an abuse of process."

To conclude, notwithstanding the obstacles to its full implementation, universal jurisdiction constitutes an integral and vital component of the international legal order. In fact, recent case law shows that criminal complaints presented before the judicial authorities for third states have given rise to a number of successful prosecutions (in particular, but not limited to, regarding Rwandan cases). Pending universal ratification of the Statute of the International Criminal Court, recourse to third States' courts shall be seen as the best way to pursue accountability and uphold victims' legitimate rights.

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9 See Macedo (ed), *Universal Jurisdiction, National Courts and the Prosecution of serious crimes under International Law*, University of Pennsylvania Press, Philadelphia, 2006.

In particular with regard to the Palestine situation, given the respective inability and unwillingness of the Palestinian and Israeli courts, and the ICC's declared lack of jurisdiction, it is presented that universal jurisdiction is a practical and possible means of securing accountability, a precondition to any workable justice in the region. As concluded in the Goldstone Report:

> The Mission is firmly convinced that justice and respect for the rule of law are the indispensable basis for peace. The prolonged situation of impunity has created a justice crisis in the occupied Palestinian territory that warrants action.

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