ARTICLES

Supernatural and the Law..............................................................Rodolfo Sacco
Il Soprannaturale E Il Diritto

Class Actions in Italy: A Farewell to America.................................Giorgio Afferini

Eclipsing the Web: Online Data Protection and Liability of Search Engines in the Google Spain Case..........................................................Antonio Davola
Elisa Stracqualursi

International Taxation: The Issue of Tax Evasion by Corporations..........................................................Valeria Camboni Miller

A Journey Through Italy’s Overcrowded Prisons..............................Giancarlo P. Pezzuti

CASE COMMENTS

2015 Case Comments............................................................................ Editorial Staff
ATTENTION SUBSCRIBERS

*The Digest* is the law journal of the National Italian American Bar Association (NIABA). *The Digest* is a professional journal publishing articles of general interest to the profession with a special focus on Roman Law, Civil Law, Italian Law, Legal History, and all areas of property law (from real property to intellectual property, cultural property, land use, and the law of historic preservation). The journal publishes articles, essays, commentary, and book reviews. You may submit a paper to us by e-mailing it as a Word attachment and sending it to: digest@law.syr.edu. Papers should be submitted in English. Citations should comply with the most current edition of the Uniform System of Citation for U.S. Law Sources (The “Bluebook”).
THE DIGEST
The Law Journal of the National Italian American Bar Association

THE NATIONAL ITALIAN AMERICAN BAR ASSOCIATION
2014-2015 OFFICERS AND BOARD MEMBERS

DINO MAZZONE
 President

P. CHARLES DILorenzo
 Executive V.P.

SIGISMONDO F. RENDA
 Treasurer

PETER S. BALISTRERI
 Secretary

PROF. PETER A. PREVITE
 Historian

FRANK JOSEPH SCHIRO
 Immediate Past-President

Regional Vice Presidents

New England: DANIEL ELLIOTT
Mid Atlantic: JOSEPH SENA
South: PAUL FINIZIO
Midwest: CAROL ANN MARTINELLI
West: DAMIAN CAPOZZOLA

Board of Directors

LOUIS R. AIDALA
CLAIRE AMBROSIO
PHIL BONCORE
CIRINO M. BRUNO*
LORRAINE CORSO
FRANCIS DONNARUMMA
JOSEPH D. FRINZI
JOSEPH M. GAGLIARDO
HON. JOSEPH N. GIAMBOI*
ANTHONY J. GIANFRANCESCO*

*Sally Ann Janulevicus
Domenic Lucarelli
Prof. Robin Paul Malloy
Thomas Mazziotti
James Michalski
Raymond A. Pacia*
John C. Sciaccotta
Valerio Spinaci
Daniel J. Stallone
Hon. Paul A. Victor
National Italian American Bar Association

The Digest • Syracuse University College of Law • Syracuse, NY 13244-1030

2014-2015 Editorial Staff

Editor-in-Chief
PROFESSOR ROBIN PAUL MALLOY

Senior Editor for Italy and Europe
LUCA ARNAUDO, J.D., P.G. DIP. IN LAW, PH.D.

Student Board of Editors

Managing Editor
RACHAEL DUNN

Associate Managing Editor
JOSEPH SULPIZIO

Executive Editor
CASEY MOORE

Second Year Associate Editors
HEATHER DELAURIE • DENNIS POLIO
HELEN HOHNHOLT • ASHLEY WEATHERS
ARTICLES

Supernatural and the Law (English Translation)..................................Rodolfo Sacco 1
Il Soprannaturale E Il Diritto (Original Italian Article)..........................Rodolfo Sacco 19

Class Actions in Italy: A Farewell to America....................................Giorgio Afferi 33

Eclipsing the Web: Online Data Protection and Liability of Search Engines in the Google Spain Case..............................................................................Antonio Davola 45
Elisa Stracqualursi

International Taxation: The Issue of Tax Evasion by Corporations................................................Valeria Camboni Miller 54

A Journey Through Italy’s Overcrowded Prisons..................................Giancarlo P. Pezzuti 74

CASE COMMENTS

2015 Case Comments.............................................................................Editorial Staff 82
1. Man, and his access to supernatural

Believers assume that humanity could access to invisible since his appearance on earth: a primary Revelation must have accompanied the Creation in order, for the man, to know how to behave.

Anthropologists, on the other hand, believe that the first man is the *homo habilis* who, deprived of both Broca’s and Wernicke’s cerebral areas, had a larynx and pharynx that did not permit him to produce those sounds that constitute our current phonetic system.

Theology, on its part, does not tell us who the first man was: theologians do not need to ask for clarifications to anthropologists, which define the *homo* as utensil manufacturer. Man as described by theologians might have had a more recent appearance than the man in zoological terms, and his story may begin when men started to communicate through an advanced phonetic system, or even when man initiated to use complex logic-and-conceptual categories (this is a topic that was not addressed even by Teilhard de Chardin).

It is however undoubted that, starting from a specific moment, man showed signals of access to a world that was hidden to his senses. I will not deal, on this occasion, with the issue of the deceptive access that occurs during dreams, when the living and the dead appear to us and when it is possible for those events, that we fear or desire the most – and which we never witnessed when awake – to happen.

For 300.000 years, men have taken care of their dead. Is that a sign? Most importantly, men have performed visual arts for 35.000 years at least: from 35.000 to 10.000 B.C. *Cro-Magnons* disseminated in Europe – in particular, France and Spain – parietal paintings of exceptional importance and beauty (Lascaux Caves, Pech Merle, Niaux, Trois Frères, Mas d’Azil, Altamira, etc.) and significant sculptures. Important paintings and graffiti may be also found in the Sahara desert, and elsewhere.

*Cro-Magnons* decorated the inside of deep, dark caves: they wanted their paintings to be distant from profanes’ sight, since the perception of the image would have deprived the operas of their mystical significance. Many scholars (in particular, André Leroi Gourhan) analysed and reconstructed the symbolic and supernatural worth of those paintings, that played a pivotal role in art as well as in the early studies on human knowledge, e.g. the research that have been

* See short biography on Page 18
conducted on the figure of bovines as symbol to characterize females and on equines’ images for males.

Among the various studies, it may be valuable to concentrate on a particular formulation, according to which the transition to an acquainted and prolific attention to the supernatural might originate in the early Upper Palaeolithic, when stone tools where diversified according to the different local and cultural realities, languages began to differentiate and, especially, when first figurative arts appeared. The period could be approximately 50,000 (or even 100,000) B.C., and the protagonist would be the homo sapiens.

With the advent of figurative art – and its mystical purposes – supernatural becomes present and ingrained in the existence of men: drawings can create imagines pursuant to the artist’s desires, and the author will be able to influence the faith and characteristics of his artwork. The mystical power of a figure may operate to invoke an increase of the game or to propitiate hunts. It is not possible, though, for anyone in the community to access the invisible: this task is demanded to a “specialist” – whether it is called sorcerer, soothsayer or shaman – gifted of special powers. These personalities can invoke blessings and protections on their populace and are able to practice those activities that have a connection with the esoteric knowledge, such as medicine, architecture, botany, astronomy, and even law.

The ability to overlap what is symbolic or sought and what is real through rituals allows witches – who are still widespread in certain regions of Italy - to cast anathemas and afflictions over their victims by executing ritual acts on depictions of their targets: curse’s specialists oppose to mystical healers, the feared and depraved black art faces white magic.

Present days, magic is practised in broad daylight in Africa, and several experts report that African law has never had laical basis: its nature may be divine (e.g. shari’a) or sacred. Such an opinion was ultimately – and unanimously – exposed during the Convention on Sacralité, pouvoir et droit en Afrique, held on 1980 by the Paris Laboratoire d’anthropologie juridique.

The mystical origin of law implies as a consequence that it will be perfectly normal in Africa to avail of magical rituals in order to find the culprit of a crime or to choose who will govern the country. Magic, however, remains present also in other continents, although in implicit forms: in many areas spiritual systems have been replaced by religions, which constitute the “erudite form” of supernatural. Nevertheless the relevance of horoscopes, predictions, appeals to visionaries talismans and magical aids is constantly growing also in Europe and U.S.A., due to the media.

Even if we observe the normal life of the Western man – whether believer or non-believer – it will be possible to find, in his behaviour, traces of that past when his ancestors believed in the power of the supernatural: men wish “good day” or “good luck”, and this usage would
be incomprehensible if we do not hypothesize some kind of power of those words to convey the event. Those who worship saints usually lay some flowers near their depiction, in order to emphasize the physical proximity of flowers and imagine as well as the resemblance between the saint and his portrait: these elements constitute the two hinges of the magical process.

It can also happen, for a magic ritual, to be adopted in religious contexts, like the ring of bells (obtained from the impact of metal against metal), the use of ceremonial clothes and the celebration of Winter and Summer Solstices.

Since fertility rituals are the most ancient ones – they are relevant for shepherds as well as for hunters –, they occur both in the religious ceremony of the blessing of herds and crops and in the laical carnival masquerades: masquerades were originally meant to create an identification between men in costume and animals they represented, as it also occurs in Sardinia with the Mamutones and in Bulgaria with the Kukeri ritual. Also the Islamists adopt suggestions and rituals of mystical extraction, even if they modulate and adapt them according to Islam.

Literature on sacredness is immense, and in order to comprehend its legitimateness it could be convenient to read the work of Lucien Lévy-Bruhl; we also dispose of a consistent and scattered literature on the survival, in the modern world, of sacral and supernatural pre-religious conceptions; and part of this literature is dedicated to the so-called “folklore” (among the works dedicate to the southern France’s rural world a good narrative reading is the chapter VI, La Masco, of Frédéric Mistral’s novel, Mireio).

Starting from a certain date, supernatural took the aspect of religion in many relevant fields: the causal inference between beneficial rituals and positive effects as well as shaman’s charming attitude are overcome by a supernatural world of invisible People with intellect, will and immense powers, who are willing to accept human’s requests.

Both magic and religion furnish to man ways of knowing the real world, proceedings to punish or honour human conducts and protections before carrying out certain acts: as a result, they will interfere with legal practices.

Legal scholars study Canon and ecclesiastical law: the first one is present whereas those who share a faith or a cult gather and organise their community – since every form of organization founds law – the second one appears when a State has a confront with these organizations. However, the legal organization of a religious community and the laws that regulate the relationship between State and believes are not the only hypothesis of connection between law and supernatural, since supernatural may intertwine law in any field: it may legitimate a role, impose or suggest the content of a disposition, offer reasons to conform to laws, indicate which behaviours are right and which are wrong.
2. Supernatural and compliance

Law would not exist if individuals were not willing to comply with it. There is a branch of anthropology that is dedicated to the study of how this compliance is born and has developed over time. The acquiescence to rules is one of the extra-juridical roots of law, and it depends on many factors: in particular, it is possible for it to be connected to the supernatural.

During Upper Palaeolithic shamans could access to supernatural knowledge: as a consequence, they knew what individual or collective conducts could lead to combine success, prosperity and benefits for the community. Through this knowledge, shamans could influence the population and even govern it, but they prefer to avoid direct responsibilities: their forecasting and predictions are unravelled from any chain of command.

The advent of agriculture and pastoralism multiplies the tasks that are demanded to supernatural: mystical knowledge must revel the best time to sow and grant the health of flocks and humans. Communities have grown and become larger; people are now aware of their common interests and shamans, who previously assisted individuals, must serve the whole community. They must dialogue with both individuals and assemblies, and their judgements qualify individual and collective behaviours; they might introduce new rules and, in the imminence of a battle, they might even suggest the designation of a leader.

We can now move on and examine what happened during the bronze age and, in particular, the events that characterise Mesopotamian and Egyptian empires (and, later, Chinese, Indian, Mexican and Peruvian empires): the division of labour has become a common practice that has led to a diversification of the interests among the different social classes: only an armed force is now capable of compose individual motivations, and only a force even greater than armies can grant order as respect of the community toward the leaders.

Then, something happens: something so great that it will influence the fate of both culture and law. An authority is born; this authority belongs to the emperor, and is realized through copious institutionalized functionaries. As a consequence arise constitutional law, administrative law, public criminal law and a procedural law for imperial courts.

Authority would be powerless without imposing armed forces that are only loyal to the emperor, and armed forces would be, in their turn, powerless if social classes were reluctant to spontaneously obey orders. In must be noted, anyhow, that even armed forces are not always able to grant a pacific designation of the emperor’s role: when empires spread from Mesopotamia and Persia over Alexandrian countries and, then, to Rome, the lack of a bond
between social classes, armies and emperor led each time to the seizure of power by the stronger 
military leader of the moment.

Therefore, in Mesopotamia, Egypt, India, and then in Persia, what could have created the 
compliance of social classes towards armies, and subsequently, the devotion of the armies 
towards a leader? And, further more, what may have granted the peaceful and orderly 
designation of the sovereign? In such a meshed society shamans, magicians, soothsayers and 
sorcerers could have lowered themselves to the role of support for private citizens; they wisely 
decided, though, to gather in castes and demanded a role worthy of a society where the need of 
their knowledge and mystical remedies was still strong.

And so, supernatural became religion: theology takes over the myth, and ministers work 
for a common goal by becoming a corporation of sages that can coordinate different knowledge 
and mystical arts so as to turn into an harmonic whole, that can be divided but is never conflicting. Ministers study any sacral discipline: divine, mathematics, engineering, politics, law, 
medicine, agriculture and even sowing: they want for their erudition to remain unknown for 
common people so that nobody is able to contest their ever-increasing knowledge. By their 
erudition, ministers are able to bend the will of the community, legitimize the authority and force 
the population to accept it. The basis of the society becomes stable because a man of intellect 
meets a suitable man of power, and they begin to collaborate.

The shaman, once become a priest, is unconditionally trusted and the confidence of the 
community in him is limitless. People ask him to identify who, as leader of the community, may 
lure beneficent supernatural forces. The shaman will invest the laical leader with mystical 
capacities and will consecrate him as emissary of an invisible Power. Obedience is a duty, and 
obeying means benefiting from the wealth diffused by the sovereign.

Those who studied the great empires have examined this issue in depth. Historians of 
religion do not approve Carl Schmitt’s theory that theology is the fundament of each political 
theory, choice or doctrine: Jan Assmann opposes that the concepts as sovereignty, authority, 
justice, power, guilt and law are primarily political constructs, and can later become theological 
categories or principles. Whose who want to take a cautious stance will suggest that he 
legitimated a self-created political power through the edification of a corpus of truths (that we 
will examine up ahead). However, concrete solutions in each empire are non-uniform.

In Egypt the pharaoh is the personification of the sun God Horus: he has a divine nature, 
but is subordinated to the will of the gods; the pharaoh is the emissary of Ka (the Creator) to 
bring the Maat, the order ruled by religion over laws and cults. In the opinion of scholars, if the 
state declines the Maat disappears, and then memory, language and knowledge perish; nature
ceases to produce food, abuses prevail and fathers and sons kill each other. Social order certainly need a support, and during the Middle Kingdom of Egypt the answer to this weakness is the State, where in the New Kingdom it will be the religion. During the regency of the XXI dynasty in the end of the New Kingdom, a god become direct sovereign of the community, and his priest is the king as (subordinated) co-regent of the god. This idea got completely lost during the Ptolemaic era.

In Mesopotamia, things are different: the actions of the sovereign are assessable and he may fail; the judgment is, obviously, up to the representatives of the supernatural.

In China it is possible to find a similar solution, but the evaluation belongs to the caste of Confucians scholars instead of clergy. Confucians know invisible truths and occupy the head roles of the society. Still remaining in Asia, it is possible to think to the Tenno, or to the Dalai Lama.

A sacral legitimateness strengthens the authority and encumbers greatly on the enemies of the sovereign: in Egypt political opponents are treated as enemies of God itself, something that obviously – says Assmann – permits brutalities against adversaries.

From the reign of Cyrus, the rule over Mesopotamia belongs to Persians and their Hellenist heirs; such a conception of government is transmitted to the “three Romes” (Rome, Constantinople, Moscow) and then to the Western Germanic countries.

Starting from Charlemagne and until French Revolution, monarchs of Europe were legitimated by Christianity; Henry the IV had to deal with the connection between his position and the papal supremacy: emperors and kings were always crowned by men of God and as men of God. Even today, Queen Elisabeth II rules over Great Britain under the blessing of God, even if the supernatural legitimacy is a mere ornament.

What does not need a legitimacy is, instead, the common law, since it is legitimated by facts: Justinian I originally said that the Digest was a corpus of consuetudinary rules, without any formal legitimateness; during the Middle Age, though, this factual basis was lost, and the Digest became a theoretical opera. It was, once again, necessary to look for a supernatural foundation: Dante Alighieri is well convinced of the mandate to legislate given by God to Justinian I.

The sacral legitimation of power and law is perfectly normal outside the Western world, as it happens in eastern Asia, Islam and Africa.

In Islam, the sharī‘a is the key to any sacral aspect of law, and law justifies authority. The interpretation of those rules, that regulate the choice of Islamic spiritual leader, is uncertain, and still a leadership may be legitimised only through Islam’s dogma. Such an issue is too well known to permit a satisfactory treatise in this context, since the bibliography on the topic coincides with the studies on Islamic law.
African law’s sources of legitimacy may be obscure to Western legal scholars, as they take into account the benefits that great invisible forces confer to those groups who can understand their bents. In those societies the leader is depositary and human custodian of the life force that animates the whole world: he multiplies crops and herds, increases the fertility of women. Those who are blessed by the favour of these forces can attract their influxes and, if they are leader of a community, all good effects will be spread on the community. Many studies on African history illustrate that many times even a rebel, when favoured by the invisible forces of nature, will win in a clash against the leader that has been legitimised by the community and, if this rebel is appointed as new leader, will attract great benefits on the society.

In Congo, first missionaries surprisingly reported that, during the celebration of major political events, some sovereigns were proud to affirm that their power was legitimised by nothing but military victory. Songhai kings after Sonni Ali referred themselves with the name of Askia (From A si kyi a, that means “it will not”), derived from the shout of contestation addressed to their progenitor Mohamed Ture on the occasion of his ascension to the throne in lack of a formal legitimation. Traditional law in many African communities, however, disposed that the heir of a king would be chosen by a war among his sons in order to choose which one would be the most deign sovereign. This was a common practice, as shown by the studies of Edward Evan Evans-Pritchard on the Azande tribe (between Sudan and Congo) and of William Randles on the reign of Monomotapa and the reign of Congo. Max Gluckman reports that the Shilluk tribe, in Suda, used to conduct a symbolic fight in order to assign the role of leader, and the losers were condemned to death.

In such a situation, it was statistically predictable that in Africa – at least in the very first period of independence (1960-1990) – the political leadership would have been obtained through a coup d’état. Nevertheless, subordination to leadership does not exhaust the topic of the compliance to law: people who conduct their lives according to law must also respect the private property of other, keep their word, not attack the other and not damage their goods.

Magic ritual can found property: if a shaman reveals to the community that trees will avenge against those who tear off their fruits, he will also be able to entrust the legitimate proprietor of a tree with the formula that will prevent the plant’s revenge. This is how a property right is created.

If a community recognise the mystical and terrible effects of the perjury, then oaths can be used to enact promises. Literature on this topic is consistent, and the main contribution is due to Walter Burkert.

Magic and religion have a great power to hold back men from committing offences if the mystical sanction looms over those who commit crimes.
3. Supernatural, and advice to legislator

Law changes unrelentingly and it absorbs new contents from social instances, claims of determinate social groups, thoughts of legal scholars and intellectuals. These are showcases for juridical model – *ius condendum* – held by a religious or, at least transcendental reflection.

There are many examples of the modelling processes inspired by supernatural in family relationships, procedures in the treatment of men’s body, mind and life: debates on anti-abortion, death penalty, euthanasia, new kind of families, eu-genetic or (in general) genetic operations.

In those situations, where the law is result of a Revelation, the idea coming from a model can overtake criticisms about its legitimacy: in Islam the *sharī‘a* is a revealed law, and its validity is *in re ipsa*. If the state authority refuses, though, to recognise a supernatural legitimation, it is however possible to regulate marriages, filiation and inheritances according to rules of law deduced from *sharī‘a*.

4. The knowledge of facts and reasons

Is he guilty or innocent? Has, or has not he received a loan? Can we say if supernatural is too distant from these concrete situations? Law must verify facts and develop remedies to operate properly, and supernatural is an incredibly useful instrument in doing it: when a shaman connects to supernatural powers he receives the desired indication and, subsequently, the right rule to adopt.

It is necessary to choose the proper technique and the person against which it is necessary to proceed: magic mirrors, emetic potions, lifelike statues can perfectly perform such tasks. Magic allows people to verify a fact, and in the Pharaonic Egypt it was possible to request oracular evidences based on the indications of the statue of a god. A common method in Christian culture was the ordeal – especially the duel –, which was kept as valid legal evidence up to 500 years after the Christianisation of the Germans, and then for another 1000 years was an instrument for the extra-juridical asseveration of rightness.

The supernatural is still an important instrument for the verification of right and wrong outside from Europe, and especially in Africa.

Africans tried to “europeanise” their law during the two decades after independence (1960-1980), but the attempt was abandoned in favour of the old customary courts: Govern had, in fact, become aware that many people kept on going to customary courts (under the European government as well as in independence). Those courts were used to practice the ascertainment of facts through magic rituals (see, for studies on the topic, Anne Retel-Laurentin and Reinhold Rau)
5. The society of believers

A community of believers may be organized according to human law as well as to rules derived from supernatural. Such a community may also believe to be the only legitimate community, and to be consequently entitled to subject other groups to his rules: this is a social model that resembles – although non-implemented – the Islamic beliefs.

In this context stands out the topic of canon law in the Catholic Church; other Christian confessions have their own laws too, but it would seem that in those cases law is deemed less important either as social framework (Orthodox Christians) or as clerical basis (evangelical confessions).

6. Secular law in respect to the community of believers and to the cults

The more religious beliefs influence a society, the more the believers of a community will feel entitled to regulate their lives and the life of the other members of the community according to religion. In a Muslim ideal society there is no place for a secular law that regulates Muslims’ behaviours and their cult. However, if a community has a laical organization, it will have the possibility of choosing if applying on the believers the state law or creating a dedicated law.

Secular tyrannical communities (e.g. communist societies) had to regulate cults and believers: these societies repudiated freedom of religion, but were too afraid of insurrections to completely deny it; they decided therefore to meticulously, rigorously and vexatiously govern them with a final regulation that resulted somehow tolerant.

Recently, the traditional setting of ecclesiastical law has been criticized, in particular, by Sergio Ferlito. First of all, it has been observed that ecclesiastical law speak only to those groups, cults and values that are uniform with the tradition of the country where ecclesiastical law operates: if a catholic state enacts an ecclesiastical legislation, its contents and guarantees will be addressed to community of priests, ceremonies and catechism regarding Catholic God. Getting a closer look, it has been observed that faith is – for believers – a real cultural marker: it influences not only the relation between a believer and the supernatural, but also how believers relate with the concrete world (how they dress, what they eat) and their relationship with themselves and the others.

It may happen that faith attests certain truths and precepts, and then that believers introduce beliefs, behaviours and rituals that are not directly derived from religion, but are someway connected with it. It would be therefore desirable that freedoms of worship were the starting point of a legal pluralism that could value the plurality of social and cultural patterns connected to credence. In this way, religion becomes a privileged marker of any culture. This is
perfectly normal: if behaviour finds its fundament in a religious precept, it will be blessed with the inviolability granted by a superior Truth.

The consequences of this phenomenon are absolutely fascinating, and so are future potential developments: laical men might as well demand an equal inviolability for rights that have been theorized by an admittedly wise community and, in perspective, any individual may request tutelage for those freedoms that are expression of his Weltanschauung. In other words: if the law of a tolerant community recognise to believers – may them be religious, laical or individualists – the opportunity to lawfully operate according to precepts, freedoms and rituals that are deduced by their cult, in addition to subjection to state law, consequences will be appreciated in two directions.

a) The tolerant community might consider its idiosyncrasies infringed in presence of ideas like the submission of women to men, the duty of levirate, free polygamy or ritual cannibalism. The concession of these or other freedoms – e.g. reducing people in slavery (the descendants of Ham) and kill determinate humans (as the romans’ ius vitae et necis, or in the pre-Columbian rituals) – to individuals of the social group according to their personal beliefs might be deemed by the members of the community a violation of the founding principles of their society.

b) On the other hand, it would be impossible for jurists to interpret the conceptual asset of a religious freedom that can refuse pure secular political powers and, consequently, might as well refuse his subordination to state authority.

7. Supernatural, and the category of juridical

Ancient Romans left for posterity a concept of ius that has been widely used over time. Some scholars tried to connect juridical and statehood, and they consequently posed new issues; some others included in the operational area of ius the so-called Natural law, and this has raised new problems. Nevertheless, it seems that we can be generally content with this category of ius, that assumes the name of law, diritto, droit, Recht, pravo, etc., according to the legal operator’s language.

Romans constituted ius starting from many apparently different phenomena: fas, lex and ritus. Ius contains also Canon law, without distinguishing on its divine or human derivation; ius includes even the so-called “unjust law”: we normally refer to the rules posed by Ulpian as iura, although they profess and sponsor slavery. Though, the ius category is not universal: it does not exist in many ancient and modern societies, as well as in classic East Asian cultures (Chinese and homologous communities). In the study of the latters, scholars focused only on the
authoritative law – the *fa* – and neglected the analysis of the laws created by non-authoritative apparatus (especially consuetudinary law).

Evaluations regarding Islam are slightly different. Legal scholars normally overlap the terms “*sharī‘a*” and “Islamic law” but not all the *sharī‘a*, and not only *sharī‘a*, is included in our current idea of law. *Sharī‘a* is the revealed law, but Islam also permits the application of customary rules on Muslims and the application of non-Islamic laws to infidels: all these laws can not be included into the *sharī‘a*. Islam demands that the orthodox Islamic authorities develops a *siyasa*, that is a set of rules appropriate to protect and maintain the public order in the society moving from political evaluations but without contradicting *sharī‘a*. The fundamentals of *siyasa* are the same of the *ius*, and Muslims undoubtedly distinguish *siyasa* from *sharī‘a*; if we analyse the Islamic judiciary system, we will also see that *qādi* (judges who are expert in matters of religion) are the only organs competent to apply *sharī‘a*, but they are not necessarily in charge of applying *siyasa* or customary laws. Western jurists, however, do not pay particular attention to this difference.

8. The multiplicity of supernatural

Until now we have been mentioning the “supernatural” as a unique, indistinct category, and, frequently, trying to differentiate is superfluous, since different forms of supernatural – religious or magical – can equally legitimate an authority or a law.

It is, however, necessary to verify if the various kind of supernatural are completely equivalent. We may begin from examining those forms of sacredness that express themselves through unalterable rules and consequently operate on the sources of law, while other sacral influences impose individual behaviours that are detached from laws (e.g. taboos are general and permanent prohibitions whereas a dreamlike vision can establish a power or a duty to be exercised in a single act). In order to linger in the concrete, it may be useful to limit our analysis to the multitude of religious experiences that refer to one or more Gods, and verify if they are all homogenous in their way of relating to law; in doing this we should primarily move from what a believer may ask to God, and what God can offer to believers, so as to distinguish and gather different religions.

There is a first group of religious traditions in which God grants temporal benefits (posterity, wealth, victory over enemies) to his followers, who in turn reciprocate with valuable goods (animals and offers) in accordance with a contract; this is what happens, in short, in ancient Hebraism, in the Ancient Greek and in the Roman Capitoline religion (in Latin, the term *fides* expresses both the conditions of the debtor and the devotee, and the perish of the *fides*
extinguish the bond between man and God. The devotee, on his side, credit – i.e. is the creditor of – God, his invisible Counterpart, who will always fulfil his duties.

The second group of religions reward their followers with knowledge, eternal wellness and salvation; believers must, yet, earn these gifts through an appropriate conduct, and their religious path may imply metamorphosis and transubstantiations during the long path towards the salvation. Whose to embrace these religions must, frequently, adhere to an articulate dogmatic apparatus. First of all it is possible to number, among these cults, Ancient Egyptian religion.

Despite taking various facets in its thousand years long history, in Egyptian religion what prevails is always the promise of salvation from benevolent gods (Thot, Osiris, Ra) by means of a fully structured and clearly described tribunal of dead. In the same group of “religions of salvations” it is also possible to consider Mesopotamian religion starting from Sumerians, the Jewish Genesis and the Greco-Roman Mysteries (that are more ancient than the Olympic religions).

Jewish community opened its mind to these conceptions after slavery: during their captivity they had frequent contacts with Persian doctrines, and that influenced their opinion on monotheism, angelology, demonology, faith in the eternity of the soul and resurrection.

Deportees found the guide of the prophets: Isaia, Michea and Asuf referred that God disowned sacrifices, feasts, collective rituals in favour of respect for the principles of justice, compassion, humility, kindness. Also Christian culture belongs to this group, while Islam seems quite distant from this kind of cult.

Other aggregation of believers ask religion to reveal the rules to be followed in the various circumstances of life, or to unveil the reasons and principles that should guide the devotees in their everyday decisions, without complaining about potential temporal or eternal blessings they may receive.

At this point, it is necessary to understand if the needing of believers, the answers that religion may furnish and a more or less complex dogmatic influences the relationship between religion itself and law: the conceptual path we have taken so far does not seem to conduct to any valuable outcome, and consequently it could be more useful to analyse distinctions based on more contingent aspects.

Religions that contemplate a revealed set of rules must definitely interface with law, but it would be misleading to think that they flourish in situations created by a synallagma.

Also those religions that need a well structured and respected religious centre to operate properly – because of the relation between God and men, or for contingent groundings – must someway relate to law: from this point of view, even Christian confessions are different among each other.
The last issues that we tried to examine probably denoted a wait for answers, which we are not currently able to formulate.

Supernatural has interested, instructed and consoled men in multiple and diverse ways, and when the various forms of supernatural confronted with law, they did not speak always the same language; we must figure out if a given form of the supernatural – and, in particular, religiousness – is more or less inclined to adapt law to its canons.

9. Supernatural, and the nature of law

Theology glorifies God Almighty, omnipotent even towards His enemies, capable of seeing in everything on the Earth what He desired for His own glory and, in particular, capable of seeing in men their nature of creatures in the image and resemblance of the Creator. Such a conception of theology can be harmoniously combined with a law of particular nature.

In this context, law – as long as it is created incompliance with God’s signals – will be interpreted as an entirety of virtuous rules; infringements are shameful for those who live according to ethic principles, and sentences actualize the benign bond between men and laws.

Although, this theological arrangement may be different if we assume that the main ethical Personality is opposed by a Rival with demiurgic capacities comparable (even if inferior) to the ones of the Creator.

As a consequence it will be necessary to evaluate which law coexists better with this metaphysic antinomy. Studies on religion lack (as far as I know) in the analysis of the role law had in the Zoroastrianism, Manichaeism and in all those cults that present the Christian conception of antinomian powers: from Gnosticism to Nestorianism, from Paulicianism to Bogomilism and Catharism.

If we assume that God conceived only the souls, while an evil demiurge has created all that is material – in particular our physical bodies –; if procreation determines the imprisonment of the soul within a mortal body; if human power and institutions satisfy only the body, and not the spirit; then authority and secular power might be legitimately demonized, and so can be individual rights, since they are devices of egoism used to conquer material benefits (while the duties and the consequent chagrin of the spirit might be seen as an encouragement to virtue).

Between these extremes, it is possible to consider intermediate positions. Men are created by the Almighty and victorious God in His image, but the Opponent of God tries to corrupt men and, often, succeeds.

Men, as imperfect beings, are attracted both by good and evil, and their actions can be inspired by God or by human weakness: law takes on, according to this vision, the role of an evil that is necessary to preserve society from self-destruction.
It is possible, instead, to be in presence of imperfect rules: law could be perfect in the abstract, but become unfair and unbalanced because human fallibility is a natural limit to the clairvoyance, sense of justice and discernment of legislators.

Metaphysic antinomy needs dogmatic definitions and lucid positions, and then embeds both them in religions where mystical truths are clearly formulated and identified.

We could find, however a sensitivity that is – similar to the antinomian vision (even if poorly defined in its profile and, consequently, vague) – dense and capable of penetrating deeply into men’s moods also in cultures that are distant from Zoroastrianism. This happens in every markedly ascetic culture, for every pessimistic conception of humanity, and for every pessimistic conception of the role of law in the society: authority may be fatally seen as oppressive, general and abstract rules can be interpreted as formalistic and exposed to the slyness of those who can take advantage of its quibbles; law may be seen as an egoistic and indifferent structure.

Consequently, policemen, executioners, soldiers and taxmen will be considered the expression of a system that distinguish people who undeservedly prevail and people who are unjustly oppressed (our thoughts instantly turn to Tolstoy): it should be noted that a well-known theologian, even if respectful of the secular authorities, underlined: «rechter Jurist, böser Christ» (a good jurist is a bad Christian).

Philosophers, psychologists, artists historians of religion might, as well as the anthropologists, are interested in these topics.

History passes on the fortunes of men who declared to exclude or admit determinate conclusions basing their reasoning on argumentations: this is the right technique to ascertain the true and false, and those men were the Sophists (even though they used to talk about “demonstrable” and “indemonstrable”). The beginning of the differentiation between true and false is more remote than the Sophistic philosophy, since the doctrine aimed to the research of the truth is tightly bound to the supernatural.

Experts of the supernatural are deemed eminent by their communities and are believed when they talk about the ethereal world, considering that they are the only ones who can access it. Once society became more complex, the need of severe and unnatural rules (tax levies, subordination, forced labour) appeared; the social authority enacted them, and it needed the armies to support them: in that time a majestic and coordinated priestly caste arose to sponsor the imperial power. Their duty was talking to the community, and convincing them to support authority appealing to the truths they discovered through the invisible world.

In other terms: a coordinated order of adept of the supernatural replaces the incoherent magic traditions of single sorcerers, magicians and witches; these new ministers begin to forge a knowledge – the interpretation of supernatural – that nowadays concerns everything studied in the universities.
This act poses, for the first time, the problem of distinguishing what is true and what is false. Somehow, men always had an inner perception of “true” and “non-true” (e.g. a hunter says that a wild boar is near because he heard its rustle, while another hunter with better sight denies it and says that the boar is far), but the truth emerging from empirical experience is not institutionalized. With the advent of the castes the truth becomes permanent (what is true is always true), socially relevant (if you sow in the sand, nothing will grow) and transcendence towards man due to its relation to the sacral. When the community becomes empire, then, truth is institutionalized: it is finally possible to distinguish True from false, believers from sceptics. In such a context, men face for the first time the challenge of creating a corpus of durable and coherent truths in order to explain the functioning of the world: beside the truth it is systematized the concept of error and there men that have the (sublime and terrible) power to decide what is the truth and what determines an error.

The heritage of truth grows, and supernatural donates to men endless gifts: mathematics, architecture, medicine and veterinary science, botany, astronomy, as well metallurgy and chemistry make continuous progresses. On these solid basis lay the foundations of a science of the divine, of the soul and death, of ethic.

Truth must be protected from profanation. Since part of the truth is necessarily exoteric, common men must be excluded from it; another part of the truth instead, is kept hidden because its enunciation determines mockery from those, who are not capable of intending it (that is what happens to the firsts who affirmed that Earth is round).

But truth must also be protected from discussions that could only ingenerate doubts and incredulity. Arcane verities are transmitted from elder to younger within the caste of priests; the truth is immutable, and those who want to access it must have an adequate repertory of knowledge, which exists outside, and before men’s world; Plato somehow grasped this concept when he enounced his theory – that was partly derived from Eastern cultures – of the ideas that pre-exist to men and that are accessible through the analysis of the pursuit of truth.

If some aspects of the truth must be hidden from the general public, on the other hand there is a part of the truth that should, instead, motivate the whole conduct of the community and be consequently spread as widely as possible. According to the already mentioned Jan Assmann, the distinction between true and false arises in with the birth of monotheisms: God is the truth, while other idols are just falsehood; actually, examples we formulated in the course of this work (Egypt, India and ancient Rome) permit to extend this distinction also outside the area of monotheism.

Verity must be bond to precise and determined words, even if they may appear, sometimes, obscure and vague: truth is equal to itself, and its formulation must always be equal to itself.
Scriptures represent the greatest guarantee of the stability of the truth: even if a verity is originally verbally transmitted, it crystallizes with the putting in writing, and the community can concentrate on the analysis of (sacred) scriptures. Nevertheless, the institutionalization of truth denies freedom of thought, and writing is the main resource of institutionalized verity. Anthropologists (in particular Claude Lévi-Strauss), understandably warn about the risk that writing could lead to men’s exploitation rather than to illumination.

Up to almost six thousand years ago, men lived in a (contented?) state of ignorance, and 5,500 years ago they began to experience the exoterism, and their acceptance of the truth was substantially uncritical. Two and a-half millennia ago, something changed: the vast knowledge accumulated by empires during the Bronze Age was originally arcane and hardly transmittable but, over thousands of years, it could not remain segregated.

New verities arrive from India and Egypt to Hellas, and they influence wise men (e.g. Pythagoras and Plato). In Hellas these men are relatively free to conjecture, diffuse and teach their idea (we should not draw improper generalizations from what happened to Socrates), and the Hellenes can consequently evaluate this knowledge critically and elaborate it according to their logic. From that moment, for 2,500 years, knowledge protected by an authority and knowledge resting on the critical reasoning coexisted: the development of the first typology is related to the remembrance of great hopes but stakes, martyrs and genocides too (what happened to Galileo is the most known example), while the progress of the second type of knowledge passes not only through the same high hopes, but also through failed attempts, asinine teachings, unjustly denied rewards and, fortunately, progresses that changed the life of humanity on this planet.

The institutional assets of Middle East imperial sovereignty spread: Alexander the Great and then Romans subject Greece and Rome to their empires, which did not have – in that moment – a bureaucracy monopolized by ministers. However, an empire is still a regime, and under regimes there is no space for a genuine pursuit of the truth. Pliny the Elder gave a pessimistic picture of the situation in the empire: when there was not a unique central govern, local communities were compelled to progress and development of knowledge by hardships, and competition among populations led to profusion of efforts.

And then? The knowledge shielded by authority and the knowledge guaranteed only by logic and experimentation still coexist and, in Western culture, the ascendancy of revealed truths is confined in the comprehension of supernatural and to ethics except for sporadic contaminations in political affairs by means of suggestions to legislators.

A sad episode, however, deserves to be recalled.
There has been an historical period in which the influence of supernatural revelations on politics had become marginal. At that time, new human alliances arose: they were not very different from the traditional community of believers; they choose their own truth and proclaimed it. Their personal faith made them active. Those people acquired political power, started to control the members of their community and suppressed the ways of thinking that were not conforming to their verity. These communities assumed the form of a single-party state, and their actions caused almost ten millions of deaths: it was just during the last century, from 1917 to 1989.

Selected bibliography

Alighieri, Dante. The Divine Comedy (a complete version is available online: http://www.gutenberg.org/files/8800/8800-h/8800-h.htm).


**Biography**

Rodolfo Sacco is considered a master of comparative law. He was born in Piedmont, Italy in 1923. He followed his father’s footsteps and attended law school at University of Turin. Growing up in fascist Italy, he became a part of the resistance movement and is well known in veterans’ circles for his war efforts. After graduating law school and passing the bar, Sacco studied with economist Luigi Eiunudi (who later became President of the Italian Republic), and in 1947 published his first work on legal interpretation. He chose an academic legal career focusing on civil law. In 1961, he taught both civil and comparative law at Pavia University, and he became Dean of the Faculty. In 1971 he went back to his Alma Matar, serving as Chair of Civil Law, and later retiring in 1999 becoming an Emeritus Professor. Sacco “created” comparative law in Italy. His former students carry on his teachings and are currently appointed professors throughout the country, with a focus in comparative law. His scholarly output on the subject is extensive, although mostly written in Italian. He continues to publish works to this day. (Riles, Annelise, *Rethinking the Masters of Comparative Law*. Portland: Hart Publishing, 2001).
IL SOPRANNATURALE E IL DIRITTO

1. L’accesso dell’uomo al soprannaturale

Il credente sa che l’uomo ha avuto accesso alle cose invisibili fin dal momento della sua apparizione sulla terra. La creazione fu accompagnata da una rivelazione primaria, senza la quale il primo uomo non avrebbe saputo come orientarsi.

Per l’antropologo, il primo uomo è *homo habilis*, privo dei centri di Broca e di Wernicke, dotato di una faringe e una laringe che non gli permettevano di produrre i suoni che oggi costituiscono il nostro strumento fonetico.

D’altronde, la teologia non ci dice chi fosse, per essa, il primo uomo. Essa non è obbligata a rivolgersi per chiarimenti all’antropologo, che parla di homo quando parla di un fabbricante di utensili. La vicenda dell’uomo teologico potrebbe essere più breve di quella dell’uomo zoologico, e incominciare con l’uomo che comunica con strumenti vocali evoluti, o addirittura che l’uomo che pensa con strumenti logico-concettuali avanzati (nemmeno Teilhard de Chardin ha trattato il tema).

In ogni caso, da una certa data l’uomo ha lasciato segni dell’accesso, da lui praticato, in un mondo nascosto ai suoi sensi.

Qui non tratterò di quell’accesso, ingannevole, che si opera nel sogno, allorché ci appaiono i vivi ed i morti, allorché si compiono gli eventi (cui, quando svegli, non abbiamo mai assistito) che più temiamo e che più desideriamo.

Da 300.000 anni l’uomo ha una qualche cura dei suoi morti. È questo un segno?


Quell’uomo di Cro-Magnon dipingeva le pareti di grotte profonde, ovviamente buie; bisognava, infatti, tenere lontano lo sguardo delle persone profane, perché la percezione dell’immagine avrebbe sottratto a quest’ultima la sua valenza magica. Studiosi sapientissimi (soprattutto, A. Leroi Gourhan) hanno ricostruito la portata simbolica e soprannaturale di quelle prime pitture, fondamentali nella storia dell’arte, e nella preistoria del sapere; si pensi al bovino, simbolo femminile, e all’equino, simbolo maschile.

Una formulazione può attrarci.

Una transizione verso una conoscenza del soprannaturale ricca e altamente produttiva potrebbe collegarsi con l’inizio dell’età della pietra antica «superiore», allorché gli oggetti in pietra si diversificano secondo scansioni culturali locali autonome, allorché le lingue si differenziano, e, soprattutto, allorché nascono arti figurative. Potrebbe essere il -50.000 (o, più remotamente, il -100.000). Il protagonista sarebbe homo sapiens.

Con l’arte figurativa, dotata di finalità magica, il soprannaturale è ben presente e ben inserito nella vita dell’uomo. Il disegno consente di creare un’immagine conformata secondo la volontà dell’artista, e questi potrà poi, incidendo sul destino della figura, operare sulla sorte del
soggetto rappresentato. Il disegno consente di moltiplicare la selvaggina e di propiziarne la cattura.

L’accesso al mondo delle cose invisibili non poté appartenere in ugual misura a tutti i membri del gruppo. Da quei tempi opera lo specialista del soprannaturale: il mago, l’indovino, lo sciamano, dotati di speciali poteri. Essi sanno come attirare sul gruppo protezioni e benefici, possono perciò praticare vantaggiosamente la medicina, l’architettura, la botanica, l’astronomia, la giurisprudenza, tutte ispirate ad un sapere esoterico.

L’omologazione del simbolico e del desiderato al reale, operata tramite procedimenti rituali, consente alla fattucchiera (oggi sicuramente viva in alcune parti d’Italia) di procurare disastri e malattie a danno della vittima, operando su immagini della vittima presa di mira. Al dispensatore di una medicina soprannaturale difensiva fa contrappeso il gestore di rimedi offensivi. Alla magia bianca si contrappone la magia nera, temuta e perversa.

Al presente, la magia fiorisce alla luce del sole in Africa. Qualcuno, che conosce bene quel continente, ci dice che ivi il diritto non è mai laico: o è divino (esempio tipico: la sharīʿa), o è sacrale. Il giudizio è stato espresso in modo corale e definitivo nel colloquio, organizzato dal Laboratoire d’anthropologie juridique a Parigi nel 1980 sul tema Sacralité, pouvoir et droit en Afrique (con studi preparatori raccolti nell’opera collettiva omonima pubblicata nel 1979).

Su questa base, si considererà normale ricorrere al procedimento magico per individuare il colpevole, o per identificare chi deve governare il paese.

La magia resiste in modo implicito negli altri continenti. In vaste aree le altre forme del sacrale hanno lasciato il posto alla religione, forma culta del soprannaturale. Ma il peso che hanno, nei media, gli oroscopi e le predizioni, la diffusione di prestazioni dei veggenti, di talismani, e di ausili di ogni tipo prova che il magico ha presa ovunque, anche in Europa e in America.

L’osservazione della vita quotidiana dell’uomo legato alla cultura occidentale (credente o non credente) rivela tracce di un passato nel corso del quale i suoi antenati confidavano nella magia.

L’uomo moderno pratica l’augurio («buon giorno, buon onomastico»), il quale non ha senso se non si opina che la parola all’origine veicolasse l’evento. L’uomo che pratica il culto dei santi dispone (a scopo propiziatorio) fiori vicini all’immagine del santo, così assegnando rilevanza alla vicinanza fisica (della cosa all’immagine) e alla rassomiglianza (dell’immagine al santo), ossia a due cardini del processo magico.

Espedienti magici vengono recepiti nella pratica religiosa: il suono della campana – ossia la percussione del metallo contro il metallo –, l’uso del colore rituale, la celebrazione del solstizio d’inverno (posticipato al 25 dicembre per un lieve errore di misurazione) e d’estate ne sono chiari esempi. La benedizione mantiene in vita i processi propiziatori. I riti di fertilità (più antichi della pastorizia, perché la fecondità interessa il cacciatore non meno dell’allevatore) rivivono sia nella cerimonia religiosa della benedizione delle greggi e delle messi, sia nella cerimonia laicissima della mascherata carnevalesca (all’origine, destinata a creare un’identificazione fra l’umano mascherato e l’animale di cui cingeva la pelliccia alla maniera dei mamutones sardi e dei kukeri bulgari). Il mondo islamico – con gradazioni diverse di intensità nei vari paesi – recepisce, adattandoli all’Islam, visioni e pratiche di origine chiaramente magica.

La letteratura sul sacrale è immensa. Sul procedimento logico che la legittima conviene prendere le mosse da Lucien Lévy-Bruhl. Sulle sopravvivenze di concezioni sacrali e soprannaturali prereligiose nel mondo moderno disponiamo di una letteratura importante e
sparpagliata, in parte rivolta al cosiddetto folclore. Sul mondo contadino della Francia del sud fa spicco il pensiero di Bonnet. E perché non rileggere, a questo proposito, il cap. VI (La Masco) della Mireio di F. Mistral?

Da una certa data, il soprannaturale ha preso in aree importanti la forma della religione. Il collegamento meccanico fra la pratica benefica e l’effetto favorevole, la virtù accattivante dello sciamano subiscono la concorrenza (vincente) di un soprannaturale in cui sono centrali Persone del mondo invisibile dotate di intelletto e volontà, dotate di superiori e immensi poteri, disponibili ad accogliere le invocazioni degli umani.

Magia e religione assicurano all’umano modi di conoscenza del reale, procedimenti per premiare o punire le diverse condotte, protezioni capaci di agevolare un programma d’azione. Esse non possono non interferire con la pratica giuridica.

Il giurista studia infatti il diritto canonico, e studia il diritto ecclesiastico. Dove coloro che condividono una fede e un culto si organizzano, poiché l’organizzazione di una comunità è diritto, noi avremo un diritto canonico o un suo omologo; e, là dove lo Stato si interessa ai culti e alle organizzazioni di credenti, noi avremo un diritto ecclesiastico o un suo omologo.

Ma l’organizzazione giuridica dei credenti e la regola dello Stato concernente la vita delle religioni non esauriscono il tema delle relazioni fra il soprannaturale e il diritto. E infatti il soprannaturale può offrire al diritto soccorsi di ogni tipo: può legittimare il potere, può dettare o suggerire il contenuto della norma, può offrire motivazioni per ottemperare alla norma, può agevolare l’accertamento del fatto, può indicare dove stanno la ragione e il torto.

2. Il soprannaturale e l’ottemperanza

Il diritto non potrebbe esistere se i membri della comunità non fossero disponibili ad osservare la norma. Un capitolo interessantissimo dell’antropologia studia precisamente questa disponibilità, come e perché essa è nata e si è sviluppata. Essa è la radice extragiuridica – o una delle radici extragiuridiche – del diritto. Questa disponibilità dipende da tanti fattori; in particolare, essa può collegarsi al soprannaturale.

Lo sciamano del paleolitico superiore ha accesso ai luoghi segreti. Sa dunque quali condotte umane possano conciliare il vantaggio, il successo e la prosperità (individuali e collettivi) nella comunità. Questo sapere gli consentirebbe – se egli lo volesse – di condizionare tutta la vita sociale, esercitando direttamente il potere. Ma lo sciamano evita le responsabilità dirette. La sua capacità di previsione e predizione opera rimanendo estranea all’elementare gerarchia del potere.

L’agricoltura e la pastorizia moltiplicano i compiti del soprannaturale, perché il sapere deve ora rivelare le date delle semine e i modi per garantire la salute degli animali (oltre che degli umani). Poiché il gruppo ha preso una consistenza notevole e crescente, ed una coscienza dei propri interessi comuni, lo sciamano, finora all’opera a favore dei singoli, da oggi si prodiga anche a favore del gruppo nel suo insieme. Parla ai singoli, e parla al gruppo unificato. La sua parola qualifica scelte individuali e collettive. È verosimile che faccia accettare qualche regola di condotta, è verosimile che nell’imminenza di uno scontro armato collettivo suggerisca la scelta di un capo.

È passiamo ora dall’età della pietra all’età dei metalli; meglio detto, all’età degli imperi che caratterizzano l’età del bronzo in Mesopotamia ed Egitto (e, più tardi, in Cina e India, ancora più tardi in Messico e nel Perù). In quel contesto la divisione del lavoro è ormai perfezionata, e ha portato con sé una diversificazione degli interessi dei vari strati sociali, si che solo un potere
armato può comporre le spinte centrifughe e particolaristiche. Solo una forza più potente delle armi può garantire l’ordine, ossia il potere del vertice e l’ottemperanza della base sociale.

Qualcosa avviene, qualcosa di grandioso che condiziona il futuro della cultura e del diritto.

Un’autorità viene creata. Essa fa capo allo scettro imperiale, ed è coordinata da funzionari numerosi e istituzionalizzati. Nasce un diritto costituzionale, un diritto amministrativo, un diritto penale pubblico, un diritto processuale applicabile nelle corti imperiali. L’autorità in questione sarebbe impotente se non potesse contare su un imponente corpo di armati, non legati ad alcun corpo sociale e devoti all’autorità imperiale. A loro volta gli armati sarebbero impotenti se le classi fossero riluttanti ad una spontanea ottemperanza. E in ogni caso gli armati non sono in grado di garantire una ordinata e pacifica assegnazione dello scettro imperiale.

E infatti, quando le strutture imperiali si diffusero dalla Mesopotamia e Persia al mondo alessandrino e da questo a Roma, e mancò un collante capace di legare le classi sociali e gli armati al legittimo imperatore, il potere spettò di volta in volta al capo militare più abile nello sbarazzarsi dei concorrenti.

E allora cosa può aver creato in Mesopotamia, Egitto, India, e poi in Persia, quella disponibilità delle classi all’obbedienza, e cosa può aver indotto gli armati alla devozione verso il Capo e cosa può aver reso possibile una designazione pacifica e ordinata del sovrano?

Nelle società a maglie strette, come sono quelle di cui parlo, sciamani, maghi, indovini, fattucchieri avrebbero potuto declassarsi e dar soccorso ai privati; ma sapientemente si costituirono in casta, e reclamarono la posizione che potevano conquistarsi in una società affamata di sapere e di aiuti soprannaturali.

Il soprannaturale diventa allora religione; e cioè, al mito subentra la teologia; i sacerdoti lavorano in vista di un risultato comune; diventano una corporazione di sapienti, capaci di coordinare i loro diversi insegnamenti e le loro varie arti soprannaturali, in modo che essi diventino compatibili e complementari, tanto da costituire un tutto armonico, suddivisibile ma non contraddittorio. Diventano teorici di tutto ciò che è sacrale: il divino, la matematica, l’ingegneria, la politica, il diritto, la medicina, l’agricoltura e le semine. Vogliono, s’intende, che la loro sapienza sia arcana, e il volgo ne rimanga lontano; vogliono, allo stesso titolo, che la loro sapienza – ch’essi arricchiscono di continuo, con sempre nuove accumulazioni – sia sottratta alla contestazione.

Questa sapienza acquista i caratteri mediante i quali può piegare la condotta degli uomini, giustificare il potere, e convincere la società ad accettarlo. Quando l’uomo della dottrina incontra l’uomo di potere che corrisponde alle sue esigenze, i due prendono a collaborare, e la base della società diventa stabile.


Gli studiosi dei grandi imperi hanno approfondito il tema. Lo storico della religione non accoglie la teoria di Carl Schmitt, secondo cui la teologia è il fondamento ultimo di ogni teoria, dottrina o scelta politica. Ad essa I. Assmann contrappone la costruzione per cui i concetti di sovranità, autorità, giustizia, potere, colpa, legge sono concezioni politiche che poi diventano principi o categorie teologiche (si veda, in particolare, la sua classica opera *Herrschaft und Heil*). L’osservatore che vuol tenerisi sul sicuro dirà che il soprannaturale ha offerto ad un potere
politico autocreatosi una legittimazione, e poté far ciò grazie all’edificazione di un corpo di verità (di cui si dirà tra breve).

Le soluzioni concrete non sono né uniformi né ripetitive.

In Egitto il faraone, personificazione del dio Horus, ha natura divina (ma l’universo degli dèi lo sovrasta); come mandatario di Ka (dio creatore) egli realizza Maat, l’ordine proposto dalla religione, rilevante per il diritto e per il culto. Un genere letterario ad hoc spiega che se lo Stato decade Maat scompare, e con ciò muoiono la capacità mnemonica, il linguaggio e il sapere, e nel contempo la natura cessa di produrre cibo, domina la sopraffazione, i padri e i figli si uccidono a vicenda. L’ordine sociale ha certo bisogno di un sostegno. Alla sua debolezza il Medio Regno risponde con lo Stato, il Nuovo Regno risponde con la religione. Con la XXI dinastia, sulla fine del nuovo regno, un dio diventa sovrano diretto degli uomini, e il sommo sacerdote diventa re, correggente (subordinato) del dio. La concezione si perde in epoca tolomaica.

In Mesopotamia le cose vanno diversamente. L’atto del re è valutabile (con il metro dell’ordine divino), e può essere trovato fallibile. Ovviamente, valutano gli uomini del soprannaturale.

Troviamo una soluzione parallela in Cina, dove il potere di valutazione fa capo, anziché al clero, alla casta dei letterati confuciani, conoscitori – anch’essi – di verità correlate a dati non visibili, e saldamente riuniti in organi collettivi posti al vertice della società.

Rimanendo in Asia, il pensiero va al Tenno, va al Dalai Lama.

La legittimazione sacrale esalta il potere ed è severa con i suoi nemici. In Egitto (ma non solo in Egitto) i nemici politici sono visti come nemici di Dio. Naturalmente (come osserva J. Assmann) ciò giustifica una violenza più feroce contro il nemico.

L’ordine creato in Mesopotamia fa capo, dal tempo di Ciro, ai Persiani e ai loro eredi ellenisti, per poi diffondersi nelle tre Rome (Roma, Bisanzio, Mosca) e dalla prima Roma si diffonde nel mondo germanico continentale.


Non ha bisogno di legittimazione la regola consuetudinaria, che opera in ragione dei fatti. Giustiniano presentò il Digesto come una regola consuetudinaria, non altrimenti legittimata. Nel medio evo il Digesto era un’opera di dottrina senza una base nei fatti, ed è ovvio, a questo punto, che la si sia assistita con una legittimazione, proveniente (è superfluo dirlo) dal soprannaturale. Dante Alighieri è ben convinto del mandato conferito da Dio a Giustiniano perché legiferi.

Fuori dello standard occidentale la legittimazione del potere e del diritto proveniente dal sacro è normale. Lo è nell’Asia orientale, lo è nell’areaislamica, lo è in Africa.

Nell’Islam tutta la parte nobile del diritto – la shari‘a – è rivelata, e il potere è giustificato dal diritto. Incertezze sussistono nell’interpretazione delle regole applicabili alla selezione di chi dovrà essere guida dei credenti. Ma una base rivelata esiste, e il potere non si legittima senza un rinvio ai canoni dell’Islam. Il dato è troppo noto per meritare una trattazione; e la bibliografia sul tema è tutt’uno con la bibliografia sul diritto islamico.

Al giurista occidentale può apparire oscura la fonte della legittimazione giuridica africana. Qui è in gioco il favore che le grandi forze invisibili assicurano al gruppo se le sue scelte asseggiano le spinte che vengono dai luoghi nascosti agli uomini. Il capo è il depositario visibile della grande forza vitale che anima il mondo, che moltiplica le messi e i greggi, che
favorisce la fecondità delle donne. È evidente che il soggetto privilegiato calamita egli stesso per primo il favore di queste forze; se dotato del potere di comando, attrairà il favore delle grandi forze su tutta la comunità. I contatti con la storia africana ci mostrano in più di un’occasione fenomeni che si possono spiegare solo sottintendendo il teorema giuridico che segue: il ribelle che vince ha il favore delle forze vitali invisibili; e, se gli è dato lo scettro del comando, calamita queste forze a favore della comunità; dispone dunque di una legittimazione più forte di quella del capo «legittimo».

I primi missionari giunti nel bacino del Congo furono sorpresi nel vedere che nelle celebrazioni delle grandi ricorrenze politiche taluni sovrani gradivano che si sottolineasse che il loro potere era privo di titolo, all’infuori della vittoria militare.

I re songhai successivi a Sonni Ali si chiamavano tutti Askia (da A si kyi a, che significa «non lo sarà»), dal grido di contestazione che accompagnò l’assunzione al trono del loro capostipite Mohamed Ture, cui si negava legittimità.

D’altronde il diritto tradizionale disponeva in molte culture africane che il re avesse per successore quello, tra i suoi figli, che sarebbe uscito vittorioso nella guerra che si sarebbe aperta con questo fine.

La pratica era diffusa. Si veda qualche esempio: gli Azande (fra il Sudan e il Congo), studiati da Evans-Pritchard; il regno di Monomotapa e il regno del Congo, studiati da Randles; M. Gluckman (nella sua nota opera _Politics Law and Ritual in Tribal Societies_, del 1968) ci dice che presso gli Shilluk del Sudan la presa di potere era preceduta da una battaglia simbolica; cui i soccombenti non sopravvivevano.

In questo clima, in Africa era statisticamente normale – almeno nel primo periodo dell’indipendenza (1960-1990) – che il potere politico venisse acquisito mediante un colpo di stato.

La subalternazione al potere non è l’unico aspetto dell’ottemperanza al diritto. Chi vive secondo diritto rispetta la proprietà altrui, mantiene la parola data, non aggredisce il prossimo e non danneggia i beni.

Procedimenti magici possono fondare la proprietà. Se l’albero si vendica di chi gli strappa i frutti, e lo sciamano rende noto questo primo dato di partenza, quello stesso sciamano può rivelare al proprietario – e solo a lui – la formula apotropaica che consente di sfuggire alla vendetta della pianta; e con ciò la proprietà è in grado di funzionare.

Se quella visione del soprannaturale conosce l’effetto devastante dello spergiuro, ecco che il giuramento potrebbe anche garantire le promesse, o talune promesse. La letteratura è ricca. L’opera centrale è dovuta a Burkert.

Magia e religione possono molto per trattenere l’uomo dall’antidiritto, se la minaccia di una sanzione viene rivolta al fatto giuridicamente illecito.

3. _Il soprannaturale e il consiglio al legislatore_


Rapporti di famiglia, pratiche rivolte al corpo dell’uomo, alla sua psiche e alla sua vita ci offrono esempi a non finire della modellazione operata nel laboratorio ove ci si ispira al soprannaturale.
Ce lo dicono la lotta intorno alla interruzione di gravidanza, intorno alla pena di morte, intorno all’eutanasia, intorno ai nuclei familiari di vecchio o nuovo tipo, intorno agli interventi a fine eugenetico e genericamente genetici.

Là dove un diritto è rivelato, il suggerimento del modello può sopravvivere ad una legittimazione contestata. In un paese islamico, la shari‘a è rivelata; la sua legittimazione è in re ipsa. Ma se il potere rifiuta la legittimazione che proviene dal soprannaturale, può sopravvivere a questo scacco l’invito a regolare il matrimonio, la filiazione, la successione secondo regole desunte dalla shari‘a.

4. La conoscenza dei fatti e delle ragioni

Colpevole o innocente? Ha ricevuto a mutuo la somma o non l’ha ricevuta? Siamo sicuri che il soprannaturale sia troppo lontano da queste vicende particolari e quotidiane, debordanti nel foro esterno?

Il diritto deve accertare fatti e individuare rimedi. Il soprannaturale offre una cooperazione mirabile a tutti questi compiti. Si entra in comunicazione con il mondo soprannaturale, e se ne riceve l’indicazione voluta: la regola da adottare. Si adotta la tecnica appropriata, e si individua il soggetto contro cui è bene procedere: specchi magici, bevande emetiche, statue capaci di esprimersi rendono servizi preziosi. La magia consente di accertare il fatto. Una prova oracolare (basata sulle indicazioni provenienti dalla statua del dio) fu introdotta verso la fine del nuovo regno nell’Egitto faraonico.

La memoria storica del cristiano corre istintivamente all’ordalia, specialmente al duello, che ancora per mezzo millennio dopo la cristianizzazione dei popoli germanici si manteneva in vita come mezzo giudiziario, e per un altro millennio fu in vita come modo di asseverazione extragiuridica della propria versione dei fatti.

Fuori d’Europa, in Africa specialmente, il soprannaturale è quotidianamente al servizio della ricostruzione della ragione e del torto.

Nel ventennio successivo all’indipendenza (1960-1980) gli africani optarono per l’europeizzazione del loro diritto. Ma quel tentativo fu abbandonato. Si sono nuovamente autorizzate le corti consuetudinarie. Soprattutto, si è presa coscienza del fatto che larghe fasce della popolazione non avevano cessato (né sotto gli europei, né in regime d’indipendenza) di rivolgersi alle corti consuetudinarie. E quelle corti praticano largamente l’accertamento del fatto a mezzo di expedienti magici (sul tema, la letteratura è ricca; si distinguono Retel-Laurentin e Rau).

5. La comunità dei credenti

Può avvenire che la comunità dei credenti si organizzi con regole umane o con regole provenienti dal soprannaturale. Essa può anche pensare di essere l’unica comunità dotata di una legittimazione propria originaria, e di aver titolo per assoggettare gli estranei a regole date. Potrebbe avvicinarsi a questo schema il modello sociale ideale elaborato, anche se non attuato, dall’Islam.

In questo quadro attira attenzione il diritto canonico della Chiesa cattolica. Anche le altre Chiese cristiane hanno un diritto interno loro proprio. Ma mi pare che diano minore importanza al diritto come scheletro del sociale (così le Chiese ortodosse) o minore importanza al diritto come scheletro dell’ecclesiastica (così le Chiese evangeliche).
6. Il diritto della società laica, rivolto alle comunità di credenti e al culto

Quanto più il religioso ha presa sulla società, tanto più la comunità di credenti chiede di regolare essa stessa tutta la propria vita, i propri soggetti, i propri mezzii. In una società musulmana perfetta non c’è posto per un diritto della società laica rivolto ai credenti e al culto.

Ma se la società è organizzata laicamente, essa avrà davanti a sé due opzioni: applicare alle comunità dei credenti il diritto comune, destinato alle associazioni, alle fondazioni, ai beni, o creare un diritto speciale.

Le società laiche tiranniche (esempio tipico: quelle comuniste) non poterono non legiferare in tema di culto e di comunità di credenti. Esse negavano la libertà. Sarebbero state felici di negare la libertà anche ai credenti. Ma temevano di provocare un’esposizione di malcontento, e allora ricorsero alla regolamentazione: minuziosa, fiscale, vessatoria; ma in qualche modo tollerante.

Di recente è stata rivolta una critica all’impostazione corrente di questo diritto delle comunità di credenti (o diritto ecclesiastico). Nella trattazione del tema si è distinto S. Ferlito.

Si è osservato innanzitutto che il diritto si indirizza soltanto a comunità, a culti, a modelli di soprannaturale omogenei rispetto a ciò che si trova nella tradizione del paese che legifera. Se legifera un paese cattolico, il diritto «ecclesiastico», e le garanzie di libertà che esso porta con sé, si indirizzano a comunità dotate di ministri, ad esternazioni cerimoniali, a dottrine rivolte alla divinità.

Più profondamente, si è osservato che il credente trova spesso nella propria fede il marcatore culturale per eccellenza; un marcatore che condiziona non solo la sua vita rivolta al soprannaturale, ma anche la sua vita rivolta alle cose terrene (al modo di vestirsi, alle cose che mangia), la sua vita individuale e i suoi rapporti con le altre persone. Può avvenire che una fede autentichi un certo numero di verità e di precetti, e che poi i fedeli si costriscano un bagaglio di credenze, di prassi, di discipline, di rituali, che non sono dettati dall’ortodossia religiosa, ma sono vissuti come legati alla religione. In altre parole, spesso si parla di religione e si vuole indicare una cultura che in qualche modo si ritiene collegata alla religione.

Si auspica allora che le libertà religiose diventino il punto di partenza di un pluralismo giuridico impostato sulla diversità dei modelli sociali e culturali che si connettono alla fede.

La religione viene così privilegiata come elemento marcatore di una cultura. Ciò non sorprende. Se quella data libertà si radica in una religione, essa porta con sé un elemento di inviolabilità garantito da una superiore Verità.

Il punto d’arrivo è affascinante. L’analisi porta peraltro a considerazioni e a sviluppi notevoli. Anche l’uomo laico potrebbe domandare una parallela inviolabilità per le libertà teorizzate da una comunità (laica) pensosa e sapiente. E l’individualista potrebbe domandare una inviolabilità per le libertà che corrispondono alla sua personale visione del mondo.

In altre parole: se il diritto di quella data società tollerante accorderà al credente – credente religioso, credente laico, credente isolato e convinto –, in aggiunta alle libertà consacrate nel diritto comune, la libertà di ottemperare ai precetti, di tenere i comportamenti raccomandati, o addirittura la libertà di esercitare le prerogative, che sono previste nel suo credo, i contraccolpi opereranno in due direzioni.

a) In primo luogo, quella società tollerante potrebbe sentire urtate le proprie ben comprensibili idiosincrasie in presenza della soggezione della donna al potere maschile, in presenza dell’obbligo del levirato, della libera poligamia, dell’antropofagia rituale. I membri di
quella comunità potrebbero sentire come una menomazione del proprio statuto la libertà concessa ad altri di compiere prestazioni crudeli, ad es. la libertà di ridurre tali persone (i discendenti di Ham) in schiavitù o di uccidere questi o quegli umani (si torni con il pensiero *allo ius vitae et necis* del diritto romano, si ricordi quale sia l’etimo della parola assassinio, si pensi ai culti americani precolombiani praticati a mezzo di uccisioni di migliaia di vittime umane).

7. Il soprannaturale e la categoria del giuridico

Gli antichi Romani ci hanno legato un concetto – *ius* –, che noi abbiamo custodito e utilizzato con profitto. È vero che qualcuno ha apparentato la giuridicità con la statualità, e così ha innovato creando problemi. È vero che alcuni hanno esteso il vocabolo all’area del cosiddetto diritto naturale, creando altri problemi. Ma nell’insieme non possiamo lamentarci di questa categoria *ius*, che diventa *law*, diritto, *droit*, *Recht*, *pravo* ecc., a seconda della lingua dell’operatore.

I Romani costruirono felicemente la categoria assorbendo in essa fenomeni dapprima creduti disparati: il *fas*, la *lex*, il *ritus*.

Ius, termine ampio, ha raccolto in sé anche il diritto canonico, senza distinguere fra il diritto di fonte rivelata divina e il diritto di fonte umana. *Ius* raccoglie in sé anche il diritto ingiusto. Noi non siamo soliti mettere in dubbio che le regole di Ulpiano siano *ius*, anche se proclamano e sponsorizzano la schiavitù.

Ma questa categoria dello *ius* non è universale.

In molte culture antiche e moderne una categoria dotata di un’estensione pari allo *ius* manca.

Manca nelle culture asiatiche orientali classiche (cinese e omologhe). Qui l’attenzione dell’osservatore contattato dall’europeo si è soffermata sul diritto autoritativo – il *fa* –, e tutta la massa del diritto creato da apparati non autoritativi (il diritto civile consuetudinario, soprattutto) è rimasto fuori della categoria.

Un discorso attento deve farsi per la cultura islamica.

Noi traduciamo quotidianamente il termine *sharī’a* con l’espressione «diritto islamico». Ma non tutta la *sharī’a* corrisponde alla nostra idea di diritto, e non solo la *sharī’a* rientra nella nostra idea di diritto.

La *sharī’a* è rivelata. L’Islam permette di applicare anche al musulmano norme consuetudinarie e di applicare norme non islamiche agli infedeli. E queste norme non rivelate non si possono chiamare *sharī’a*. L’Islam vuole che il potere islamico ortodosso edifichi una *siyasa*, cioè un insieme di norme che, senza contraddire la *sharī’a*, muovendo dalla opportunità politica, assicurino nella società l’ordine, prevenendo ciò che può metterlo a rischio. La base della definizione della *siyasa* coincide proprio con la base della definizione dello *ius*! Ma certamente il musulmano non chiama *sharī’a* la *siyasa*. Il *qādi*, il giudice ben preparato nell’area della dottrina religiosa, è l’unico competente ad applicare la *sharī’a*. Non è detto che spetti a lui applicare la consuetudine né la *siyasa*. Però il giurista occidentale sta al gioco e paragona al «diritto» la sola *sharī’a*.
8. La varietà del soprannaturale

Fin qui, abbiamo parlato del soprannaturale come si parla di una categoria indistinta. A taluni fini, del resto, distinguere non serve. Forme diversissime di soprannaturale possono tutte legittimare un potere o una norma. Così la magia, così la religione.

Però, volendo garantire completezza al discorso, è giusto verificare se i tanti soprannaturali si equivalgano a tutti i fini.

Possiamo portare il discorso sulle forme di sacralità che si esprimono in norme immutabili, e sono dunque pronte ad intervenire nel sistema delle fonti. Altre forme di sacralità possono invece scatenare imperativi singoli, avulsì dal contesto normativo. Il tabù implica divieti generalizzati e permanenti, un potente messaggio onirico può invece fondare un potere o un dovere da esercitarsi o da adempiersi in un unico atto.

Per rimanere in un terreno più concreto, giova restringere il discorso all’esperienza religiosa, facente capo a un Dio o a una pluralità di dèi personali, per domandare se – dal punto di vista del loro rapporto con il diritto – le religioni si possano considerare tutte omogenee.

Per distinguerele e raggrupparle, si dovrebbero prendere le mosse da ciò che il fedele domanda a Dio, e da ciò che offre da parte sua.

Pare di poter identificare un primo gruppo di esperienze religiose, in cui Dio concede vantaggi terreni (posterità, ricchezza, vittoria sui nemici), e il fedele – in conformità di un sinallagma – offre a Dio beni economici (animali, offerte). È questo, ridotto all’osso, lo schema della religione di Abramo, della religione olimpica greca, della religione romana capitolina. In lingua latina la fides, virtù tipica del debitore, è altresì lo stato caratterizzante del devoto, e il suo venir meno cancella il legame fra il devoto e il Dio. E il devoto credit – cioè è creditore – nei confronti della sua invisibile Controparte, sul cui adempimento non sono concepibili dubbii.

Un secondo gruppo di religioni offre al fedele sopravvivenza e salvezza eterni, nonché la sapienza. Il fedele deve meritarsi l’una e l’altra con una condotta appropriata. Metamorfosi e transustanziazioni impressionanti agevolano la salvezza del credente. Quest’ultimo spesso deve aderire ad un apparato dogmatico che, in queste religioni, è sviluppato. Possiamo mettere in questo gruppo, anzi tutto, la religione egiziana. Essa, nelle migliaia di anni della sua durata, ebbe modo di presentare aspetti multipli. Comunque, in essa domina la promessa della salvezza, rivolta da dèi giusti e credibili (Thot, Osiride, il dio Sole); e funziona un tribunale dei morti compiutamente strutturato e chiaramente descritto. Siamo nell’area delle religioni dell’etica e della salvezza. Appartengono al medesimo gruppo la religione mesopotamica dai Sumeri in poi, il momento della genesi recepito dagli ebrei, possiamo aggiungere i misteri greci e romani, le cui origini sono più antiche delle religioni olimpiche, destinate a rivaleggiare con essi.

Gli ebrei fecero concessioni a queste concezioni quando ritornarono dalla cattività. Invero, nella cattività gli ebrei deportati ebbero contatti significativi con i seguaci delle dottrine persiane. Ne fu influenzata la loro visione del monoteismo, l’angelologia, la demonologia, la fede nell’eternità dell’anima e nella resurrezione. I deportati ebbero la guida dei profeti; in quel clima Isaia, Michea, Asuf, odono Dio ripudiare i sacrifici, le feste, le riunioni, e prescrivere la giustizia, la pietà, l’umiltà, la bontà.

Appartiene al gruppo di cui parliamo il cristianesimo, molto meno l’Islam.

Altri fedeli si rivolgono alla religione senza troppo curarsi dei vantaggi terreni o eterni che essa potrebbe offrire. Essi chiedono alla religione di indicare la regola etica da seguire nelle circostanze in cui il fedele si trova, o di indicare quali motivazioni siano valide per le scelte che il fedele deve compiere ogni volta.
Il bisogno del fedele, la risposta della religione, la presenza di un apparato dogmatico più ricco incidono sul modo in cui la religione si pone, o pretende di porsi, nei confronti del diritto?

Rispetto a quest’ultima domanda, l’itinerario intrapreso fino a questo momento non sembra portare a traguardi significativi.

Distinzioni ispirate ad elementi più contingenti possono forse essere esaminate con maggior profitto. Parla al diritto la religione che contempla regole di condotta di origine rivelata; ma correremmo il rischio di fermarci alle apparenze se dicesimo che queste rivelazioni fioriscono nelle situazioni create dal sinallagma. Parla al diritto la religione che – per ragioni legate al rapporto fra Dio e l’uomo, o per ragioni contingenti – vuole un potere religioso centrale ben strutturato e ubbidito; da questo punto di vista, le diverse confessioni cristiane hanno connotati non identici.

Forse le ultime domande ora poste hanno suscitato l’attesa di risposte che poi non si sa come formulare.

Le figure soprannaturali che hanno interessato, ammaestrato e consolato l’uomo sono molteplici e diversissime. È certo che esse, rivolgendosi al diritto, non hanno parlato tutte il medesimo linguaggio. Ma è da scoprire se ogni singola forma di soprannaturale – e, in specie, di religiosità – sia più incline, o invece meno propensa, a pretendere dal diritto l’adeguamento ai suoi propri ammaestramenti.

9. Il soprannaturale e la qualità del diritto

La teologia può glorificare Dio onnipotente, dotato di potestà totale anche nei confronti del Suo nemico, può vedere in ciò che è terreno un’opera da Lui voluta per la propria gloria, ovviamente perfetta, e nell’uomo una creatura conformata ad immagine e somiglianza del Creatore.

Una visione teologica di questo tipo può saldarsi armoniosamente con una speciale concezione del diritto. Il diritto – purché concepito e dettato in conformità dell’ispirazione divina, e facendo ricorso alle capacità concesse da Dio all’uomo – potrebbe essere un complesso di norme sublimi; la devianza sarà indegna dell’uomo etico, la pena giuridica sarà l’istituto che rende effettivo il benefico legame tra la norma e l’uomo.

Ma il discorso teologico può essere diverso. Così è, se si pone che il Personaggio soprannaturale primario ed etico sia contrastato da un Rivale, dotato di poteri demiurgici – inferiori, ma comunque paragonabili a quelli del Dio primo creatore. Se si pone questa antinomia metafisica, resta allora da vedere con quale configurazione del diritto essa si saldi meglio. Per quanto ne so io, nel sapere occidentale manca un filone di ricerca rivolto al diritto nella visione di Zoroastro e, poi, dei suoi seguaci, un filone rivolto al diritto nella concezione di Mani, un filone rivolto al diritto in tutte quelle ricostruzioni in cui si sono composte in qualche modo l’idea cristiana e la rappresentazione antinomica: dalla gnostica alla nestoriana, dalla pauliciana alla bogomila e alla catara.

Certo è che, se un Dio buono ha creato i soli spiriti, e invece procede da un demiurgo malvagio, rivale di Dio, tutto ciò che è materiale, in specie i corpi dei viventi; se la procreazione rovinosamente permette a un corpo di imprigionare uno spirito; se il potere umano (e l’istituzione) gratificano la persona terrena e corporea, e non lo spirito; se tutto ciò è vero, allora non è vietato demonizzare il potere terreno e l’istituzione; e anche più sarà possibile demonizzare il diritto soggettivo, presidio di pretese egoiste, rivolte a vantaggi terreni (mentre forse il dovere, mortificante, legato alla rinuncia, potrebbe vedersi come un incoraggiamento alla virtù).
Tra i due estremi, visioni intermedie sono possibili.


Ecco, alternativamente, un diritto che astrattamente potrebbe essere perfetto, ma è ingiusto e squilibrato perché l’imperfezione umana pone limiti alla chiaroveggenza, alla capacità di giustizia e al discernimento del legislatore.

L’antinomia metafisica ha bisogno di definizioni dogmatiche e visioni lucide, e inserisce le une e le altre in religioni dove le verità sono chiaramente formulate ed identificate. Ma un sentimento vicino alla visione antinomica, una percezione poco determinata nei suoi contorni e perciò vaga, ma tuttavia densa e capace di penetrare profondamente negli umori dell’uomo, può appartenere anche a culture o a individui lontani dalla dottrina di Zoroastro. Questo discorso vale per ogni concezione marcatamente ascetica. Questo stesso discorso vale per ogni visione pessimistica dell’uomo, e per ogni visione pessimistica del diritto. Il potere, l’istituzione possono essere visti come fatalmente oppressivi. La norma, generale e astratta, può essere vista come fatalmente formalista, come predisposta a favore di chi saprà furbescamente sfruttare i cavilli. L’esercizio del diritto può essere visto come l’accademia dell’egoismo e dell’indifferenza per gli altri. Il poliziotto, il carnefice, l’armato, l’esattore saranno visti come l’espressione di un sistema che distingue e contrappone chi senza merito prevale sugli altri e chi senza colpa subisce (parlando di questo temi, il pensiero va a Tolstoj). Di un pensatore dedicatosi a Dio, sicuramente rispettosissimo dell’autorità laica, si ricorda che puntualizzò che «rechter Jurist, böser Christ».

Il filosofo, lo psicologo, l’artista, lo storico delle religioni potrebbero interessarsi a questi temi, alla pari con l’antropologo.

La storia ci tramanda il ricordo di personaggi che per primi dichiararono di voler escludere determinate conclusioni e ammettere altre in base ad argomentazioni. Questa tecnica è il modo di ricercare il falso e il vero; e i personaggi in questione furono i sofisti, anche se i sofisti dissero di cercare non già il vero ed il falso, ma il dimostrabile ed il non dimostrabile.

L’inizio della distinzione fra vero e falso è più remoto dell’epoca dei sofisti.

La nascita di una dottrina della verità si lega al soprannaturale.

L’uomo del soprannaturale ha un ascendente sui membri della comunità, ed è creduto quando parla loro di cose nascoste, cui egli solo ha accesso.

Un giorno la società diventata complessa ebbe bisogno di cementare regole di condotta severe e innaturali (prelievi tributarii, subalternazioni, lavoro coatto), programmate da un vertice sociale onnicompetente, ed ebbe bisogno di ottenere che gli armati obbedissero a quel vertice.

È quello il momento in cui tutta la pittoresca varietà degli uomini del soprannaturale si compone in una grandiosa casta sacerdotale che opera in modo coordinato, e sponsorizza il potere imperiale; e, a tal fine, deve parlare alla comunità, e convincerla.

Per convincere la comunità, deve appellarsi ad una Verità, che ha acquisito accedendo alle cose nascoste.

Detto altrimenti: quando alla magia disorganica di singoli stregoni, maghi e fattucchieri si sostituisce una ordinata casta di operatori soprannaturali, questi sacerdoti incominciano a creare una sapienza, cioè una dottrina del soprannaturale che si estende anche a tutto ciò che oggi figura come scienza universitaria.
Ciò pone per la prima volta in modo consapevole un problema di vero e di falso.
In qualche modo, l’uomo aveva posseduto da tempo immemorabile un’idea del vero e del non vero. Quel fruscio fa dire a quel cacciatore che un cinghiale è vicino, e l’altro cacciatore vede meglio, e gli dice che non è vero. Ma la verità che emerge in queste esperienze laiche ed empiriche non si istituzionalizza.
La verità acquista caratteri di permanenza (ciò che è vero è sempre vero), di rilevanza sociale (se semini il grano nella sabbia non cresce nulla), di trascendenza rispetto all’uomo quando si sposa al sacrale.
Quando la comunità diventa impero, la verità si istituzionalizza. Si distingue allora il Vero dal falso. Si distingue – cosa gravida di conseguenze – il credente dallo scettico.
Menti umane si pongono, per la prima volta, l’obbiettivo di comporre un corpo di verità coerenti e permanenti, capaci di spiegare globalmente il reale. Viene allora istituzionalizzata, accanto alla verità, la figura dell’errore.
Per la prima volta qualcuno ha il potere – sublime e tremendo – di decidere e proclamare cosa sia la verità e cosa sia l’errore.
La verità si incrementa. Il soprannaturale riversa sugli uomini doni che non hanno mai fine. La matematica, l’architettura, la medicina e veterinaria, la botanica, l’astronomia, per tacere della metallurgia e della chimica, progrediscono senza pause. E si fonda su basi solide una scienza del divino, una scienza dell’anima e della morte, un’etica.
La verità deve essere difesa. Bisogna preservarla dalla profanazione. Una parte di essa è per sua natura esoterica. Bisogna dunque vietarne la conoscenza a chi non vi ha titolo, all’uomo comune. Una parte della verità viene nascosta perché riflessioni validissime muovono il dileggio in chi non è capace di apprezzarle, così come è accaduto a chi per primo ha detto che la terra è rotonda. La verità va difesa da discussioni buone solo ad ingenerare il dubbio, l’incredulità. La verità arcana è comunicata dal vecchio al giovane all’interno della casta di coloro che vi hanno accesso, la casta sacerdotale. Il vero è immutabile, quindi fermo, e per essere utilizzato deve prima essere rinvenuto in qualche idoneo repertorio, che esiste fuori e prima dell’uomo, e cui l’uomo del soprannaturale accede. Di queste visioni si sente l’eco in Platone e nella teoria (che egli aveva importato dalle culture orientali) dalle idee che preesistono all’uomo e cui l’uomo accede con una visitazione che gli riserva la conoscenza del vero e del reale.
Una parte della verità deve invece motivare tutta la condotta della comunità, bisogna dunque diffonderne la conoscenza al massimo.
Assmann colloca la distinzione fra il vero e il falso nella fase del monoteismo: il Dio unico è la verità, gli idoli sono la menzogna. Gli esempi storici disponibili (l’Egitto, l’India, la Roma dei Cesari) consentono peraltro la versione qui sopra formulata, anche fuori dell’area del monoteismo.
La verità dovrà legarsi a parole precise e determinate. Potranno essere parole oscure, vaghe. Ma dovranno essere parole ben determinate, perché la verità è uguale a se stessa e la sua formulazione deve essere in ogni caso uguale a se stessa. Una garanzia più assoluta di questa identità della parola nel tempo e nello spazio è data dalla scrittura. La verità rivelata nasce orale, ma viene messa per scritto. E l’attenzione si concentra sul libro, sulla (sacra) scrittura.
La verità istituzionalizzata è la negazione della libertà di pensiero. La scrittura è l’arma della verità istituzionalizzata. Non stupiamoci se l’antropologo (Lévi-Strauss) ammonisce che al momento della sua apparizione la scrittura potrebbe favorire lo sfruttamento degli uomini, prima che la loro illuminazione.
Se fino a seimila anni fa l’uomo viveva in uno stato di (più o meno felice) non sapere, 5.500 anni fa egli ha incominciato a conoscere esotericamente, con un’adesione al vero che andava di pari passo con la mancanza di un vaglio critico razionale.

Or è due millenni e mezzo abbondanti, qualcosa è cambiato.

Un sapere vistoso aveva potuto accumularsi all’interno degli imperi dell’età del bronzo. Il sapere elaborato negli imperi era arcano e non destinato all’esportazione. Ma sull’arco dei millenni non potevano non avvenire fughe di notizie.

Verità giungono nell’Ellade dall’India e dall’Egitto. Conquistano spiriti capaci di pensieri profondi, come Pitagora e Platone. Ma nell’Ellade il rischio che si corre pensando, parlando e insegnando è relativo (non si traggano generalizzazioni impropre dall’esempio di Socrate). E perciò gli Elleni sottopongono i brandelli di sapienza caduti nelle loro mani a un vaglio logico. Nasce un sapere filtrato attraverso la critica.

Da allora, e lungo l’arco di 2.500 anni, un sapere garantito da un’autorità e un sapere appoggiato sulla critica sono convissuti. La storia del primo si sposa alla memoria dei grandi speranze, di roghi, di martirii e di genocidi (la vicenda di Galileo, nel quadro, appare come una disavventura mitissima). La storia del secondo si sposa alla memoria di grandi speranze, di tentativi falliti, di insegnamenti universitari asinini, di riconoscimenti negati; e si sposa anche al ricordo di qualche progresso che ha mutato il volto dell’umanità e del pianeta.

L’istituzione imperiale mediorientale si diffonde. Con Alessandro e poi con i Romani la Grecia e Roma fanno parte dell’area sovrastata dall’impero, o da un impero. È un impero che, transitariamente, non dispone di apparati dogmatici asfissianti. Ma è un impero. E l’impero forse non crea il clima ideale per la caccia alla verità.

Plinio il vecchio traccia invero con convinzione un quadro pessimistico: quando l’impero non era universale, le realtà locali, con le loro ristrettezze, erano sospinte alla ricerca e all’intelligenza. La concorrenza tra i poteri locali pungolava la profusione dei mezzi.

E poi?

Il sapere garantito dall’autorità e il sapere privo di garanzie che non siano quelle della sperimentazione e della logica sono convissuti e convivono. Nella cultura occidentale, la verità rivelata limita la propria competenza alla conoscenza del soprannaturale e all’etica, salva una presenza episodica nell’area del politico, che si concreta in suggerimenti rivolti al legislatore.

Un episodio melanconico merita peraltro di essere rievocato.

In un momento in cui la presa della rivelazione sul politico era diventata marginale, ecco che nuovi schieramenti umani, non dissimili dalle tradizionali comunità di credenti, hanno preso possesso di una verità, e l’hanno proclamata; la fede li ha resi attivi; essi si sono procurati il potere politico, hanno preso a controllare il pensiero dei membri della comunità, hanno represso l’errore e difeso la verità. Questi schieramenti hanno assunto la forma del partito politico unico. Qualche decina di milioni di morti figurano nel bilancio di questa esperienza, occorsa il secolo scorso, tra il 1917 e il 1989.
Class Actions in Italy: A Farewell to America

GIORGIO AFFERNI*

1. INTRODUCTION

Class actions became available in Italy beginning in January 1st, 2010. According to the Osservatorio antitrust of the University of Trento, so far only forty class actions have been filed. Of these forty class actions, three have been decided by a court on the merits, sixteen have been declared non-admissible (the equivalent of denial of certification), and twenty-one are still pending. Of the twenty-one class actions still pending, nine have been admitted. The other twelve are still in the admissibility stage. 2

2. THE LIMITED AVAILABILITY OF CLASS ACTIONS

Filing a class action is subject to some limitations. The first limitation is that only consumers have standing. Any consumer may file a class action personally, through a consumers’ association or a committee of consumers established expressly to file that class action. In practice, almost all class actions have so far been filed through and financed by consumers’ associations. Class actions are not cost effective for consumers.

A notable exception is the De Zordo vs. Quadrifoglio class action. In this case, an individual consumer filed a class action personally against a private company charged with cleaning the streets of Florence. The plaintiff complained that the defendant breached its contract with the municipality (and therefore with the citizens of Florence at large) on the occasion of an exceptional and unprecedented snowfall. However, Mrs. De Zordo was not a common consumer. She was a member of the city council, who was obviously more interested in the political return of her judicial initiative than in recovering non-pecuniary damages caused by the snowfall.

The second limitation to the availability of class actions is that they may be filed only for certain infringements: infringements of contractual rights, product liability, unfair commercial practices, and infringements of antitrust law. Recently, class actions have also been made

*J.D. (Genoa State University ’00); LL.M. (Harvard ’02); S.J.D. (Pisa State University ’06); Lecturer in Private Law and European Private Law at the University of Genoa; Attorney, Studio Legale Afferni Crispo & C. - Genoa and Milan.

1. See Italian Consumers Code, Par. 5, Art. 140-bis (amended 23 July 2009). For an overview of the recent developments and case law on Italian class action, see Giorgio Afferni, Recenti sviluppi nell’azione di classe [Recent Developments in the Class Action], 29 CONTRATTO E IMPRESA 1275-1292 (2013).
2. See Azioni Di Classe Incardinate Nei Tribunali Italiani [Class Actions filed in Italian Courts], OSSERVATORIO ARC (Last Visited Mar. 25, 2015), http://www.osservatorioantitrust.eu/it/azioni-di-classe-incardinate-nei-tribunali-italiani/. All orders and decisions of Italian courts on class actions cited in this article are available in the database of the Osservatorio.
3. CODICE DEL CONSUMO [Consumers Code], par. 5, art. 140-bis sec. 1 (It.).
4. See Trib. Florence, 15 Luglio 2011, Foro. It. 2012, V, 137 (It.) (the decision of the Tribunal not to admit this class action was confirmed by order of the Court of Appeal of Florence, 27 Dec. 2011).
available in cases of liability of providers of services.\textsuperscript{5} For all other infringements, class actions are not available. For example, class actions may not be filed in case of environmental liability. It is disputed as to what extent class actions may be filed in case of fraud on financial markets.\textsuperscript{6} The third limitation is that class actions may be filed only for claiming restitutions or damages.\textsuperscript{7} In case law, it was unsettled as to whether class actions could be filed to establish infringement only, leaving the issue of restitutions or damages to later individual judgments (so-called bifurcation). In the case \textit{Codacons vs. Unicredit}, the Tribunal of Rome held that, similarly to individual actions, class actions could be filed to establish infringement only.\textsuperscript{8}

In the case \textit{Codacons vs. Intesa San Paolo}, on the contrary, the Court of Appeal of Turin held that class actions to merely establish infringement are not admissible.\textsuperscript{9} The Court of Appeal of Turin argued that, because consumers that opt-in a class action loose the right to file separate individual actions for the same infringement, should merely declaratory class actions be admitted, consumers opting-in would have no opportunity to collect damages at a later stage by filing individual actions for restitutions or damages.

Finally, the legislator confirmed that bifurcation is not admissible by amending Article 140-bis of the Italian Consumer Code specifying that “class actions deal with the establishment of the infringement and the condemnation to damages and restitutions in favor of consumers” (emphasis added).\textsuperscript{10}

As far as damages are concerned, it is disputed as to whether class actions may be admitted only to recover pecuniary damages or to recover non-pecuniary damages as well. Contrary to French law, Italian law does not take an explicit position against the availability of class actions for non-pecuniary damages.\textsuperscript{11} However, it is well established in Italian case law that courts must take into due consideration all relevant individual issues when evaluating the amount of non-pecuniary damages to be recovered (the so-called “personalization” of non-pecuniary damages).\textsuperscript{12}

On the other hand, as we will see, class actions in Italian law may be admitted only if the Tribunal has established that all relevant issues are common to the class so that no individual issues will need to be tried. Therefore, it could be argued that class actions for non-pecuniary damages should never be admitted, because they always involve the trial of issues that are individual to each class member. However, this extreme view has been rejected by Italian courts that have admitted several class actions were non-pecuniary damages were claimed.\textsuperscript{13} A more balanced view is to distinguish according to the kind of non-pecuniary damages that are claimed.

\textsuperscript{5} Article 6 of the Law Decree, 24 January 2012, no. 1, converted with amendments into Law, 24 March 2012, no. 27. \textit{See Remo Caponi, Azione di Classe: il Punto, la Linea e la Discontinuità [Class Action: The Point, The Line, and The Discontinuity], 137 FORO ITALIANO V-149 (2012); Claudio Consolo & Beatrice Zuffi, L’AZIONE DI CLASSE EX ART. 140-BIS COD. CONS. [THE CLASS ACTION EX ART. 140 BIS OF THE CONSUMER CODE], (2012).}

\textsuperscript{6} \textit{See Giorgio Afferni, Recent Development on Prospectus Liability in Italian Law, EUROPEAN BANKING & FINANCIAL LAW REVIEW, 476 ff. (2011).}

\textsuperscript{7} \textit{Codice del Consumo [Consumers Code], par. 5, art. 140-bis sec. 1 (It.).}


\textsuperscript{9} App. Torino, 27 Ottobre 2010, Foro it. 2011, V (It.). This view was also supported by Mario Libertini & Maria Rosaria Maugeri, \textit{Ancora sul Giudizio di Ammissibilità dell’Azione di Classe [Once More on the Admissability of Class Action]}, 27 NUOVA GIURISPRUDENZA CIVILE COMMENTATA I-522 (2011).

\textsuperscript{10} \textit{See Codice del Consumo [Consumer Code], par. 5, art. 140-bis (It.) (amended 24 March 2012).}

\textsuperscript{11} \textit{See Code de Commerce [C.COM.][Commercial Code] art. L423-1 (Fr.).}


\textsuperscript{13} \textit{See Trib. Naples, 18 Febbraio 2013, Foro. It. 2013, I, 1719, 138 (It.).}
If the lead plaintiff seeks recovery of non-pecuniary damages that are common to all class members, the class action should be admitted. If, on the other hand, the lead plaintiff seeks compensation of non-pecuniary damages that are individual to each member of the class, the class action should not be admitted.\(^\text{14}\)

For example, in the case *Altroconsumo vs. Trenord*, train commuters of the Milan area filed a class action against a local railway undertaking because of an exceptional and unprecedented chain of delays and cancellations due to a software failure. Lead plaintiffs claimed reimbursement of part of the price paid for the travel pass and compensation of non-pecuniary damages typically suffered by all members of the class, such as the common discomfort caused by recurring delays and cancellations. They did not seek compensation of individual non-pecuniary damages, such as the sorrow for not having been able to attend a wedding party because of the delay of the train. In this case, the decision of the Court of Appeal of Milan to admit the class action is convincing.\(^\text{15}\)

A class action should not be admitted if the lead plaintiff seeks compensation of non-pecuniary damages that are too diversified and are not necessarily common to all members of the class. For example, a product liability class action should not be admitted if the plaintiff seeks compensation of pain and suffering and the defect of the product has caused different kinds of harm to different members of the class. In this respect, the class action *Codacons vs. Policlinico Gemelli* may be mentioned.\(^\text{16}\) In this case, a group of mothers that gave birth in a public hospital in Rome at a time when it was established that an obstetrician had an infective disease (tuberculosis) filed a class action against the hospital claiming compensation of non-pecuniary damages. The Tribunal of Rome admitted the class action defining the class to include all mothers that gave birth and infants that were born in that hospital during the period affected by the risk of tuberculosis. The class included both mothers and infants that were infected by tuberculosis and mothers and infants that were not infected by this disease, but simply feared for a certain time that they were infected. The decision of the Tribunal of Rome to admit the class action with such definition of the class is not convincing. It is clear that in this case the issue of damages (as the issue of causation) is not common to all members of the class.

As a consequence of its decision to admit this class action, the Tribunal of Rome will need to run separate trials for each member of the class (lead plaintiffs and consumers opting-in). However, it could be noted that in this case the potential class was very small. Therefore, it is possible that the Tribunal of Rome considered the class action manageable even if the issues of damages and causation were not common to all members of the class.

### 3. “EMPTY CLASSES”: THE BURDEN OF OPTING-IN

Italian class action is an opt-in class action. The decision of the court is binding only for consumers that are members of the class opt-in.\(^\text{17}\) When the claim of each individual consumer is small, the key question is how many consumers will take the burden of opting-in. In this respect, the Italian experience so far confirms the skepticism of American legal literature on opt-in class

---

17. *Codice del Consumo* [Consumer Code], par. 5, art. 140-bis para. 14 (It.).
The number of consumers opting-in is very small, almost insignificant. An extreme (but instructive) case is Codacons vs. Voden Medical Instruments. In this case, the Tribunal of Milan admitted a class action brought by one individual against the distributor of a flu shot because of an alleged unfair commercial practice. After the class action was admitted the plaintiff gave due notice thereof inviting all consumers that bought the same flu shot to opt-in. Only one consumer opted-in!

Finally, the Tribunal of Milan dismissed the case because the defendant proved at trial that the plaintiff, who was a lawyer of a consumers’ association, did not buy the product for consumption purposes. It was proven that she bought the flu shot just a few hours before she went to the notary to give the power of attorney to the consumers’ association to file the class action. The peculiar part of the story is that even the only other individual that opted-in was not a consumer, but was also a lawyer, who wanted to “have a look” to this new procedural instrument.

The number of consumers opting-in is negatively affected also by the administrative difficulties of doing so. The law specifies that consumers may opt-in without the assistance of a lawyer and also by fax or certified email. However, in the case Altroconsumo vs. Banca Intesa, the Tribunal of Turin held that in order to be valid the declaration of opting-in must be notarized. In this case, a consumers’ association filed a class action on behalf of three consumers against Banca Intesa for unfair overdraft commissions. After the class action was admitted 104 consumers opted-in: ninety-eight consumers opted-in through Altroconsumo; six opted-in directly in court bypassing the consumers’ association. The Tribunal of Turin held that the declaration of the ninety-eight consumers opting-in through Altroconsumo was not valid because their request was not duly notarized. Of the other six declarations of consumers that opted-in directly in court, only three were admitted because of other formal reasons. Ultimately, the class action was decided in favour of the plaintiffs and Banca Intesa was required to compensate the three lead plaintiffs and the three consumers that opted-in total damages for about $1.500.

4. “CONSUMPTION” OF THE CLASS ACTIONS: MANDATORY JOINER AND PRECLUSION

Italian law provides that only one class action may be decided for every single infringement. All class actions that have been filed for the same infringement must be joined and decided by the Tribunal in front of which proceedings were started first. After the term for opting-in has expired, no new class action may be filed for the same facts (so-called “consumption” of the class action). Therefore, before expiration of this term, any consumer that claims to have been harmed by the same infringement may choose to opt-in the class action that has already been filed by another consumer (typically through a consumers’ association) or to

21. CODICE DEL CONSUMO [Consumer Code], par. 5, art. 140-bis para. 3 (It.) (emended 24 January 2012).
23. CODICE DEL CONSUMO [Consumer Code], par. 5, art. 140-bis para. 14 (It.).
file an autonomous class action that will be joined with the class action that has already been started. After this term has expired this consumer may only bring a separate and autonomous individual action, being no longer able to opt-in or to file an autonomous class action for the same facts.

As a consequence, there is at least in theory some space for competition among consumers or consumers’ association, in the sense that if consumers are not confident about the ability of the lead plaintiff or of the consumers’ association that is acting on his behalf to adequately represent the interest of the class, each consumer may file an autonomous class action. In this respect, the Trenord case may be mentioned. It will be recalled that, in this case, consumers were complaining about an extraordinary and unprecedented chain of delays and cancellations against a railway undertaking. For these same facts, three consumers’ association filed separate class actions: Altroconsumo, Codacons, and Codici. Of these three class actions only two have been admitted (those filed by Altroconsumo and Codici). The two surviving class actions are still pending in front of the Tribunal of Milan. They have not been joined yet, but according to the law should be joined in the near future.

5. REQUIREMENTS FOR THE ADMISSION OF CLASS ACTIONS

In order to be admitted the class action must satisfy the following requirements: (a) it must not be manifestly ungrounded; (b) the rights claimed by individual consumers must be homogeneous; (c) there must be no conflict of interests between the lead plaintiffs and other members of the class; (d) the lead plaintiffs must seem capable of adequately representing the interests of the class.25

Differently from US class action, the Italian class action foresees a preliminary assessment on the merits of the claim. A class action will not be admitted if the claim of the lead plaintiffs is deemed manifestly ungrounded at the preliminary hearing. It is generally held that this preliminary assessment must be made on the base of the maxim si vera sunt exposita, which implies that the Tribunal must assume, only for the purpose of admission, that what is alleged by the plaintiff is true.

In this respect, an interesting case is Codacons vs. British American Tobacco. In this case, a consumers’ association (Codacons) filed a class action on behalf of some consumers against a producer of cigarettes claiming compensation of damages to health caused by smoking. The Tribunal of Rome refused to admit the class action because, among other reasons, the claim was manifestly without merit. The Tribunal argued that from a certain time onward it has become common knowledge that smoking is harmful to health. Therefore, since all lead plaintiffs started to smoke after this time, they manifestly had no right to compensation for damages caused by smoking, because they acted at their own risk.26

25. CODICE DEL CONSUMO [Consumer Code], par. 5 art. 140-bis para. 6 (It.).
Among all these requirements of admissibility, by far the most difficult to meet is the requirement of homogeneity of the rights of individual members of the class. Since it is not entirely clear what homogeneity of rights really means, Tribunals have taken a functional approach. The rights of individual class members are homogeneous when the Tribunal is satisfied at the preliminary hearing that it will not be necessary to conduct separate trials for different members of the class, but, rather one single trial common to all members of the class. To this end, lead plaintiffs must show in the complaint or at the preliminary hearing that it will be possible to provide proof common to all members of the class of all requirements of defendant’s liability, namely proof of infringement, causation, and damages.27

In this respect, it may be noted that proof of infringement is normally common to all members of the class, assuming that the class has been defined to include only victims of the same infringement. Common proof of damages does not require that all members of the class have suffered the same and identical harm. It is sufficient that the Tribunal will be able to establish a formula to calculate damages, which is common to all members of the class. For example, in the case Altroconsumo and Casa del consumatore vs. Moby et al., the consumers’ associations Altroconsumo and Casa del consumatore filed a class action against some shipping companies for an alleged price-fixing cartel on the ferry lines to/from Sardinia.28 Defendants objected that the rights of the individual members of the class were not homogeneous because different members of the class paid different prices for different services (some travelled with a car, others with a motorbike; some slept in a cabin, others on the deck; some travelled on the weekends, others during the week; and so on). Lead plaintiffs counter objected that irrespective of all these differences it was possible for the Tribunal to find a formula to calculate damages common to all members of the class (e.g. a certain percentage of the price paid), because the cartel has caused prices paid by each individual consumer to raise of the same or of a similar percentage. According to lead plaintiffs it is also possible to form different subclasses to take into account any major differences between different subgroups of consumers (for example, a subclass of consumers that travelled with shipping company A and a subclass of consumers that travelled with shipping company B; or a subclass of consumers that have travelled with shipping company A on the ferry line y and a subclass of consumers that have travelled with shipping company A on the ferry line x; and so on). The case is still pending in front of the Tribunal of Genoa that has not decided yet on its admissibility.

As far as common proof of causation is concerned, it may be mentioned that lead plaintiffs should be allowed to rely on presumptions. For example, it is generally held that price-fixing cartels must be presumed to have increased prices actually paid by all consumers who purchased the cartelized product or service directly from the firm that took part to the cartel.29 It is also generally held that one must presume that all investors purchasing a security have relied

on the integrity of the market and that therefore in case of fraud-on-the-market investors would not have purchased the security had they been aware of the fraud. While these presumptions have been held in respect of individual actions, there is no reason to exclude that they could also be used by lead plaintiffs within class actions to provide common proof of causation, e.g. that the cartel caused harm to all members of the class or that all members of the class relied on the misrepresentation while purchasing the securities affected by fraud.

Finally, before admitting a class action the Tribunal must verify that there is no conflict of interests between the lead plaintiff and other members of the class and that the lead plaintiff appears to be able to adequately represent the interests of the class. As far as adequacy of representation is concerned, so far Italian case law has dealt only with the issue of lead plaintiffs’ financial adequacy. Consumers’ associations that are listed in the public registry of consumers’ associations are generally presumed to be able to adequately represent the interests of the class.

On the other hand, individual consumers that file class actions without the support of a consumers’ association may fail adequacy of representation. For example, in the Altroconsumo vs. Banca Intesa case, the Tribunal of Turin held at the admission stage that the power of attorney given by lead plaintiffs to the consumers’ association was not valid. Lead plaintiffs were considered to be in front of the Tribunal without the assistance of a consumers’ association. As it will be recalled, the lead plaintiffs in this case complained about the payment of an unfair overdraft commission. Therefore, the balance of their bank account was below zero.

On the basis of this consideration, the Tribunal found the lead plaintiffs to be inadequate to represent the interests of the class because they had no resources to finance the class action. The Court of appeal of Turin overturned this decision and admitted the class action, stating that the power of attorney given to Altroconsumo was valid and that this consumers’ association could adequately represent the interests of the class.

All admissibility requirements of the class action must be verified by the Tribunal by its own motion. This rule is not explicitly stated in the law. However, it follows from the fact that there is a public interest in verifying that such requirements are met before the class action is admitted. This view is coherent with the Recommendation of the European Commission on collective redress. It is also confirmed by the fact that in the Italian law the lead plaintiff of a class action must serve his complaint also to the public attorney that may choose to participate in the preliminary hearing on the admissibility of the class action.

6. PROCEDURAL RULES AT THE ADMISSION STAGE

The preliminary decision of the Tribunal on the admissibility of the class action is subject to immediate appeal. The party that is not satisfied with this preliminary decision does not need to wait until the final decision of the Tribunal on the merit of the case before he can challenge the decision on the admissibility. To keep the class action from slowing down, the law specifies

32. See App. Turin, 23 Settembre 2011, Foro it. 2011, V, 3422, 1236 (It.).
34. CODICE DEL CONSUMO [Consumer Code], par. 5 art. 140-bis para. 5 (It.).
that the appeal of the defendant against the decision to admit the class action does not stay the proceedings in front of the Tribunal.  

The *Corte di Cassazione* in the first and so far only decision of the Italian Supreme Court on class actions held that the decision of the Court of appeal, which denies admission of the class action (confirming or reforming the decision of the Tribunal) is not subject to further appeal in front of the Supreme Court. The reason given is that the decision of the Court of appeal does not prevent the lead plaintiff from filing a new class action against the same defendants for the same facts.

If the class action is not admitted the plaintiff must reimburse the legal expenses incurred by the defendant (the so-called looser pays or English rule). In addition, he must give adequate publicity to the decision of the Tribunal (e.g. through publication on newspapers). Therefore, bringing a class action is not only expensive (for the reasons that we will see below), but also risky.

If for the same infringement a judgment is pending in front of an administrative authority (such as the *Autorità Garante per la Concorrenza e il Mercato* - AGCM, the Italian competition public authority) or in front of an administrative court, the Tribunal may stay proceedings until the decision of the administrative authority or court is final. For example, in the first and so far only antitrust class action filed in Italy (*Altroconsumo and Casa del consumatore vs. Moby and others*), which was started in November 2011 as a reaction to an extraordinary and unprecedented increase in the prices applied by all ferry companies on the lines to/from Sardinia, the case is still pending at the admissibility stage because the Tribunal staid proceeding until the decision of the AGCM becomes final. This decision, which is pending in front of the *Consiglio di Stato* (the highest Italian administrative court), is expected to become final by the end of 2015. It is not clear how many consumers will still be interested at that point in opting-in to recover an overcharge of a couple of hundreds USD paid in 2011 (assuming that they have kept the ferry ticket to prove their right!).

Finally, it may be recalled that, in case of an infringement of EU antitrust law, if a decision of the European Commission is pending, the Tribunal must stay proceedings until the decision is final, because it may not decide a case contrary to what is established by the European Commission or Courts.

7. **NOTICE OF ADMISSION: “CLASS ACTIONS CEMETERY”**

If the class action is admitted the Tribunal must order the most appropriate public notice so that all consumers that are part of the class are informed of the action and the opportunity to opt-in. Typically the Tribunal will order publication on one or two national newspapers. Newspapers typically apply special tariffs for such publications, which are significantly higher than regular tariffs. Public notice of the admission of a class action may cost as much as $50,000 or even $100,000.

If the class action is finally admitted, these costs will be reimbursed by the defendant. However, until the case is decided, the lead plaintiff (or the consumers’ association the filed the action on his behalf) must pay these expenses ahead of time, which of course will not be reimbursed if the case is finally lost. If the lead plaintiff (or the consumers’ association acting on

---

35. *Id.* at para. 7.
his behalf) does not give public notice of the Tribunal’s decision to admit the class action, the action shall not be allowed to proceed.\(^{38}\)

As stated at the very beginning of this survey, according to the *Osservatorio* on competition law of the University of Trento, forty class actions has been filed so far, of which nine have been admitted and sixteen have been declared inadmissible. Of the nine class actions that have been admitted only three have been decided. Now, it is not clear why only twenty five of the forty class actions that have been filed have been decided on the admissibility and why only three of the nine class actions that have been admitted have been decided on the merits. One explanation is of course that Italian civil proceedings are too long. Another explanation is that the parties have settled the cases before or after the class action was admitted. Neither of these explanations is convincing (certainly not the explanation that cases have been settled, for the reasons I will discuss below).

In my opinion, especially after the class action is admitted and the Tribunal has ordered public notice of the admission, lead plaintiffs realize how high the costs of bringing forward a class action are with respect to the value of their claims or even to the aggregate value of the claims of all consumers that are likely to opt-in. Therefore, it may be expected that only national class actions that are filed by big consumers association (e.g. *Altroconsumo vs. Banca Intesa*) or local class action that have lower costs for public notice (e.g. *Maggi vs. Wecan Tour di Goa*, were the class was made of about twenty/twenty five consumers that bought a travel package to Zanzibar from a Neapolitan tour operator) are litigated until the decision on the merit. The remaining class actions, even after they are admitted, are abandoned and left to die until they are declared extinguished.

### 8. Decision on the Merit and Settlement

With the order admitting the class action, the Tribunal must: (a) define the class, establishing the conditions that consumers must satisfy to be able to opt-in; (b) set a deadline for giving public notice of admission; and (c) set an additional deadline - not exceeding 120 days from the expiration of the deadline public notice - for consumers to opt-in. Moreover, with the same or with a subsequent order, which may be modified at any time, the Tribunal may establish the course of the proceedings.\(^{39}\)

The decision of the Tribunal is binding on all consumers that filed the class action (lead plaintiffs) and on all consumers that opted-in. Consumers that did not opt-in may file an individual action for the same infringement. As mentioned, after expiration of the deadline for opting-in, no other class action for the same infringement may be filed. Pending the deadline for opting-in, any consumer may freely choose to opt-in the class action already filed or to file an autonomous class action, which will be joined with the first class action filed for the same infringement. Only in the latter case, does the consumer become a true party of the proceedings. As such, he is entitled to appoint its own lawyer and to appeal against the unfavorable decision of the Tribunal. On the other hand, as also mentioned, the consumer that filed a separate class action may be required to reimburse legal expenses incurred by the defendant if the class action

\(^{38}\) *Codice del Consumo* [Consumer Code], par. 5 art. 140-bis para. 9 (It.).

\(^{39}\) *Id.*
is finally rejected. Consumers that only opted-in may not be required to reimburse the legal expenses incurred by the defendant.\(^{40}\)

Typically, consumers filing or opting-in a class action seek compensation for damages. The law specifies that the Tribunal may award damages on an \textit{ex aequo et bono} basis, as is generally the case in Italian Law when it is certain that some damages have been suffered, but uncertain exactly how much.\(^{41}\) It is noteworthy that punitive damages are not allowed under Italian law.\(^{42}\) Therefore, consumers filing or opting-in a class action will only be allowed to recover compensatory damages for harm that they actually suffered.

Class actions may be settled. The right to settle belongs only to lead plaintiffs that, having filed the class action, are a true parties to the proceedings. Consumers that merely opted-in the class action may only choose to opt-in the settlement. Class action settlements are binding only on consumers that, after having opted-in the class action, opt-in in the settlement (they must opt-in twice!).\(^{43}\) On the other hand, settlements must not be authorized by the Tribunal. There are no available data on the number of class actions that have been settled so far. It would not be surprising if this number turns out to be zero. Under the present law, there is very little or no incentive for the defendant to settle a class action even after it has been admitted. On the one hand, for low value claims (\textit{e.g.} antitrust claims by consumers) the risk posed by the class action to the defendant is very limited because the number of consumers opting-in is very small.

On the other hand, for high value claims (\textit{e.g.} security class actions to the extent that they are admissible), the attractiveness of settlement is very limited because it will only bind consumers that opted-in the settlement. Consumers that opted-in the class action, but did not opt-in the settlement, regain the right to file separate individual actions for the same infringement.\(^{44}\)

9. **FINANCING THE CLASS ACTION**

The Italian Law on class actions does not provide for any specific provisions on the funding of the action. As is well known, consumers typically do not have an interest in funding a class action, because the costs of such actions are much higher than their expected benefits. More generally, self-interested consumers would always prefer individual actions to class actions, because they can reach the same result by investing less money and taking a lower risk.

Actually, in some cases, most notably those involving non-pecuniary damages, by filing a class action, instead of filing an individual action, consumers give up the opportunity to claim the full amount of the damage suffered, because the may only claim the part of damage that is common to all members of the class. Therefore, it cannot be expected that class actions will be funded by consumers.

It may also not be expected that class actions will be financed by law firms. Firstly, in Italy, as in most other European states, the “loser pays” rule applies. Therefore, law firms, in addition to anticipating costs, should also bear the risk of having to reimburse the legal expenses

\(^{40}\) Trib. Milan, 13 Marzo 2012, Foro it. 2012, V, 1909, 137 (It.) (held the only consumer that opted-in jointly liable with the lead plaintiff to reimburse the legal expenses incurred by the defendant.). App. Milan, 26 Agosto 2013, Foro it., V, 617, 136 (It.) (This court reversed the previous decision).

\(^{41}\) C.Con, \textit{supra} note 10 at art. 140-\textit{bis}, par. 12; Codice Civile C.c. [Civil Code] art. 1226 (It.).

\(^{42}\) See Cass., 8 Febbraio 2012, n. 1781, CORRIERE GIURIDICO 1070 (2012); Cass., 19 Gennaio 2007, no. 1183, DANNI E RESPONSABILITÀ, 1126 (2007). (In both cases the Italian Supreme Court denied the \textit{exequatur} to U.S. courts’ decisions granting punitive damages against Italian defendants.)

\(^{43}\) C.Con, \textit{supra} note 10 at art. 140-\textit{bis}, para. 15

\(^{44}\) \textit{Id}.
incurred by the defendant. Secondly, in Italy, as in many other European states, contingencies fees are not allowed.\(^{45}\) Therefore, law firms may not legitimately agree with consumers filing or opting-in the class action that whatever recovered on the base of a court decision or settlement will be shared according to a certain formula.

More generally, at least for the time being, class actions are not a good business for lawyers. In this respect, it is sufficient to consider the following. If the class action is admitted and finally won, the Tribunal will order the defendant to compensate legal expenses incurred by the plaintiffs. These legal expenses will be calculated by applying legal parameters that vary as a function of the value of the case.\(^{46}\) In case of class actions, these legal parameters foresee that the value of the case is equal to the sum of the claims of all consumers that filed the class action. The value of the claims of consumers that opted-in does not count. Thereafter, the applicable tariff may be multiplied by three.\(^{47}\)

Let’s take the Altroconsumo and Casa del consumatore vs. Moby case as an example, where two consumers’ associations filed a class action on behalf of seven individual consumers. The potential class is made of about two millions consumers. The lead plaintiffs are claiming compensation of 50\% of the price paid for the purchase of the ferry tickets for a total amount of about $2,000. Should they finally win the case, the Tribunal should order compensation of legal expenses of about $15,000. In these days, at least for small Italian law firms, this is certainly not a negligible amount of money. However, it is certainly not sufficient to create a new market for specialized law firms.

**10. MEANWHILE IN EUROPE** …

In the meanwhile, in the European Union other Member States are introducing or planning to introduce class actions with different features. France introduced damages class actions that may be filed only by certain consumers’ association on behalf of consumers. As the Italian class action, the French class action may be filed only for certain infringements, including antitrust violations.\(^{48}\) Also the French class action requires that consumers opt-in. However, while in the Italian class action, consumers may opt-in after the action is admitted and in any event before it is decided on the merits, in the French class action consumers may opt-in only after the decision of the court has become final.\(^{49}\) There are advantages and disadvantages to the French rule.

On the one side, consumers are encouraged to opt-in because they may do so when the case has already been won. On the other hand, the decision of the court may become final only many years after the infringement took place, with the consequence that consumers may not be any longer in the position to prove they are members of the class or may simply have lost any interest in opting-in especially if the value of their claim is small. Finally, it may be recalled that French class action is not available to recover non pecuniary damages.

England, on the other hand, is planning to introduce an opt-out class action for antitrust infringements only.\(^{50}\) More precisely, the court must decide according to the circumstances of the case if the class action may proceed as an opt-out or an opt-in class action. English antitrust

---

45. L. 31 dicembre 2012 n. 247, G.U. 18 gennaio 2013 n.15 (It.)
46. L. 10 marzo 2014, no. 55 G.U. 2 aprile 2014 n. 77 (It.)
47. Id. at art. 4 par. 10,
48. C.Com, supra note 11 at art. L423-1
49. Id. at art. L423-3
class action will be available not only for consumers, but also for businesses. In order to avoid the excesses of U.S. style class actions, it is planned to concentrate all cases in front of a specialized court, to exclude punitive or exemplary damages, and to avoid contingency fees agreement with lawyers.

On the whole, the English proposal seems well balanced and is expected to become the paradigm for European class actions, at least in the antitrust area.

Class actions have also been on top of the European Commission agenda for several years now. Not been able to find sufficient political support for the adoption of a hard law instrument (such as a regulation or a directive), the Commission published a recommendation. Member States are recommended (not obliged) to introduce a damages class action with some of the features of the Italian class action. The main difference is that the recommended EU class action may be brought not only by consumers, but also by businesses.

As in Italian Law, the recommended EU class action should be an opt-in class action. It should foresee a preliminary assessment on the merit. Punitive damages and contingency fees should not be allowed. A significant difference with the Italian class action is that, according to the recommendation, follow-on class actions (i.e. class actions that follow the starting of proceedings by a national administrative authority for the establishment of an infringement of EU law, e.g. an antitrust violation) may be filed only after the decision of the public authority has become final. This rule may also be found in the French law on class actions. If it is introduced also in Italian law, it will certainly have the effect of reducing further the number of consumers opting-in.

11. CONCLUSIONS: CLASS ACTION IN NAME ONLY

At the time the class action was introduced in Italy it seemed reasonable to state that the Italian legislator had been wise to approach such a powerful instrument with some caution, especially in the light of the perceived abuses in the U.S.A. Today, it has become clear that the Italian class action has been an almost complete failure. It is generally acknowledged that the reason for this failure is the opt-in requirement. As was anticipated by some American observers, opt-in class actions simply do not work with small value claims, where class actions are most desirable. The way forward is shown by the English proposal on antitrust private enforcement. An opt-out class action at the discretion of a specialized court, no juries and no punitive damages. Being a plaintiff lawyer, I leave open the issue of whether contingency fees should be precluded.

53. C.Com, supra note 11 at art. L423-17
55. Cf. Issacharoff & Miller, supra note 18 at 203
Eclipsing the Web: *Online Data Protection and Liability of Search Engines in the Google Spain Case*

ANTONIO DAVOLA*, ELISA STRACQUALURSI*

INTRODUCTION

The widespread availability of Internet raises increasingly complex issues in terms of information regulation. In fact, the amount of circulating information and the possibilities to track them is raising growing concerns, related both to business as well as personal freedoms, that were not even imaginable in the early Nineties, when the first legal provisions related to the protection of personal data were adopted by the European Union (hereinafter EU).

In May 2014, by “leveraging” a case that occurred within one of the EU Member States (namely, Spain, the main parties being a Spanish citizen, a Spanish media group, and the Google group), the EU Court of Justice (“EUCJ”) wrote a new page on the protection of the “digital rights” of individuals when operating in the internet, by delivering a decision in contrast with a concept of net neutrality behind which the web companies can freely operate.¹ Purpose of this case comment is to read together, and eventually understand, the main features of a sea-changing EU jurisprudence. In order to do this, we will try, first, to introduce the relevant EU legal framework, moving then to a more detailed analysis of the case law; some conclusive (as well as critical) remarks will also be provided.

I. MAIN FEATURES OF RELEVANT EU LEGAL FRAMEWORK

The legal basis of the EUCJ decision is represented by the Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (“Directive”), regulating the pivotal aspects of personal data processing in accordance with some general principles expounded in the preliminary recitals². In more detail, the Directive states that data processing systems must respect individuals’ fundamental rights and freedoms - notably the right to privacy - and contribute to their well

* Antonio Davola is a J.D. student at Sant’Anna School of Advanced Studies in Italy. His research interest involves intellectual property law, European private law and the analysis of the interplay between consumers’ protection and competition law.
* Elisa Stracqualursi is a J.D student at Sant’Anna School of Advanced Studies in Italy. Her research interests include private law and administrative law.

being, whatever the nationality or residence of natural persons may be. Moreover, since the object of the national EU Member States laws on the processing of personal data is to protect fundamental rights and freedoms, those laws and their harmonization can never determine a lessening of the protection accorded by the Directive.\(^3\)

Since its enactment, the Directive has been subject to additions and specifications aimed at outlining its characteristics in a more accurate way. A pivotal role in this process has been covered by the Data Protection Working Party (“DPWP”), established in accordance with Art. 29 of the Directive. The DPWP is an independent organ that gives opinions on controversial aspects of the Directive on a regular basis, in order to keep a public eye open on the most relevant issues and foster the adaptation of the Directive to new technologies.\(^4\)

---

3. In order to guarantee the effectiveness of the Directive’s provisions, any processing of personal data, within, the EU must be carried out in accordance with the law of one of the EU Member States, under the responsibility of a controller governed by the law of that State. With regards to this aspect, the legitimate jurisdiction must be determined through the geographic location of the controller’s establishment, independently from its legal form (according to Art. 2, a “controller” is the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data). Eventually, the fact that the processing of data is carried out by a person established in a third country must not reduce the protection of individuals provided for in the Directive. The Directive then identifies its scope in “processing of personal data wholly or partly by automatic means”, and in “processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system” (art. 3). The “processing of personal data” identifies any operation performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction of these data, whereas a personal data is defined as “any information relating to an identified or identifiable natural person” (art. 2). The national implementing legislations must also assure that personal data are processed fairly and lawfully, are collected only for specified, explicit and legitimate purposes in adequate, relevant and not excessive quantity; data must not be further processed in a way which is incompatible with their original collecting purpose. Lastly, data must be accurate and, where necessary, kept up to date in a form that permits identification of data subjects for no longer than what is necessary for the purposes for which the data were collected or processed (art. 6). In order to consider the data processing legitimate, it must be indispensable for the purposes of the legitimate interest pursued by the controller or by the third party to whom the data are disclosed. Such interests decade when they are overridden by fundamental rights or when they concern subjects who require protection (art. 7): in such cases the data subject will, in fact, have the right to object to the processing of the data (art. 14). Supra note 2.

4. Among the documents of the DPWP, it is important to draw the attention on the following opinions: See generally Data Protection Working Party, Opinion 1/2008 on data protection issues related to search engines, 00737/EN WP 148 (Apr. 4, 2008); Data Protection Working Party, Opinion 1/2010 on the concepts of “controller” and “processor”, 00264/10/EN WP 169 (Feb. 16, 2010); Data Protection Party, Opinion 8/2010 on applicable law, 0836-02/10/EN WP 179 (Dec. 16, 2010). Clarifying the scope of application of the Directive more in details, its Article 4 determines which national data protection law adopted pursuant to the Directive may be applicable to the processing of personal data.
Crucial information on the role of internet service providers can also be found in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. Furthermore, clarifications on the Directive stem from European case law: in the Lindqvist case, for instance, the EUCJ further specified the concept of personal data online processing and underlined how the Directive must be interpreted in compliance with the purpose of maintaining a balance between freedom of movement of personal data and protection of private life.

II. Facts

On March 5, 2010, a Spanish citizen resident in Spain, Mr. Costeja González, lodged a complaint against La Vanguardia Ediciones SL (La Vanguardia), Google Spain and Google Inc. (jointly, Google), through the Spanish Privacy Protection Authority (Agencia Española de Protección de Datos, “AEPD”). In more detail, Mr González claimed that the quest of his name on Google Search led to two 1998’s pages of La Vanguardia’s newspaper, mentioning him as related to a real-estate auction connected with attachment proceedings for the recovery of social security debts.

As the above mentioned proceedings had been fully resolved, and that link therefore was no longer representative of his financial condition, Mr. Costeja González demanded the removal or alteration of his data from La Vanguardia’s newspaper, or, at least, to exclude those results from the search engines of the newspaper. Furthermore, he demanded Google to remove or conceal his personal data from its research engine in order to avoid the appearance of any links to the above-mentioned webpage of La Vanguardia.

On one hand, The AEPD rejected the complaint referred to La Vanguardia by considering that the publication of the data had to be considered coherent with some dispositions given by the Spanish Ministry of Labour and Social Affairs in order to provide the maximum publicity to the auction.

On the other hand, the AEPD upheld the claim against Google. According to AEPD’s conclusions, search engine operators are subject to the data protection legislation and act as intermediaries of the data they provide: any owner of data subject will consequently have the right to ask the national institution responsible for the protection of personal data to order the removal and prohibition of access to that data from the search engine. The national authority will then be deemed to have protected such a right every time the dissemination of the data is deemed liable to compromise the fundamental right to data protection and the dignity of persons in a

6. In particular, the act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, has been qualified as data processing. See U. Dammann, S. Simitis, Datenschutzrichtlinie – Kommentar (Privacy Policy – Comment) 120 (Baden-Baden, Nomos, 1997).
broad sense, that is to say also comprehending the mere wish of the person to maintain that this data remains unknown.

Such order, furthermore, may be imposed regardless of the contextual obligation to erase the data or information from the website where it originally appeared.

Google brought actions against the AEPD’s decision. Since the resolution of the conflict depends on the interpretation of the Directive regarding technologies that became available after its adoption, the competent Spanish court (Audiencia Nacional) decided to stay the proceeding and filed a request to the EUCJ for a preliminary ruling.8

By doing so, the Audiencia Nacional raised some preliminary questions, i.e. asking on which basis it is possible to consider that a processor has an establishment in a given area in order to identify the national law to be duly applied. The Audiencia Nacional questioned, then, if the temporary storage of the information indexed by internet search engines may be regarded as “use of equipment” in the terms of Article 4 of the Directive.9 The Audiencia Nacional also questioned the EUCJ if the Directive must be applied in the Member State where the most effective protection of the rights of Union citizens is possible, independently from the existence of formalized connecting factors.

Apart from the preliminary questions, the Audiencia Nacional demanded some clarifications on the role of research engines as content providers in relation to the Directive, wondering if the activity conducted by Google might be considered as data processing, and, in the case of an affirmative answer, if the managing undertaking must be deemed as controller of the personal data contained in the web pages that it indexes.

Whereas Google was to be considered a data controller, the court then asked if the AEPD had the right to impose directly on Google Search the removal or withdrawal of personal data without concern about the erase of the data from the website where it originally appears. Otherwise, the obligation of search engines will be excluded when information is still kept available on the web page from which it originates.

The last issue raised by the Audiencia Nacional was related to the data subject’s rights: the court asked, in particular, if data subjects may directly address the search engine in order to avoid indexing of personal information published – even legally – on third parties’ web pages,

8. According to Art. 267 TFUE, the Court of Justice of EU shall have jurisdiction to give preliminary rulings concerning the interpretation of the treaties, the validity and interpretation of acts of the Institutions, bodies, offices or agencies of the Union. Consolidated Version of the Treaty on the Functioning of the European Union, Part 6, Title 1, Ch. 1, § 5, Art. 267, 2008 O.J. (115).
9. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data, 1995 O.J. (L 281) Art. 4. “Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where: […] (c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.” (emphasis added). Id.
when they think that such information might be prejudicial to them and they wish it to be consigned to oblivion.

III. ON THE GENERAL ADVOCATE AND EUCJ POSITIONS.

To paraphrase the above statements, the main questions referred to the Audiencia Nacional may be identified as follows:

1) Territorial scope of application of EU data protection rules;
2) Scope of application *ratione materiae* of the Directive;
3) Right to be forgotten.

Regarding the first group of questions, the EUCJ follows the position of the Advocate General (AG)^10. In fact, they both agree on the shortage of the “centre of gravity”^11 of the dispute as a criterion for a stronger protection in a certain Member State. On the basis of DPWP’s interpretation, the territorial scope of the Directive should be determined by the location of the controller’s establishment, the location of the means or the equipment being used (when the controller is established outside the EU).

The problem, however, is interpreting such provision in relation to Internet. In order to solve this problem, both the EUCJ and the AG take into account the keyword advertising and the provision of national web domains. The EUCJ in particular argues that, once verified that the entrepreneurial activity is located in Spain, the personal data processing will inevitably be carried on within the same Member State; this does not require, though, the processing to be carried out “by” the establishment concerned itself, but only “in the context of [its] activities”^12.

Moving to the second question, the EUCJ meditates on the role of the “controller” of the provider, here shifting away from the position of the AG. In fact, even if both affirm that Google, Inc. processes personal data, since it consists in “locating information published or included on the Internet by third parties,” the AG doesn’t believe that the Internet provider could be responsible for it^13.

---

10. Conclusion of Advocate General Jaaskinen delivered on 25 June 2013. Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2013 ECLI:EU:C:2013:424. It is worth remembering that the EUCJ is composed by one judge from each Member State, assisted by nine AG, whose role is to consider the written and oral submissions to the Court in every case that raises a new point of law, and deliver an impartial opinion to the Court on the legal solution. Although AG are full members of the court, they do not take part in the EUCJ’s deliberations.
11. *Id.* at 23, 52, 53.
13. *Id.* at 70. *See also* Lindqvist, 2003 E.C.R. I-12992.
Indeed, the presence of personal data remains unknown\textsuperscript{14}, and there is no “difference between a source web page containing personal data and another not including such data”\textsuperscript{15}.

Consequently, the AG doubts that relating the Internet provider to the person ‘determining the purposes and means of the processing of the personal data’ could lead to a truthful construction of the Directive. He affirms:

“In my opinion the general scheme of the Directive is based on the idea of responsibility of the controller over the personal data processed in the sense that the controller is aware of the existence of a certain defined category of information amounting to personal data and the controller processes this data with some intention which relates to their processing as personal data”\textsuperscript{16}.

According to the EUCJ, on the contrary, the Internet provider is responsible, since it is the operator that determinates the purposes and means of that processing. In fact, the Internet provider makes an overall dissemination of those data, “in that it renders the latter accessible to any Internet user”\textsuperscript{17} and organises information by using secret search algorithms.

Therefore, a “general derogation from the application of the Directive 95/46 in such a case would largely deprive the directive of its effects”\textsuperscript{18}.

In reference to the third group of questions, the EUCJ underlines that the principles and the objectives of the Directive are supposed to be the pillars also of the high level of protection deserved to the fundamental rights and freedom of natural persons.

For this reason, according to the EUCJ, it is possible to expand the boundaries of Article 12 so as to justify the possibility to remove from the list of results - when displayed by following a search made on the basis of a person’s name - the link to web pages, also in a case where that name or information are not erased from those pages\textsuperscript{19}. The Court adds, “in the light of the potential seriousness of that interference, it is clear that it cannot be justified by merely the economic interest which the operator of such an engine has in that processing”\textsuperscript{20}. However, once

\textsuperscript{14} The Internet provider is aware of the existence of personal data only as a statistical fact. Google Spain, C-131/12, 84.
\textsuperscript{15} Id. at 72.
\textsuperscript{16} As a support of this position he notes the approach of Article 29 Working Party and the article 47 of the Directive, he affirms also that an opposite opinion would entail Internet search engines being incompatible with EU law, “a conclusion I would find absurd”. The only situation in which there could be a responsibility for the internet provider are: a decision not to comply with the exclusion codes on a web page; internet provider does not update a web page in its cache despite a request received from website.
\textsuperscript{17} Case C-131/12, Google Spain, 36.
\textsuperscript{18} Id. at 30.
\textsuperscript{19} As we can read in para 84 of the decision, “effective and complete protection of data users could not be achieved if the latter had to obtain first or in parallel the erasure of the information relating to them from the publishers of websites”.
\textsuperscript{20} Case C-131/12, Google Spain, 81.
verified that such intervention has effects upon the legitimate interest of internet users\textsuperscript{21}, it is no more necessary the balance between rights\textsuperscript{22}: indeed, if there a right exists, that the information relating to one person should no longer be linked to his name, it is inevitable that it will override not only the economic interest of the the search engine operator but also the interest of the public in finding that information.

IV. SOME CRITICAL REMARKS ON THE DECISION

The EUCJ decision raised huge interest worldwide, due to its profound consequences on the design of the Internet. According to many comments, there is a good number of reasons for considering such decision controversial on both formal and substantial profiles. In fact, legal scholars\textsuperscript{23} (and the same Advocate General) pointed out that the EUCJ might have omitted a proper analysis of the relationship between the right to be forgotten, the public interest and freedom of the press, by simply embracing a literal interpretation of the Directive and posing a rigid hierarchy among potentially conflicting principles. Such an interpretation seems confirmed by the words that the EUCJ uses to clarify the meaning of Articles seven and eight of the Directive: the Court underlines that users’ right to protect their personal data “override, as a rule, not only the economic interest of the search engine operator but also the general public interest in having access to that information upon a search relating to the data subject’s name”.

It might be noted that, even considering the exemption of incurring in overriding public needs, posing such a rigid graduation and suggesting the substantial lack of necessity of a balance of interests, seems conceivably unjustified\textsuperscript{24}.

The decision of the Court, furthermore, seems arguable also for its policy’s implications. It should be noted that, since it is virtually impossible to identify an univocal criterion to distinguish which treatments of personal data are worthy of protection and which are not, research providers will be induced to deal with each request discretionally.

In order to prospect some possible scenarios we could hypothesize, e.g., that Google might decide to critically accept any request for cancellation, in fear of continuous refunds to data subjects.

\textsuperscript{21} Considering the rights we can find out from Council Directive 46/95, art. 7 & 8.
\textsuperscript{22} In fact the internet provider could not take advantage from article 9 of the Directive.
\textsuperscript{24} According to the jurisprudence of the Court, operating a balance of the various involved interests has always been an essential element for the judgement. See generally: Case C-101/01, Lindquist v. Sweden, 2003 E.C.R. I-12992, Case C-92/93-09, Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen, OJ C 129, joint cases C-465/00, 138/01 and 139/01, Rechnungshof v. Österreichischer Rundfunk et al. and Christa Neukomm and Joseph Lauermann v. Österreichischer Rundfunk, 20 May 2003, ECR 2003 I-04989.
It is equally plausible, though, that Google may reorganise its research algorithms in order to precautionary filter the information and differentiate its traceability depending on the location of those who carry out the research online and on the content of the information itself.

It is clear that such a solution arises complex problems in terms of governance and management of the international diffusion of data. Some legal scholars\(^\text{25}\) also noticed that the EUCJ seems unaware of the potential relations that can be delineated between the right to be forgotten – which is abundantly examined in the judgment – and the fundamental right of freedom of expression: since internet (and search engine services) permits anyone to divulge his contents to the general public through the display of information on the web, any interference with such a process might determine relevant constraints that also should be taken into account. According to European legal tradition, “freedom of expression may be restricted to protect the rights of others.”\(^\text{26}\) It is undisputed, though, that the restrictions can be imposed only on a case-to-case basis, operating a balance among the different rights that may conflict. It must be noted, with primary reference to the case here discussed, that freedom of expression includes the right to receive and pursue information, and inasmuch such rights are essential for individuals to freely develop their personalities.\(^\text{27}\) Since the research of data on the web intensely relies on the utilization of search engines, it is evident that any limitation on them will indirectly affect capability of web users to self-determinate.

Above all these considerations, it seems – and this is probably the most problematic aspect of the decision – that the EUCJ might have led the identification of the rights involved in the controversy more cautiously. In fact, its argumentations are essentially based on the contents of the right to be forgotten of the data subject: nevertheless, if the Court believes – as it seems – that Google conducts a data processing activity, it would have been probably more appropriate to refer to the right to objection to the processing of a data subject.

Indeed, if Google conducts a data processing activity, we should reasonably assume that, every time a new research is executed, this should be considered a new processing suitable for legitimate possible objections of concerned people.

Under this viewpoint, the protection of Mr. Gonsáles’ right to be forgotten, which involves the removal of already processed “static” data, is probably improper: what should be considered instead is the “dynamic” aspect of the utilization of data by Google and, consequently the safeguard of the data subject’s right to object in accordance with the Article 14 of the Directive. Moreover, if the EUCJ truly intended to protect the right to be forgotten of the data subject, the best solution would have been to legitimate the right of Mr. Gonsáles to proceed directly against the administrator of the web page. The problem is that, as AEPD correctly affirmed, the publicity

\(^{25}\) See Ioannis Igelzakis, The Right to Be Forgotten in the Google Spain Case (Case C-131/12): A Clear Victory for Data Protection or an Obstacle for the Internet?

\(^{26}\) Brendan Van Alsenoy, Aleksandra Kuczerawy & Jef Ausloos, Search Engines after ‘Google Spain’: Internet@Liberty or Privacy@Peril, ICRI RESEARCH PAPER 15 (Sept. 6, 2013).

requirements demanded from Spanish government precluded the removal of data from *La Vanguardia*. Once that the EUCJ agrees on the necessity of the maximum diffusion of the information, it seems plausible that the legal publicity requirement should prohibit the direct removal of the information from *La Vanguardia* as well as the indirect elimination through the search engine.

V. CONCLUSIONS

The EUCJ verdict in *Google Spain SL v. Agencia Española de Protección de Datos (AEPD) and González* could have been the occasion to settle once and for all the issue of the liability of the search engine: it will be, instead, harbinger of new significant controversies. The choice of qualifying search engines as data processors is probably irreconcilable with the possibility of granting to data subjects a protection in terms of right to oblivion: protection may granted, on such a premise, only in terms of objection to data processing. It is possible, though, that the decision's focus on the right to be forgotten might have been influenced by the considerable attention that legal scholars – and the public eye – are currently dedicating to the topic: nevertheless such an aspect might influence, in the future, the interpretation of the Directive in both the European and national context.

On the European side, the main contribution on the topic is currently the *Proposal for a Regulation of The European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) as for national legislations*\(^\text{28}\), where its Article17 provides a general arrangement for the right to oblivion.

If we analyse the paragraph 3 of Article 17, it seems that the European legislator pursued a perspective of balance between privacy and public interest, which is paradoxically similar to the one that the EUCJ excludes in the interpretation of the Directive 95/46: the interpretation rendered by the latter seems, therefore, not in harmony with the new intents of the legislator.

As for national legislations, many States decided to take a stand on the issue of data treatment and right to be forgotten: for instance, the Italian Government has recently predisposed the draft of a “Charter of Fundamental Rights in Internet”\(^\text{29}\). The document, which appears mainly programmatic, underlines the complexity of the data processing issue and the need of balance amongst the various interests involved: no need to say, its efficacy (together with the same chance to be effectively adopted) will obviously need to be assessed in the near future.

\(^{28}\). COM(2012) 11 final 2012/0011 (COD) C7-0025/12

\(^{29}\). Cf. the *Carta dei diritti in Internet*,
International Taxation: the Issue of Tax Evasion by Corporations

Valeria Camboni Miller*

I. INTRODUCTION

The issue of tax evasion by corporations in the United States and Italy is still a problem, despite the work done by both of the governments internally and by cooperating with each other internationally, namely by ratifying tax treaties between them. In Italy, the UIF (Financial Information Unit) created by public law n. 231 of 21 November, 2007, has the function of analyzing financial data and transmitting to investigative agencies noted suspicious activities that banks and other financial intermediaries at risk of money laundering must communicate, by law, to the UIF. The UIF is an independent agency, however, the Banca D’Italia regulates the UIF’s functions. In recent years, the number of reported suspicious activity increased steadily: 12,200 in 2007; 14,200 in 2008; 20,600 in 2009; 37,300 in 2010; and over 43,000 in 2011, due, in part, on the evolution of penal, administrative and fiscal laws. The fiscal evasion numbers in Italy are astronomical: 270 billion euros per year of undeclared taxable income, and 100-125 billion euros per year of missed revenue to the federal government. As UIF noted, fiscal evasion negatively impacts the economy of the country in which it occurs because it increases taxes for those who pay them, and reduces the funds for public works. The UIF contributes to the prevention of tax evasion by providing indexes and models of anomalies to banks and other financial intermediaries so that those intermediaries may become more proficient in identifying suspicious activities.

In the United States, U.S. Rep. Lloyd Doggett (D) introduced a bill called “The Fairness in International Taxation Act” to end the current practice of treaty shopping to avoid paying U.S. taxes. As discussed below, the United States has tax treaties with a large number of trading partners that reduce the amount of taxes that a United States - based entity owes on interest and royalties paid to a foreign parent. Since many of these foreign parent companies are set up in tax havens, these companies now bypass United States taxes by routing the payment through a tax-treaty country that then just transfers the funds to the tax-haven parent. This bill, introduced on

* J.D., William Mitchell College of Law, St. Paul, Minnesota, 2013; B.S., University of Great Falls, 2009. I would like to thank my husband Kevin R. Miller and my children Valentina A. Miller and Stefano R. Miller for their patience, support and encouragement throughout the article-writing process; Professor Anthony S. Winer of William Mitchell College of Law for his advice and guidance; Professor Jo-Ann Swanson of the University of Great Falls, English Department and Professor Sue Hart of Montana State University – Billings, English Department, for encouraging me to keep writing.

2. The Banca D’Italia is Italy’s Central Bank.
4. Castaldi, supra note 1, at 3.
April 15, 2013, would end that legal fiction and will allow the tax-treaty discount only if the parent company is actually located in a tax-treaty country.⁵

On May 1, 2013, a New York Grand Jury indicted a Swiss lawyer and a bank executive for their roles in allegedly assisting U.S. citizens with hiding assets in Swiss bank accounts, allowing the U.S. citizens to evade income taxes. The defendants allegedly advised their clients to evade U.S. tax laws by using several methods, including repatriating funds from foreign accounts by: (i) transferring the monies to intermediary offshore accounts held in the names of foreign corporate entities or trusts created for that purpose; (ii) structuring the sizes of transfers to avoid reporting obligations; (iii) making transfers to different individuals or entities to conceal the identity of the beneficial owner; and (iv) converting the offshore funds into expensive jewelry and thereafter transferring it to the account holder in the United States.⁶

II. FATCA

In an effort to eradicate tax evasion by corporations, the United States enacted the Foreign Account Tax Compliance Act (FATCA), which is an important development in U.S. efforts to improve tax compliance involving foreign financial assets and offshore accounts. It requires foreign financial institutions to report directly to the IRS information about financial accounts held by U.S. taxpayers, or held by foreign entities in which U.S. taxpayers hold a substantial ownership interest.⁷ FATCA was enacted, in part, as a response to scandals over the last few years involving U.S. taxpayers using offshore accounts and shell corporations to hide income and avoid U.S. federal income tax on such income.⁸

On January 17, 2013, the Treasury and the IRS issued the final regulations under FATCA, enacting Chapter 4 (§1471 – 1474) of the Internal Revenue Code and also making other modifications to the Code.⁹ The new regulations also added §6038D (26 U.S.C. § 6038D) to the Internal Revenue Code, which requires reporting any interest in assets over $50,000, and §1298(f) (26 U.S.C. § 1298(f)), requiring shareholders of a passive foreign investment company (PFIC) to report certain information.

The principal targets of FATCA enforcement are “foreign financial institutions” (FFIs). An FFI is a foreign entity that is engaged in a banking, brokerage, investment or similar business. Targeting FFIs seems sensible because U.S. persons are likely to hold offshore accounts with these types of institutions.¹⁰ In addition, related parties (generally at or above the 50% common ownership and control threshold) are treated as FFIs. So, the parent company of a

---

10. Supra note 9, at 13.
foreign bank, and its affiliates, are all FFIs.\textsuperscript{11} While the definition specifically includes typical financial institutions such as banks, investment banks and brokerage firms, it is broad enough to include private equity funds, hedge funds and insurance companies.\textsuperscript{12} FATCA also targets “non-financial foreign entities” (NFFEs), unless they provide information on their U.S. owners, if any. This prevents U.S. persons from simply setting up an offshore company to hold their overseas accounts.\textsuperscript{13}

On February 8, 2012, France, Germany, Italy, Spain, and the United Kingdom signed an agreement with the U.S. on FATCA implementation.\textsuperscript{14} Switzerland signed a separate agreement to implement FATCA on February 14, 2013.\textsuperscript{15} China - the world's second-largest economy - is seen by some tax experts as an important participant if the U.S. Foreign Accounts Tax Compliance Act, or FATCA, is to work effectively, especially in Asia. Treasury has negotiated FATCA deals, known as intergovernmental agreements (IGAs), with five countries (U.K., Denmark, Mexico, Ireland and, most recently, Switzerland) and negotiations with dozens more countries are under way. Talks with China have been hush-hush, but are occurring. "We have engaged with China on FATCA and will continue to do so," a Treasury spokeswoman said, declining to comment further. China is seen as a critical part of the FATCA puzzle not only due to the country's own global economic prominence, but also because of its sway over Hong Kong, a major money center.\textsuperscript{16} Currently, the U.S. has signed FATCA agreements with Denmark, Ireland, Mexico, Switzerland and the United Kingdom.\textsuperscript{17}

III. "JOINT STATEMENT FROM THE UNITED STATES, FRANCE, GERMANY, ITALY, SPAIN AND THE UNITED KINGDOM REGARDING AN INTERGOVERNMENTAL APPROACH TO IMPROVING INTERNATIONAL TAX COMPLIANCE AND IMPLEMENTING FATCA."

On February 8, 2012, the Treasury issued a Joint Statement from the United States, France, Germany, Italy, Spain, and the United Kingdom setting forth the framework for an intergovernmental approach to FATCA implementation in lieu of requiring FFIs established in those countries to report directly to the Service. The Joint Statement addresses concerns raised by governments, financial institutions and practitioners that FATCA reporting may violate various foreign privacy and data protection laws. The financial institutions from the five EU states would no longer have to conclude individual agreements with the US tax administration.

\begin{itemize}
  \item \textsuperscript{12} Id. at 2.
  \item \textsuperscript{13} Supra note 9, at 2.
  \item \textsuperscript{16} Patrick Temple-West, Yimou Lee. US – China Anti-Tax Evasion Deal Seen as Crucial, but Elusive, available at http://www.reuters.com/article/2013/03/13/usa-tax-fatca-idUSL1N0BYH9520130313.
  \item \textsuperscript{17} U.S. Department of Treasury, http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx.
\end{itemize}
(IRS), nor transmit to it the required information on the assets of US taxpayers that they manage.\(^{18}\)

In the Joint Statement, the five EU States agreed to adopt the necessary implementing legislation to require FFIs in their jurisdiction to collect and report to the authorities of the FATCA partner the required information; to allow FFIs established in the FATCA partner to apply necessary diligence to identify US accounts, and to transfer to the United States, on an automatic basis, the information reported by the FFIs.\(^{19}\) In return, the United States agreed to eliminate the obligation of each FFI established in the FATCA partner to enter into a separate FFI agreement directly with the IRS, if each FFI is registered with the IRS; to allow FFIs established in the FATCA partner to comply with their reporting obligations under FATCA by reporting information to the FATCA partner instead of reporting it directly to the IRS; to eliminate U.S. withholding under FATCA on payments to FFIs established in the FATCA partner; to identify in the agreement specific categories of FFIs established in the FATCA partner that would be treated, consistent with IRS guidelines, as compliant or presenting a low risk of tax evasion; and to commit to reciprocity with respect to collecting and reporting on an automatic basis to the authorities of the FATCA partner information on the U.S. accounts of residents of the FATCA partner.\(^{20}\) The penalty for non-compliance is 30% ("withholding tax") of funds from US source, such as vouchers, dividends, interest, royalties, stipends or income.

The "Model Intergovernmental Agreement on Improving Tax Compliance and Implementing FATCA," published on July 26, 2012 (five months after the issuance of the Joint Statement), defines the rules of implementation to be signed by adhering countries.\(^{21}\) The Joint Statement will go into effect in Italy on January 1, 2014, in several phases (to be completed on March 31, 2017),\(^{22}\) and Italy has not yet implemented it; thus, it is too soon to determine whether any issues will arise from this agreement that will require litigation.

IV. NEW FATCA AGREEMENT REQUIRES REPORTING BY FINANCIAL INSTITUTIONS WITH RESPECT TO CERTAIN ACCOUNTS

On January 10, 2014, the United States signed a new anti-tax evasion agreement with Italy, which became the thirteenth country to sign such a deal with the United States.\(^{23}\) The Agreement called “The Agreement between the Government of the United States of America and the Government of the Republic of Italy to Improve International Tax Compliance and to Implement FATCA,” applies to “U.S. citizen or resident individual, a partnership or corporation organized in the United States or under the laws of the United States.”\(^{24}\)


\(^{20}\) Id. para. B.2.

\(^{21}\) L’adeguamento alla normativa FATCA, PWC (2014) (Covering The Adjustment to the FATCA Regulations), http://www.pwc.com/it/it/services/fatca/index.jhtml.

\(^{22}\) L’adeguamento alla normativa FATCA available at http://www.pwc.com/it/it/services/fatca/index.jhtml and www.pwc.com/it/it/services/fatca/docs/fatca-brochure.pdf.


The Agreement also applies to residents “of Italy, including entities that certify that they are resident in Italy for tax purposes, with respect to which U.S. source income that is subject to reporting.”

Article 2 of the Agreement complements the tax Convention between Italy and the United States, discussed below in Paragraphs V-VIII, which authorizes the exchange of information for tax purposes. Article 2 states, in part, that each Party “shall annually exchange this information with the other Party on an automatic basis pursuant to the provisions of Article 26 of the Convention.” The financial institutions of each Country must report to each other all reportable accounts. A reportable account is a financial account maintained by a financial institution and held by a specified U.S. Person, which is a U.S. Person, other than a corporation the stock of which is regularly traded, or any organization exempt from taxation under section 501(a) of the U.S. Internal Revenue Code. Thus, if a subsidiary of a U.S. corporation in Italy has a depositary account in a financial institution, the financial institution is required under the Agreement to report the existence of the account.

V. TAX TREATIES

The United States entered into several bilateral tax treaties with Italy to improve tax compliance by its citizens. Tax treaties are designed to encourage cross-border investment and economic activity. They provide a way to resolve taxation disputes between Countries, help authorities enforce tax laws, and reduce barriers to foreign direct investment, such as double taxation and high withholding tax rates. The U.S. Treasury Department, the Senate Foreign Relations Committee and the Joint Committee on Taxation coordinate future treaty negotiating objectives, monitor current treaty implementation and even discuss action to withdraw from treaties if the they do not believe the treaty is in the U.S. interest. The United States has executed 68 other bilateral treaties with foreign countries to avoid double taxation and tax fraud.

The treaties applicable to business enterprises cover the areas of:

1. Residence: determining where a business enterprise (including a corporation, limited liability company or partnership) is resident for treaty purposes.

2. Taxable presence: for a business enterprise from a contracting state, one of the most important considerations when entering a new market is whether the threshold has been crossed such that the enterprise is carrying on a business in the other contracting state. If

25. Id. art. 1, para. bb.
26. Id. art. 2, para. 1.
27. Id. art. 1, para ff.
28. A depositary account includes any commercial, checking, savings, time, or thrift account, or an account that is evidenced by a certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar instrument maintained by a Financial Institution in the ordinary course of a banking or similar business. Id. art. 1, para. 1.
so, it will become a taxpayer subject to income resulting from a “permanent establishment.

3. Withholding on items of income: even when an individual, or an enterprise, from one
country is not resident in the other country, certain types of income will be subject to tax
that is withheld by the person making the payment.

4. Relief from double taxation: the treaty may relieve a taxpayer in one country from
taxation in the other country through, for example, exempting certain types of income
from withholding tax.

5. “Limitation on benefits”: the U.S., in particular, has been keen to ensure that its tax
treaties may be used only by a defined group of people who are considered entitled to the
benefits of a treaty. As a result, all treaties in recent years have included a “limitation on
benefits” article. 32

One of the bilateral tax treaties with the United States is the “Convention between the
Government of the United States of America and the Government of the Italian Republic for the
Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fraud or
Fiscal Evasion,” which was executed in 1984. The 1984 Convention replaced the income tax
treaty with Italy which was signed at Washington on March 30, 1955, and has been in force since
1956. 33 In 1999, the United States and Italy executed a second Convention, which revises and
considerably expands the 1984 Convention. Each Convention contains a “Protocol” clarifying
and supplementing the Convention.

a. Residence

Article 4 of the 1999 Convention defines what a resident is and how the residency status
is determined. The Convention’s definition of resident is “any person who, under the laws of
that State, is liable to tax therein by reason of his domicile, residence, place of management,
place of incorporation, or any other criterion of a similar nature.” 34 If a person is a resident in
both contracting states, the residence is determined by in which state “he has a permanent home
available to him.” If the taxpayer has a permanent home available in both states, the taxpayer
“shall be deemed to be a resident of that State with which his personal and economic relations
are closer (center of vital interests).” 35

b. Permanent Establishment

Under Article 5 of the Convention, permanent establishment “means a fixed place of
business in which the business of the enterprise is wholly or partly carried on.” Article 5,

32. Tax Treaties – How They Work for Effective Tax Planning, UHY 1, 2-4 (2008), http://www.uhy.com/wp-
33. See generally United State-Italy Income and Capital Tax Convention, U.S.-It., Apr. 17, 1984,
34. Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fraud
policy/treaties/Documents/italy.pdf. [hereinafter Convention for Prevention of Fraud]
35. Id. art. 4, para. 2.
paragraph 2 lists several factors to determine whether permanent establishment exists. These factors include place of management; a branch; an office; a factory; a workshop; a mine, or other place of extraction of natural resources; and a building site or construction that exists for more than twelve months. Permanent establishment does not include use of facilities solely for the purpose of storage, or the maintenance of a fixed place of business solely for the purpose of advertising.  

If a business has an agent-principal relationship with a natural person or legal entity in another state, the Convention prohibits that business to "be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent, or any other agent of an independent status."  

Withholding on items of income

Under Article 7 of the Convention, "The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein." If a United States corporation earns an income in the Unites States, that corporation must pay United States taxes, unless the corporation has permanent establishment in the other contracting State. In the case of permanent establishment, the corporation must pay taxes on profits attributable to the permanent establishment. The profits attributable to the permanent establishment are those which the corporation "might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions."  "No profits shall be attributable to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise."  

Under Article 9 of the Convention, when related enterprises engage in a transaction on terms that are not arm’s length, the Contracting States may make appropriate adjustments to the taxable income and tax liability of such related enterprises to reflect what the income and tax of these enterprises with respect to the transaction would have been had there been an arm’s length relationship between them.  

Relief from Double Taxation

Under article 23, the United States in the case of a U.S. company owning “at least ten percent of the voting stock of a company which is a resident of Italy from which it receives dividends in any taxable year, the United States shall allow as a credit against the United States tax on income the appropriate amount of income tax paid to Italy by that company with respect to the profits out of which such dividends are paid." This credit is for the income tax paid by the Italian corporation on the profits out of which the dividends are considered paid, and it is  

36. Id. art. 5, para 2-3.  
37. Id. art. 5, para. 5.  
38. Id. art. 7, para. 2.  
39. Convention for Prevention of Fraud, supra note at 31, art. 7, para. 4.  
41. Convention for Prevention of Fraud, supra note at 31, art. 23, para. 2.
consistent with §902 of the Internal Revenue Code. The United States, under the Convention, considers Italian taxes paid by the Italian corporation to be income taxes. Italy replaced the local taxes with regional taxes on productive activities (IRAP) in 1988. Article 2, paragraph 2 (b)(iii) requires that only a portion of the IRAP tax that is considered to be an income tax under Article 23 is subject to the Convention. Article 23, paragraph 2 (c) details a formula to be used to calculate the portion of the IRAP that is subject to the Convention: the portion is calculated by multiplying the applicable ratio by the total amount of the IRAP tax. The “applicable ratio,” under the Convention is the adjusted base divided by the total tax base upon which the IRAP tax is imposed.42 Another important piece of this formula, the “adjusted base” is either zero or the total tax base on which the IRAP tax is imposed, less the total amount of labor expense and interest expense not otherwise taken into account in determining the total tax base upon which the IRAP tax is imposed, whichever is greater.43 For example, M is a manufacturing company resident in the United States, with a permanent establishment in Italy. M has the following items of income and expense attributable to the permanent establishment in Italy: Gross Revenue subject to IRAP $100,000; Rent/Depreciation Expense 40,000; Labor Expense 20,000; and Interest Expense 10,000. The tax base upon which IRAP is imposed is $60,000 ($100,000, less $40,000 rent/depreciation expense). No deduction is allowed under Italian law for the labor and interest expenses in calculating IRAP. Accordingly, M pays IRAP in the amount of $2,550 (4.25 percent rate multiplied by $60,000). For purposes of determining the portion of this tax that is considered an income tax under paragraph 2 (c), the “adjusted base” equals $30,000 ($60,000 base upon which IRAP is actually imposed, less $20,000 labor expense and $10,000 interest expense that were not otherwise taken into account in determining the actual IRAP tax base). The “applicable ratio” is ½ ($30,000 adjusted base, divided by $60,000 actual IRAP tax base). Accordingly, the portion of IRAP that is considered an income tax under paragraph 2 (c) is $1,275 (½ applicable ratio, multiplied by $2,550 total amount of IRAP paid).44 Italy extends to the United States the same courtesy by allowing Italian residents a credit against Italian tax for U.S. taxes on income. Paragraph 4 of Article 23 provides special rules for the tax treatment in both States of certain types of income derived from U.S. sources by U.S. citizens who are resident in Italy: U.S. citizens, regardless of residence, are subject to United States tax at ordinary progressive rates on their worldwide income; Italy does not provide full relief for the U.S. tax imposed on U.S. citizens resident in Italy. Italy would grant a credit against Italian tax in an amount not exceeding the tax that would be due to the United States if the resident of Italy were not a citizen of the United. For example, if a U.S. citizen resident in Italy receives U.S. source portfolio dividends, the foreign tax credit granted by Italy would be limited to 15 percent of the dividend -- the U.S. tax that may be imposed under paragraph 2(b) of Article 10 (Dividends) -- even if the shareholder is subject to U.S. net income tax because of his U.S. citizenship.45

e. Limitation on Benefits

The Convention is clarified and supplemented by a Protocol. Under Article 2 of the Protocol, a resident of Italy or the U.S. is only eligible to claim Convention benefits if it also

42. Id. art. 23, para. 2(c)(i).
43. Id. art. 23, para. 2(c)(ii).
44. Technical Explanation, supra note 37, art. 23.
45. Id.
satisfies one of these tests. Individuals test: individuals residents of Italy and the U.S. who beneficially own the income in question will be entitled to all Convention benefits. Publicly-held corporations test: a company resident in Italy or the U.S. will be entitled to all Convention benefits if all the shares in the class or classes of shares that represent more than 50% of the company’s voting power and value are regularly traded on a “recognized stock exchange” located in either Italy or the U.S. Subsidiary of a publicly-held corporation test: a company will be entitled to all Convention benefits if 50% or more of each class of its shares (not just the class or classes of shares accounting for more than 50% of the company’s vote and value) is directly or indirectly owned by five or fewer companies that qualify as a publicly-traded corporation under the test described above. Ownership/Base Erosion test: a legal entity resident in Italy or the U.S. must satisfy each of the following two requirements: 1) 50% or more of each class of beneficial interests in the entity (in the case of a corporation, 50% or more of each class of its shares) must be owned on at least half the days of the entity’s taxable year by persons who are themselves entitled to Convention benefits (ownership test); or 2) Less than 50% of the entity’s gross income for the taxable year must be paid or accrued, directly or indirectly, to non-residents of Italy or the U.S. (unless the payment is attributable to a permanent establishment of the non-resident located in either Italy or the U.S.), in the form of payments that are tax-deductible in the entity’s state of residence (base erosion test).

VI. PREVENTION OF FISCAL EVASION UNDER THE CONVENTION

As previously mentioned, fiscal evasion is still a problem for both Italy and the United States. The Convention, under Article 26, allows the Competent Authorities in the Contracting States to exchange information “necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States” regarding taxes covered by the Convention and “for the prevention of fraud or fiscal evasion.” The taxes covered by the Convention for purposes of this Article constitute a broader category of taxes than those referred to in Article 2 (Taxes Covered). In addition, Article 26 states that “The exchange of information is not restricted by Article 1 (Personal Scope).” Accordingly, information may be requested and provided under this Article with respect to persons who are not residents of either Contracting State. For example, if a third-country resident has a permanent establishment in Italy and it engages in transactions with a U.S. enterprise, the United States could request information with respect to that permanent establishment, even though the third-country resident is not a resident of either Contracting State. Similarly, if a third-country resident maintains a bank account in Italy, and the Internal Revenue Service has reason to believe that funds in that account should

47. Under Article 3 of the Convention, Competent Authorities are in the United States: the Secretary of the Treasury or his delegate; in Italy: the Ministry of Finance. Convention for Prevention of Fraud, supra note 31, art. 3, para. 1(e).
48. Supra note 31, art. 3 para 1(e).
have been reported for U.S. tax purposes but have not been so reported, information can be requested from Italy with respect to that person's account.\footnote{Technical Explanation, supra note 37, art. 26.}

VII. RATIFICATION STATUTES FOR THE 1984 AND 1999 CONVENTIONS


The United States President ratified the 1984 Convention on December 23, 1985.\footnote{United State-Italy Income and Capital Tax Convention, supra note 30.} President Clinton signed the U.S. instrument of ratification on 28 December 1999, ratifying the 1999 treaty subject to the Senate reservation and understanding. The reservation, however, required approval from the Italian government. Diplomatic notes were exchanged in 2006 and 2007 in an attempt to further the progress of the 1999 Convention, with the Italian government officially agreeing to the Senate reservation requiring the deletion of the main purpose tests and the understanding on information exchange.\footnote{Piergiorgio Valente, Italy-USA: New Convention Against Double Taxation (Dec. 10, 2011), http://annalisagiambronecommercialista.blogspot.com/2011/12/italy-usa-convention-against-double.html.} The 1999 Convention between Italy and the United States entered into force on 1 January 2010. The exchange of instruments of ratification between the two countries took place December 16, 2009.\footnote{Id.}

VIII. DIFFERENCES BETWEEN THE 1984 AND 1999 CONVENTIONS

The 1999 Convention added some new features to the 1984 Convention, expanding it considerably.

a. Taxes Covered

As mentioned above, the 1999 Convention, in the case of Italy, replaces the local taxes with regional taxes on productive activities for the existing taxes to which the Convention applies. The “Imposta Regionale sulle Attività Produttive,” known in Italy by the acronym IRAP, was created with the legislative decree n. 446 of 15 December 1997.\footnote{IRAP, REGIONE LAZIO, http://www.regione.lazio.it/rl_tributi/?vw=tab&id=42.} This tax is imposed by each region of Italy for activities within its territory. IRAP is calculated without a deduction for labor costs and, for certain taxpayers, without a deduction for interest costs.\footnote{See Convention for Prevention of Fraud, supra note 31.}

\begin{itemize}
\item \footnote{Technical Explanation, supra note 37, art. 26.}
\item \footnote{United State-Italy Income and Capital Tax Convention, supra note 30.} President Clinton signed the U.S. instrument of ratification on 28 December 1999, ratifying the 1999 treaty subject to the Senate reservation and understanding.
\item \footnote{Id.} The exchange of instruments of ratification between the two countries took place December 16, 2009.
\item \footnote{IRAP, REGIONE LAZIO, http://www.regione.lazio.it/rl_tributi/?vw=tab&id=42.} This tax is imposed by each region of Italy for activities within its territory.
\item \footnote{See Convention for Prevention of Fraud, supra note 31.} IRAP is calculated without a deduction for labor costs and, for certain taxpayers, without a deduction for interest costs.
b. Business Profits

Article 7 of the 1999 Convention modifies paragraph six and adds paragraph seven. Paragraph six states that in applying certain paragraphs from articles seven (Business Profits), 10 (Dividends), 11 (Interests), 12 (Royalties), 13 (Capital Gains), 14 (Independent Personal Services) and 22 (Other Income) any income or gain attributable to a permanent establishment during its existence is taxable in the Contracting State where such permanent establishment situated. Paragraph 6 in the 1984 Convention stated, “Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.” The 1984 paragraph 6 does not mention permanent establishment; Article 5 of the 1984 Convention remained unchanged.

c. Associated Enterprises

Article 9 of the 1999 Convention left paragraph 1 unchanged and added paragraph 2, which deals with double taxation of business profits: if a contracting State includes in the profits of an enterprise profits already taxed by the other contracting State, then the two contracting States contracting State would make adjustments to the amount of tax charged. In determining the adjustment, the other provisions of this Convention must be considered and the adjustment must be made according to Article 25 (Mutual Agreement Procedure). The profits qualify for the avoidance of double taxation if the conditions made between the two enterprises in both contracting States had been those which would have been made between independent enterprises.

d. Dividends

The dividends article is significantly modified from the 1984 treaty, both in rates and in the treatment of dividends paid by Real Estate Investment Trusts (REITs) and Regulated Investment Companies (RICs). The 1999 Convention will exempt dividends if the beneficial owner is a qualified governmental entity that holds, directly or indirectly, less than 25% of the payor's voting shares. The 1984 Convention’s 10% rate on dividends is eliminated, and the ownership requirement to obtain a new 5% rate is lowered: the beneficial owner need only hold at least 25% of the distributing company's voting shares for 12 months ending on the date the dividends are declared. The rate will be 15% in all other cases. The withholding tax on RICs will be 15% regardless of ownership level. According to the Department of the Treasury Technical Explanation of the Convention, shares are considered voting stock for purposes of applying the 5% withholding rate if they provide the power to elect, appoint, or replace any person vested with the powers ordinarily exercised by the board of directors of a U.S. corporation.

57. See id.
e. Interests

Exemptions will apply to interest paid to a qualified governmental entity that holds, directly or indirectly, less than 25% of the capital of the person paying the interest; interest paid or accrued with respect to a credit sale of goods, merchandise, or services provided by one enterprise to another; or interest paid or accrued in connection with the credit sale of industrial, commercial or scientific equipment. The rate will be 10% in all other cases. The maximum rate under the 1984 Convention was 15%, with fewer exemptions provided.\(^{59}\)

f. Royalties

The withholding tax rate is 5% for royalties for the use of, or right to use, computer software or industrial, commercial or scientific equipment. Otherwise the rate is 8%. Rates under the 1984 Convention were 5% for literary, artistic or scientific work; 8% for motion pictures and films, tapes, or other means of reproduction used for radio or television broadcasting; and 10% in all other cases.\(^{60}\)

g. Limitation on Benefits

A resident of the U.S. or Italy not otherwise entitled to benefits under the Convention may still be granted benefits under the 1999 Convention if the competent authority of the contracting State from which benefits are claimed so determines.\(^{61}\) The Limitation on benefits is found in the Protocol that follows the Convention’s text, and it is more restrictive than the Limitation on Benefits allowed under the prior Convention. Under Article 2 of the Protocol of the 1984 Convention, a “person” (other than an individual) that was a resident of a Contracting State was not entitled to benefits [under Articles 7 (Business Profits), 10 (Dividends), 11 (Interest), 12 (Royalties), 13 (Capital Gains) or 22 (Other Income)] unless more than 50 percent of the beneficial ownership of such person (or in the case of a company, more than 50 percent of the number of shares of each class of the company's shares) was owned, directly or indirectly, by any combination of one or more of individuals who were residents or citizens of the U.S. or individuals who were residents of Italy.\(^{60}\) As discussed above, the 1999 Convention’s Protocol allows a “person” benefits under the Convention only if certain tests are met.

h. Mutual Agreement Procedure and Arbitration

The 1999 Convention describes the method that both contracting States must use to resolve double taxation issues. The new Convention significantly expands Article 25 of the 1984 Convention by adding that the Competent Authorities may “consult together for the elimination of double taxation in cases not provided for in the Convention.” Additionally, the

---

59. \textit{Id.}
60. \textit{Id.}
61. \textit{Id.}

62. Under Art. 3 of both Conventions a “person” includes an individual, a company, an estate, a trust, a partnership, and any other body of persons. \textit{See} 1984 Convention, \textit{supra} note 33, art. 3; \textit{see also} 1999 Convention, \textit{supra} note 34, art. 3.
Competent Authorities may communicate with each other directly or indirectly to resolve issues. If the Competent Authorities are unable to reach an agreement, “the case may, if both competent authorities and the taxpayer agree, be submitted for arbitration, provided that the taxpayer agrees in writing to be bound by the decision of the arbitration board.”

In sum, the 1999 Convention is more comprehensive; in some instances, such as in the Limitation of Benefits, it is more restrictive than the 1984 Convention; the 1999 Convention also has a broader reach into what kind of taxes are covered, but lowers taxes on royalties, interests and dividends to make the Convention fair and acceptable by both contracting States under their current tax laws.

IX. “PERMANENT ESTABLISHMENT”

Article 5 of the 1999 Convention uses the term “permanent establishment” to determine whether a non-resident corporation could be subject to taxation in Italy. The term "permanent establishment" is significant for several articles of the Convention. The existence of a permanent establishment in a Contracting State is necessary under Article 7 (Business Profits) for the taxation by that State of the business profits of a resident of the other Contracting State. Since the term "fixed base" in Article 14 (Independent Personal Services) is understood by reference to the definition of "permanent establishment," this Article is also relevant for purposes of Article 14. Articles 10, 11 and 12 (dealing with dividends, interest, and royalties, respectively) provide for reduced rates of tax at source on payments of these items of income to a resident of the other State only when the income is not attributable to a permanent establishment or fixed base that the recipient has in the source State.

According to the ruling of the Italian Supreme Court (Corte di Cassazione), opinion 7851 of 23 April 2004, “In regard to direct taxation, the permanent establishment (stabile organizzazione), under the dispositions of TUIR, art. 20 and 113 of D.P.R. 917/1986, is subject to all regulations that govern the determination of income for a corporation.” In particular, art. 20 considers subject to taxation the permanent establishment of non-resident corporations, through which corporate activities are exercised in the Italian territory. Art. 113 specifies that “for non-resident corporations and commercial entities with permanent establishment in the Italian territory…income is calculated… based on profits and losses related to the operation of the permanent establishment and other commercial activities that produce income in Italy.” The Italian Supreme Court also held in opinion number 8820 of 27 November 1987 and number 9580 of 19 September 1990 that permanent establishment “exists when facts…show the objective of the corporations is to exercise in Italy certain commercial activities, that besides the non-occasional connection with places in the Italian territory and with persons working in Italy,

---

63. See 1999 Convention, supra note 34, art. 25.
65. TUIR stands for Testo Unico sulle Imposte sui Redditi (Unified Text on Taxation). DPR stands for Decreto del Presidente della Repubblica (Presidential executive order).
67. Id.
include the effective use of goods and labor force, coordinated for the production and the exchange of goods and services, and have an effective, even if limited, autonomous function.”

Italy, as all Member States of the European Union, imposes a value-added tax for goods or services purchased by consumers, which in Italy is called IVA. The IVA is paid on each increment in value of the goods and services from production until consumption of the goods or receipt of the services. Since the enterprise selling goods or services can detract the amount of IVA it paid to acquire the goods from the amount paid by customers, the IVA tax does not affect the enterprise. Italy has four rates of IVA: 4% minimum rate for necessary items (such as food and newspapers); 10% for restaurants, hotels other touristic services; and 22% default rate in cases where the Italian tax code does not specify which rate applies. The 22% rate became effective on 1 November 2013. The Italian Supreme Court held in opinion number 9580 of 19 September 1990, that “the amenability of non-resident corporations in Italy to IVA presupposes a permanent establishment in the Italian territory.”

Thus, although the IVA is not the subject of the Convention, the mere fact that a non-resident corporation pays this tax means that the corporation has a permanent establishment in Italy, which then makes that particular non-resident corporation subject to the Convention.

X. COMPETENT AUTHORITY ASSISTANCE TO RESOLVE ISSUES UNDER THE TREATY

The new treaty allows the United States to impose its branch profits tax and branch-level interest tax on U.S. branches of Italian corporations. Both taxes were enacted subsequent to negotiation of the 1984 treaty. Thus, the new treaty permits each Country to tax a foreign corporation on a "dividend equivalent amount" (or, in the case of Italy, an analogous amount) if the corporation has income attributable to a permanent establishment in the Country, derives income from real property in the country which is taxed on a net basis under Article 6, or realizes gains in the country taxable under paragraph 1 of Article 13.

If the company taxpayer (or person) disagrees with the imposition of taxation on its income, or it believes the country is imposing a tax in a manner that is inconsistent with an income tax treaty, the taxpayer may request Competent Authority assistance by initiating the procedure detailed in Article 25 of the Convention. The taxpayer may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24 (Non-Discrimination), to that of the Contracting State of which he is a national.

68. Id.
69. IVA is an acronym for Imposta sul Valore Aggiunto. Before a corporation can conduct business in Italy, the corporation must obtain a number called Partita Iva, a tax ID number.
71. 1999 Convention supra note 34, art. 23.
73. The competent authority for Italy is the Ministry of Finance, while the competent authority for the United States is the Secretary of the Treasury; See 1999 Convention, supra note 34, art. 25.
74. 1999 Convention, supra note 34, art. 25.
Taxpayers that request Competent Authority assistance must file a timely protective claim for credit or refund of U.S. taxes in accordance with Section 9 of Revenue Procedure 2006-54, 2006-2 C.B. 1035, and take appropriate actions under the procedures of the foreign country to avoid the lapse or termination of the right to appeal under the foreign country’s income tax law. Under the Convention, the taxpayer must bring the case within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

The taxpayers must send all written requests for, or any inquiries regarding, U.S. Competent Authority assistance to the Deputy Commissioner (International), Large and Mid-Size Business Division, Attn: Office of Tax Treaty, Internal Revenue Service, 1111 Constitution Avenue, NW, Routing: MA3-322A, Washington, D.C. 20224. No user fees are required with respect to a request for U.S. competent authority assistance.

The request for U.S. competent authority assistance must be in the form of a letter addressed to the Deputy Commissioner (International), Large and Mid-Size Business Division. It must be dated and signed by a person having the authority to sign the taxpayer’s federal tax returns. The request must contain a statement that competent authority assistance is being requested, and it must include the following information:

1. A reference to the specific treaty and the provisions therein pursuant to which the request is made;
2. The names, addresses, U.S. taxpayer identification number and foreign taxpayer identification number (if any) of the taxpayer and, if applicable, all related persons involved in the matter;
3. A brief description of the issues for which competent authority assistance is requested, including a description of the relevant transactions, activities or other circumstances involved in the issues raised and the basis for the adjustment, if any;
4. If applicable, a description of the control and business relationships between the taxpayer and any relevant related person for the years in issue, including any changes in such relationship to the date of filing the request;
5. The years and amounts involved with respect to the issues in both U.S. dollars and foreign currency;
6. The IRS office that has made or is proposing to make the adjustment or, if known, the IRS office with examination jurisdiction over the taxpayer;

76. 1999 Convention, supra note 34, art. 25.
78. Id. at § 14.
(7) an explanation of the nature of the relief sought or the action requested in the United States or in the treaty country with respect to the issues raised, including a statement as to whether the taxpayer wishes to apply for treatment similar to that provided under Rev. Proc. 99-32, 1999-2 C.B. 296 (referred to in this revenue procedure as “Rev. Proc. 99-32 treatment” and explained in further detail in section 10 of this revenue procedure);

(8) a statement whether the period of limitations for the years for which relief is sought has expired in the United States or in the treaty country; (9) a statement of relevant domestic and foreign judicial or administrative proceedings that involve the taxpayer and related persons, including all information related to notification of the treaty country;

(10) to the extent known by the taxpayer, a statement of relevant foreign judicial or public administrative proceedings that do not involve the taxpayer or related persons but involve the same issue for which competent authority assistance is requested;

(11) a statement whether the request for competent authority assistance involves issues that are currently, or were previously, considered part of an Advance Pricing Agreement (“APA”) proceeding or other proceeding relevant to the issue under consideration in the United States or part of a similar proceeding in the foreign country;

(12) if applicable, powers of attorney with respect to the taxpayer, and the request should identify the individual to serve as the taxpayer’s initial point of contact for the competent authority;

(13) if the jurisdiction of an issue is with an IRS Appeals office, a summary of prior discussions of the issue with that office and contact information regarding the IRS Appeals officer handling the issue; also, if appropriate, a statement whether the taxpayer is requesting the Simultaneous Appeals procedure as provided in section 8 of this revenue procedure;

(14) in a separate section, the statement and information required by section 9.02 of this revenue procedure if the request is to serve as a protective claim;

(15) on a separate document, a statement that the taxpayer consents to the disclosure to the competent authority of the treaty country (with the name of the treaty country specifically stated) and that competent authority’s staff, of any or all of the items of information set forth or enclosed in the request for U.S. competent authority assistance within the limits contained in the tax treaty under which the taxpayer is seeking relief. The taxpayer may request, as part of this statement, that its trade secrets not be disclosed to a foreign competent authority. This statement must be dated and signed by a person having authority to sign the taxpayer’s federal tax returns and is required to facilitate the administrative
handling of the request by the U.S. competent authority for purposes of the 
recordkeeping requirements of section 6103(p) of the Code. Failure to provide 
such a statement will not prevent the U.S. competent authority from disclosing 
information under the terms of a treaty. See section 6103(k)(4) of the Code. 
Taxpayers are encouraged to provide duplicates to the U.S. and foreign competent 
authorities of all information otherwise disclosable under the treaty;

(16) a penalties of perjury statement in the following form:

Under penalties of perjury, I declare that I have examined this request, including 
accompanying documents, and, to the best of my knowledge and belief, the facts 
presented in support of the request for competent authority assistance are true, 
correct and complete.

The declaration must be dated and signed by the person or persons on whose 
behalf the request is being made and not by the taxpayer’s representative. The 
person signing for a corporate taxpayer must be an authorized officer of the 
taxpayer who has personal knowledge of the facts. The person signing for a trust, 
an estate or a partnership must be respectively, a trustee, an executor or a partner 
who has personal knowledge of the facts; and

(17) any other information required or requested under this revenue procedure, as 
applicable. See, e.g., section 7.06 of this revenue procedure, which requires the 
provision of certain information in the case of a request for the accelerated 
competent authority procedure, and section 10 of this revenue procedure, which 
requires the provision of certain information in the case of a request for Rev. Proc. 
99-32 treatment. Requests for supplemental information may include items such 
as detailed financial information, comparability analysis, or other material 
relevant to a transfer pricing analysis.77

Upon receiving a request for assistance pursuant to this revenue procedure, the U.S. 
competent authority will notify the taxpayer whether the facts provide a basis for assistance.78 
The competent authority “shall endeavor if the objection appears to it to be justified and if it is 
not itself able to arrive at a satisfactory solution,” to resolve the issue by mutual agreement with 
the competent authority of the other Country. The issue may be discussed orally between the two 
competent authorities, when warranted. In such cases, the conversation may take place through a 
Commission consisting of representatives of the competent authorities of the Contracting 
States.79 The U.S. competent authority will notify a taxpayer requesting competent authority 
assistance of any agreement that the U.S. and the foreign competent authorities reach with 
respect to the request.80

If an agreement cannot be reached by the competent authorities, “the case may, if both 
competent authorities and the taxpayer agree, be submitted for arbitration, provided that the

77. Id. at §4.
78. Id. at §12.
79. 1999 Convention, supra note 34, art. 25, para. 4.
80. IRS Rev. Proc, supra note 77 at §12.
taxpayer agrees in writing to be bound by the decision of the arbitration board."\textsuperscript{81} The competent authority will provide to the arbitration board the information necessary for carrying out the arbitration procedure. "The award of the arbitration board shall be binding on the taxpayer and on both States with regard to that case. The procedures shall be finalized by the Contracting States by means of notes to be exchanged through diplomatic channels after consultation between the competent authorities."\textsuperscript{82}

Most cases are resolved with Competent Authority assistance and without litigation. In fact, since the 1999 Convention became effective on January 1, 2010, no case law has been generated. Older cases, under the 1955 Convention may provide some guidance on the type of cases that may be brought under the new Convention. Both of the cases mentioned below deal with interpretation of specific words of the treaty.

In \textit{Di Portanova v. U.S.}, 690 F.2d 169 (1982), the issue before the United States Court of Claims was whether the plaintiff, a dual United States-Italian citizen by birth who renounced his United States citizenship in 1972, was entitled to be taxed upon income he received in 1973 from trusts, at the flat rate of 30 percent that section 871(a) of the Internal Revenue Code of 1954, 26 U.S.C. s 871(a) (1976), imposes upon United States source income of a nonresident alien who is not engaged in a trade or business in the United States. The answer, the Court noted, depended upon two other issues: (1) whether the plaintiff, through the trusts, was “engaged in trade or business within the United States” I.R.C. s 871(b); and (2) if not, whether his expatriation had as “one of its principal purposes the avoidance of taxes.” I.R.C. s 877(a).

In 1973, the plaintiff received $901,448 from the trusts. Each trust owns several leases, which were subject to several operating agreements. The plaintiff paid on this income the flat tax of 30 percent that section 871(a) of the Code imposes on the United States source income of a nonresident alien who is not engaged in a trade or business in the United States. In 1980, the Internal Revenue Service assessed a deficiency on the ground that the trust income was taxable at the higher rates for income. The plaintiff paid the deficiency and filed a timely claim for refund. After the Internal Revenue Service denied the refund, the plaintiff filed suit. He contended that in 1973 he was not engaged in a trade or business or, if he was so engaged, the income is exempt from tax under the Convention on Double Taxation, March 30, 1955, United States-Italy, art. III, para. 1.\textsuperscript{83} The Court held that the activities of the trusts regarding the properties subject to the operating agreements did not constitute a trade or business; thus, plaintiff’s 1973 income from those trusts was subject to a flat tax of 30 percent-unless the plaintiff’s 1972 renunciation of his United States citizenship had a tax avoidance purpose.\textsuperscript{84}

In \textit{Estate of Burghardt v. Commissioner of Internal Revenue}, 80 T.C. 705 (1983), the Petitioner, the estate of a nonresident alien, claimed, under the estate tax Convention between the United States and Italy, a credit against its estate tax in excess of the credit permitted under sec. 2102(c)(1), I.R.C. 1954. On November 22, 1978, Bankers Trust Co., as a person in possession of property belonging to the decedent, filed a U.S. estate tax return. The return listed decedent’s taxable estate at $118,882 but claimed no estate tax due by reason of the Italian treaty. Respondent determined a deficiency of $4,983.11 in petitioner’s Federal estate tax. Article IV of the treaty provided nonresident aliens of the respective contracting States with a prorated “specific exemption” equal to a proportion of the “specific exemption, which would be allowable

\textsuperscript{83} 1999 Convention, \textit{supra} note 34, art. 25, para. 4.
\textsuperscript{84} 1999 Convention, \textit{supra} note 34, art. 25, para. 5.
\textsuperscript{86} Di Portanova, 690 F.2d at 176.
under [the law of the taxing country] if the decedent had been domiciled in that state. The issue was the meaning of “specific exemption.” The United States Tax Court noted that Courts must “give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties.” Maximov v. United States, 299 F.2d 565, 568 (2d Cir. 1962), aff’d 373 U.S. 49 (1963). After examining the same article contained in similar Conventions with Australia, Canada, Finland, France, Switzerland, Norway, and Greece, the court noted “we are satisfied that the context of article IV of the treaty permits us to read “specific exemption” in the broad sense to mean the method by which small estates are exempted from the estate tax.” The Court held “the term “specific exemption,” as used in the Italian treaty, should be construed as including the unified credit. To hold otherwise, as respondent would have us do, would read the “specific exemption” provision out of the Italian treaty.”


Generally, bilateral tax treaties such as the 1984 and 1999 Conventions have to be interpreted and applied in the light of other international obligations. Thus, corporate clients that wish to establish a new corporation in Italy and possible subsidiaries in other European Union Member States must keep in mind other international regulations that might affect the new businesses.

One such regulation is Council Directive 2011/96/EU of 30 November 2011, on the Common System of Taxation Applicable in the case of Parent Companies and Subsidiaries of Different Member States passed by The Council of the European Union. The objective of the Directive is to “exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company.” The Directive applies to distributions of profits received by companies of that Member State, which come from their subsidiaries of other Member States; to distributions of profits by companies of that Member State to companies of other Member States of which they are subsidiaries; to distributions of profits received by permanent establishments situated in that Member State of companies of other Member States, which come from their subsidiaries of a Member State other than that where the permanent establishment is situated; and to distributions of profits by companies of that Member State to permanent establishments situated in another Member State of companies of the same Member State of which they are subsidiaries. “The payment of profit distributions to, and their receipt by, a permanent establishment of a parent company should give rise to the same treatment as that applying between a subsidiary and its parent.”

Article 2 of the Directive focuses on definitions; in particular, it defines “company of a Member State,” and “permanent establishment.” Under this Directive, “permanent establishment” means “a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on in so far as the profits of that place of business are subject to tax in the Member State in which it is situated.”

88. Id. at 711.
89. Id. at 717.
91. Id.
92. Id.
Article 3 explains how the status of parent company is established for the purpose of the Directive. Under the Directive, the status of a company is attributed to the company of a Member State that “has a minimum holding of 10% in the capital of a company of the same Member State, held in whole or in part by a permanent establishment of the former company situated in another Member State or to a company of a Member State that has a minimum holding of 10% in the capital of a company of another Member State.

XII. THE RELATIONSHIP BETWEEN THE CONVENTIONS AND COUNCIL DIRECTIVE 2011/96/EU

As mentioned above, bilateral tax treaties have to be interpreted and applied in the light of other international obligations. In the European Union, for instance, EU Directives often have a significant effect in the way certain intra-European transactions are taxed. An important example is the Directive 2011/96/EU, which would take precedence over a treaty. The Directive and the 1999 Convention complement each other and have similar features: 1) the definition of permanent establishment in the Directive is almost identical to the definition in the Convention, except for the examples listed in the Convention, which are not part of the definition under the Directive; 2) double taxation: the Directive’s objective is to avoid double taxation by exempting from taxation dividends and other profit distributions from a subsidiary to a parent company to avoid subjecting the parent company to double taxation. The Convention also seeks to prevent double taxation; however, the method is different because the Convention allows credit for taxes paid in one Contracting State when the company is a resident or has permanent establishment in the other Contracting State rather than subjecting the company to double taxation.

XIII. CONCLUSION

The issue of tax evasion by corporations in United States and Italy is still a problem, despite the ratification of tax treaties and internal efforts to eradicate it. The recently introduced bills by U.S. Rep. Lloyd Doggett (D), “The Fairness in International Taxation Act” and “The International Tax Competitiveness Act,” if passed and implemented by the United States government could potentially limit the tax evasion by U.S.-based corporations. Italy has seen a steady increase in the number of suspicious financial activities in the last few years, and the fiscal evasion numbers are astronomical: 100-125 billion euros per year of missed revenue and 270 billion euros per year of undeclared taxable income, which are demonstrative of an active problem with tax evasion that Italy is combating nationally and internationally. The cooperation between the United States and Italy on tax evasion under the 1999 Convention and Directive 2011/96/EU is vital in helping to limit the number of corporations that avoid paying taxes in one country or the other.

93. See supra note 22.
A Journey Through Italy’s Overcrowded Prisons

Giancarlo P. Pezzuti*

Prisons across Europe are facing an overcrowding crisis, a manifestation of at least three trends: tougher sentencing by judges (particularly for drug-related offenses), a painfully slow justice system and lack of money to build and manage new facilities to accommodate the excess number of inmates. This crisis is particularly acute in Italy, where correctional facilities are extremely crowded with a daily avalanche of convicted men and women. Almost 67,000 inmates are housed in Italian facilities that were designed to hold only 45,000—meaning they are at a capacity of more than 140%, among the highest rates in the European Union, with some individual prisons at 268% capacity, where the average capacity is just under 100%.

There are a number of reasons for the prison overpopulation in Italy. The Italian correctional system is currently based on a criminal code that dates back to 1930, since it was enacted during the Fascist period, and is basically aimed at the restriction of physical freedom, using detention or arrest, and enforced by fines. In 1948, when the Republican Constitution came into force, the so-called “Rocco Code” had to be interpreted according to a supreme principle introduced into the Italian system: the purpose of punishment is the social rehabilitation of the inmate. In addition, Article 27 of the Constitution states: “Punishment shall not consist of treatments against the sense of humanity and shall be aimed at the re-education of the sentenced person”; thus, the punishment must be a path to rehabilitate the person who is sentenced.

In Italy, although recently there have been major steps forward, there is still a use of detention as a means of taking precautionary measures (under “extrema ratio”) when there is a high risk of a person fleeing, of committing additional crimes, and a danger of interfering with evidence. In addition, many inmates are in prison awaiting their trial or awaiting final judgment and determination of their prison sentence.

The prison population in Italy has had a sharp increase in recent years. In part this is due to the crisis of the welfare state, together with the lack of social supports for people in need. There has also been an increase in the number of people in prison related to concerns regarding security issues. Foreigners often make-up members of these groups (people lacking social support or people identified as security risks). Despite the complications of making international

---

*Giancarlo Pezzuti graduated in law from the University Federico II of Naples and clerked at the criminal law firm “Pietro Costa.” In 2000, he was admitted to the Napoli Bar Association and was appointed as Honorary Prosecutor in 2001 by the Superior Council of Magistracy. He has taught at training centers and institutes of higher education and has sued the Italian government at the European Court of Human Rights, denouncing prisoners’ conditions in jails and unfair trials. He co-founded the association “Divenire” and the Cooperative “Novalis” to support kids at risk of delinquency. Currently, he is a public prosecutor at the Courts of Ischia and Capri. He is also an active member of the American Society of Criminology.

2. PIETRO TIDEI, LA SITUAZIONE PENITENZIARIA IN ITALIA. PROBLEMI E PROSPETTIVE, 168 (Vecchiarelli 2010).
3. PIETRO BUFFA, PRIGONI. AMMINISTRARE LA SOFFERENZA, 296 (Le staffette Collana, EGA-Edizioni Gruppo Abele 2013).
comparisons (due to different legal systems and different statistical methods), there are some common traits found among the conditions of detainees in general and with respect to foreigners in particular. Specifically referring to foreigners, there are a number of problems related to the lack and/or the restraint of communication (mainly due to language obstacles): knowledge of legal rights, adequate legal assistance, embassy or consular support, health care and psychiatric care, employment and training opportunities (both inside and outside jails), know-how of management of foreigners by prison staff, family contacts and/or friendships outside the jail system, access to alternative measures to imprisonment, and so on.

Nonetheless, scholars and politicians keep considering the sharp increase of foreigners in European prisons. Recent data show that the foreign population in the EU prisons reached almost 120,000 units, that is, about 20% of the total prisoners (over 631,000 units). Considering the single member States, foreign inmates have, in terms of percentages, a significant impact in Luxembourg (representing around 70.0% of total prisoners), Cyprus and Greece (close to 60.0%). However, the greatest incidences, in absolute terms, are found in Italy and Spain (more than 23,000 foreign prisoners in each country), Germany (around 17,500) and France (about 12,000).

As already indicated, Italy has some of the worst prison overcrowding in Europe. Among the prisoners housed in the Italian jails, there are many males (women populations do not exceed 4.3%) and foreigners (35.6% of the total inmates are foreigners, unlike the 20.0% share held by the European Union). The prison population is concentrated in the regional territories of Lombardy (9,289), Campania (8,296), Lazio (7,231) and Sicily (7,081), thus collecting nearly 50.0% of the total inmates in the country. However, if the prison population is split into native Italians and foreigners, it is interesting to observe that the Italians are mostly detained in the South of the country, while the foreigners are in the North. This analytical focus on foreign detainees perfectly fits the progressive increase of immigrants in Italy, a phenomenon that following the widespread trend of the Western world-is inevitably leading to significant changes in both demographic and socio-economic scenes. Among the foreigners housed in Italian prisons, there is a clear prevalence of Africans (49.0% of the total foreign prisoners), most of all coming from the Maghreb area (35.8%). They are followed by Europeans - members of EU (20.7%) and not (19.9%) - and then Americans and Asians who are certainly less (respectively 5.7% and 4.9%). The most highly represented nationalities among the foreign inmates are the Moroccan (19.0%), the Romanian (15.8%), the Tunisian (12.5%) and the Albanian (12.3%), which all together sum 60.0% of the total, that is, nearby 14,000 of the whole foreigners housed in Italian prisons (23,436 units).

By examining the relationship and conditions of native Italian prisoners and the foreign prisoners in Italy, we can see that overcrowding is not an aspect suffered mainly by foreign prisoners, but it is equally suffered by most of the native prisoners. Furthermore, studies revealed that there is a sort of “equal overcrowding distress” among the foreign inmates. Although overcrowding is not exclusively suffered by foreign prisoners, the fact is that foreigners undoubtedly are at a disadvantage. Actually, the paradoxical effects that the Italian Criminal Justice has on immigration issues reverberate on the prison system; in fact, the number of foreign prisoners tends to increase for minor offenses (such as detention for the ones whose residence permit is expired). Likewise, there is a significant relapse on the individual rights of those foreigners who have to face greater difficulties in accessing rights and guarantees offered by the Italian social system.

Additionally, foreigners more so than Italians undergo pre-trial detention, because they usually lack a fixed residence and/or adequate accommodations, making optional “home arrest” impossible. Actually, when foreigners are convicted, they have a greater chance of being punished with imprisonment rather than with alternative penalties. In addition, foreign prisoners frequently have limited resources and cannot simply avoid imprisonment by paying a fine. They also have limited access to high quality legal advocacy services, and usually have communication problems due to lack of knowledge of the Italian language.

Numbers show a gloomier picture: according to the Council of Europe, Italy stands third in the list of the most overcrowded prison systems with 147 detainees for every 100 available places. The only countries doing worse are Serbia and Greece. A delegation composed of four members of Euro Parliament, Juan Fernando López Aguilar (S&D), Frank Engel (EPP), Kinga Göncz (S&D) and Salvatore Iacolino (EPP) visited the prisons facilities of Rebibbia in Rome and Poggioreale in Naples from the 26th until the 28th March 2014. Even though both Rebibbia and Poggioreale prison facilities suffer from overcrowding, what really struck the delegation was the situation of Poggioreale and the living conditions of its prisoners: “I was deeply moved and appalled by the conditions of Poggioreale”, stated the chair of the delegation, Mr. Aguilar. They observed 2,354 detainees “hosted” in a prison with a total capacity of 1,400, up to 12 persons in each cell spending 22 hours behind bars, buildings without heating and warm water, cold food, poor health care hygienic conditions. Mr. Aguilar criticized the Italian Government and the lack of political commitment to renew existing facilities while prison such as Poggioreale date back more than one hundred years (Poggioreale was built in 1908). The delegation was also informed of the alleged existence of the so-called “cell zero” where prisoners would be beaten by the Police, an issue currently under judicial investigation.

The Commission also found negative conditions in the prison facilities of Rebibbia in Rome. It houses 385 prisoners (many accept only 240), of which 195 are Italians and 190 are foreigners, mainly originating from Romania, Bosnia and Herzegovina, and the former

Yugoslavia. The basic problem in this prison is the presence of very young babies in jail with their mothers, confined in a cell since their birth.\textsuperscript{17}

A further source of controversy is the lack of the crime of “torture” in the Italian Penal Code, even though a Constitutional provision, (article 13), explicitly prohibits it. As a result, violence against prisoners is only punishable as an “ordinary crime,” like bodily harm. To address the issue, the Italian Senate voted on March 5th 2014 a draft law for the introduction of a separate crime of torture in the Penal Code.\textsuperscript{18} However, its amendments to the original text have considerably narrowed the purpose of the original draft: crime of torture is introduced as an “ordinary crime” that could be committed by anyone, whereas the UN Convention Against Torture (ratified by Italy in 1989) rules that the committing of torture by public officers should be a constitutive element of the crime and not merely an aggravating factor.\textsuperscript{19}

Another sad urgency involves suicide in Italian prisons; almost 1,000 deaths from 2002 to 2012 were recorded in Italian prisons.\textsuperscript{20} Taking one’s own life is too often a reaction of people living in inhuman conditions. It is likewise distressing reading about jail guards’ suicides too. Working conditions are unsafe, unhealthy, and exhausting. In the last ten years, eighty jail guards took their own life, twenty-nine in the past three years alone.\textsuperscript{21}

The instant, ordinary, short-term answer to the situation of overcrowding might include the building of new prisons. Currently, in Italy there are 240 prisons facilities but 40, completed and already tested, are vacant because there are not enough jail guards and civil employees, and because maintenance’s costs are much too expensive.\textsuperscript{22} At the same time, the Italian Constitution and Human Rights agreements underline that “punishment shall be aimed at the re-education of the sentenced person”.

The issue of prison overcrowding in Italy was taken to the European Court of Human Rights. Ultimately, the European Court of Human Rights\textsuperscript{23} rejected the final appeal advanced by Italy and, consequently, obliged the Italian government to rapidly resolve prison overcrowding and recognized a need for compensation for the prisoners who are victims of the overcrowding conditions. The Strasbourg Court ruled that Italy's woefully overcrowded prisons violate the basic rights of inmates, fined the government 100,000 euros (\$131,000 US dollars), and ordered it to make changes within a year (from May 27th 2013).\textsuperscript{24} The issue came out three years after Italy's government recognized the problem itself but failed to pass legislation designed to correct it. The Italian government in 2010 had declared a state of emergency for its overcrowded prisons, planning the creation of 40 prisons to boost capacity by more than 20,000 inmates and drafting a reform for allowing house arrest as an alternative to prison for certain crimes.

\textsuperscript{17} LA CARA DAVIDE & CASTORINA NINO, VIAGGIO NELLE CARCERI, 75 (Eir 2014).
\textsuperscript{18} Atto Senato 5 marzo 2014, n. 849 (It.).
\textsuperscript{19} Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.
\textsuperscript{20} Campesi, supra note 7.
\textsuperscript{24} MARCO RUOTOLO, IL SENSO DELLA PENA, AD UN ANNO DALLA SENTENZA TORREGGIANI, (Editoriale Scientifica, collana “Diritto penitenziario e costituzione”, 2014).
In 2009, the Strasbourg Court ruled on a case brought by seven inmates in two separate prisons who complained that they each were forced to share a 97 square feet cell with two other people, giving each inmate 32 square feet of personal space. The men also said they didn't have regular hot water or lighting. The Court found that the reported conditions violated the European Convention on Human Rights prohibition against torture and inhumane or degrading treatment. While the Court found no indication that Italy intended to humiliate the prisoners, it did find that the inmates’ conditions subjected them to excessive hardship.

Italian Justice Minister Severino, who had made reforming Italy's prison system a priority when she came into office in 2012, said she was "disheartened" but not surprised by that decision. The Italian President Giorgio Napolitano lamented Parliament’s failure to act on such a critical issue, calling the Strasbourg court's decision a "mortifying confirmation" of Italy's inability to guarantee its prisoners their most basic rights.

The Court used what is known as a pilot judgement for the case, a procedure used when there are many similar complaints before the court that enables it to not only determine if a violation has occurred but also to offer ways to face the root of the problem. In the case of Italian prison overcrowding, there were several hundred complaints in front of the court.

Prison overcrowding is not only the result of higher crime rates or improved effectiveness in investigating crimes and sanctioning perpetrators. The problem is also related to the excessive length of criminal proceedings and the subsequent pre-trial detention and, above all, it is related to the insufficient use of non-custodial measures. It is important to underline that the fight against overcrowding in prisons is not only a matter of achieving better material conditions, but also of giving offenders good and humane conditions respecting their dignity, with a view to achieving an effective rehabilitation, thus reducing the risk of recidivism with certain positive consequences in terms of increased social security.

Initiatives taken by Italy to comply with the Court’s ruling and international law standards on human dignity were presented by Mauro Palma, former chair of the European Committee for the Prevention of Torture, and current chair of the “Commissione ministeriale per gli interventi in materia penitenziaria.” A new independent authority, National Ombudsman, with the role of “monitoring and supervising prison facilities” (operational by the end of May 2014) and a system of non-custodial measures are the steps Italy has taken to comply with the measures indicated by the ECHR. Also, the Italian system has lately considered a greater use of fines as a more effective way of dealing with criminals; but paying out of pocket may not be the best way to operate a system.

The Italian procedure code provides a fair set of temporary and precautionary measures that can replace the “extrema ratio” of pre-trial detention in prison. These include: “house

arrest,” “prohibition to stay in the place of residence,” “mandatory residence,” “restraining orders,” or “orders of protection,” depending on the offender and the offense committed. These are much more effective measures that can begin the path to rehabilitation. Among other alternatives to post-trial detention we can find: assignment of the offender to probation services, special probation for drug addicts or alcoholics, home detention/house arrest, semi-liberty, conditional release and early release. A sentence of imprisonment is often the general rule, but now there are a number of possibilities permitting a different path to probation. The Italian correctional system, with the latest reforms, allows people to suspend these prison terms.

Among these alternative measures, Italian law has made a big step forward in the last period. Previously, for example, those who had relapsed or who had committed multiple crimes in the course of a career would have difficulty avoiding prison time. This has been changed—apart from those convicted of mafia association, stalking or child abuse-offenders will no longer automatically end up behind bars, but will be eligible to request community service or house arrest. The new system follows the Anglo-Saxon example, started in Italy in the 70s, ensures the sentenced the chance of focusing on re-education, and on the possibility of having the individual reintroduced into the external community with an ability to find a job. Often it happens that social services are able to understand the personal situation of the inmate, and they work with the inmate on a plan of rehabilitation.

The law decree 92/2014 also implements the recommendations of the ECHR in the Torreggiani case regarding remedies for violations of prisoners’ human rights. The decree amends the Penitentiary Act, reforming the pre-existing “generic” type of remedy (a general means of recourse, administrative in nature, which allows detainees to complain about their detention conditions) and introducing a new, truly jurisdictional, remedy. The jurisdictional remedy (reclamo giurisdizionale) had actually been introduced by the Italian Constitutional Court (judgment 26/1999); however, in practice, decisions taken by the surveillance judge could be disregarded by the penitentiary administration (as stated by the ECHR in the Torreggiani case and by the Constitutional Court, judgment 279/2013). The new provision allows detainees to file a claim to the surveillance judge to appeal disciplinary measures taken by the penitentiary administration, or violations of the penitentiary law or the enforcing regulations by the administration, in case they give rise to a serious and present infringement of their rights. These claims are tried following a special jurisdictional procedure (supervisory proceedings) and lead to the adoption of an order by the supervisory judge. Should the order not be enforced by the administration, the detainee can open a compliance procedure, at the end of which the supervisory judge may: order the execution of its decision (if necessary, also by appointing an enforcement agent-commissario ad acta); declare acts adopted by the penitentiary administration to be null and void; or order payment to the detainee to compensate the violation.

In addition, the “generic” remedy has also been amended. This procedure allows detainees to complain about their detention conditions in front of the newly established “Garante nazionale dei diritti delle persone detenute.” This sort of National Ombudsperson for detainees

29. La Cara Davide & Castorina, supra note 17.
30. Decreto-Legge 26 giugno 2014, n. 92 (It.).
is composed of three persons appointed by decree of the President of the Republic and has a right to visit all types of detention centers and to make recommendations to the public administration.

According to the law 117/2014 inmates still in prison will have their sentences discounted by 1 day for every 10 spent in cells of less than 3 square meters while former inmates will receive 8 euros for every day spent in such unhumane conditions. More recently politicians overhauled the drug laws, lowering penalties for marijuana, which is set to significantly reduce to the number of low-level criminals behind bars. The Parliament is still debating over a broad decriminalization and a reduction to administrative fines for many crimes.

The Council of Europe praised the "significant results" of Italy's prison reform, following a damning report by the European Court of Human Rights 18 months before. The Council’s decision-making body, the Committee of Ministers, in its ruling praised the “authorities’ commitment” and said “significant results” had been achieved in recent months. The ministers reported “an important and continuing drop in the prison population, and an increase in living space” for prisoners in Italy. The Council of Europe backed the reforms, noting "an important and continuing drop in the prison population," down from around 68,000 people in 2012 to 59,000 today.

**Bibliography**

BACCARO Laura – MORELLI Francesco, *In carcere: del suicidio e altre fughe*, Edizioni Ristretti Orizzonti, 2009


LA CARA Davide – CASTORINA Nino, *Viaggio nelle carceri*, Eir, 2014


33. Legge 11 agosto 2014, N. 117 (It.).


**Electronic Sources**


http://www.gazzettaufficiale.it/eli/id/2014/06/27/14G00104/sg

http://www.giustizia.it/giustizia/it/img_1_14.wp


http://www.hrweb.org/legal/cat.html

http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?fam=1&i=001-116248#{"itemid":["001-116248"]}

http://www.huffingtonpost.it/2013/10/08/napolitano-carceri-camere_n_4062871.html

http://www.senato.it/leg/17/BGT/Schede/Ddliter/41371.htm

Utility Air Regulatory Group v. Environmental Protection Agency: Expanding EPA’s Discretionary Regulations of Greenhouse Gases

Heather DeLaurie*

INTRODUCTION

Congress created the Clean Air Act (“CAA”) to protect the health of United States’ citizens by regulating the release of air pollutants into the air.¹ Title I of the CAA charges the Environmental Protection Agency (“EPA”) to formulate the National Ambient Air Quality Standards (“NAAQS”) for air pollutants.² The air pollutants that are currently included are sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead.³ Additionally, it is the job of the EPA to appropriately interpret the CAA and regulate pollution emitting sources called stationary sources.⁴ Stationary sources include but are not limited to factories, power plants, and automobiles.⁵ Stationary sources must have a permit called a Prevention of Significant Deterioration (“PSD”) permit, which allows these sources to emit a certain amount of harmful pollutants.⁶ Individual states issue these permits under the direction of the EPA.⁷ Additionally, there are sources defined as “anyway” sources that already have PSD permits.⁸ The EPA can impose technology called Best Available Control Technology (“BACT”) on these sources to further regulate the NAAQS pollutants.⁹ This process of regulating air pollutants involves a lot of statutory interpretation by the EPA. Statutory interpretation of the CAA has been the subject of multiple Supreme Court cases. It is important to the Court that the EPA retains a balance when deciphering the language of the statute. The interpretation should not be too broad, nor too narrow which is a difficult balance to strive for. Scalia delivered the majority opinion in the 2014 decision in Utility Air Regulatory Group v. EPA.¹⁰ In this case, the Court looked at the EPA’s interpretation of the CAA when promulgating regulatory standards involving greenhouse gases.¹¹

* 2016 J.D. Candidate, Syracuse University College of Law, B.S., University at Buffalo, 2013. I would like to thank my mother, Terry DeLaurie for her love and support throughout my academic career; Professor Robin Paul Malloy for his guidance and Professor David Driesen for expanding my interest and knowledge of environmental law.

³. Id. at 2435.
⁴. See id.
⁵. Id. at 2431.
⁶. Id. at 2432.
⁸. Id.
⁹. Id.
10. Id.
11. Id.
CASE HISTORY

Following the 2007 decision in Massachusetts v. EPA where the Court held that the EPA had the authority to regulate new motor vehicle greenhouse gas emissions, the EPA began to interpret the CAA to include the regulation of greenhouse gas emissions in stationary sources. Over a period from 2007 to 2011, the EPA took administrative steps to inform the public of its plan to regulate greenhouse gas emissions in sources other than motor vehicles. Throughout this process the EPA did not add greenhouse gas emissions to the NAAQS list for regulated air pollutants. Numerous parties including corporations and states felt that the EPA had overstepped its authority to monitor greenhouse gas emissions and brought suit against the EPA. The DC Circuit held the statutory language compelled the EPA’s broad interpretation of the statute and the petitioners were without standing to bring suit. The Supreme Court granted certiorari concerning the interpretation of the CAA.

MAJORITY OPINION

The Court focused on two issues. First, whether the EPA properly interpreted the CAA to include the permitting and regulation of greenhouse gas emissions in stationary sources. Secondly, whether the EPA reasonably interpreted the CAA to require “anyway” sources (those sources that already emit conventional pollutants) to comply with BACT standards concerning the emission of greenhouse gases. The Court disagreed with the EPA concerning the first issue, but upheld the agency’s interpretation of regulating greenhouse gases in “anyway” sources or already permitted sources. The Court focused on the interpretation of the CAA by the EPA using a standard set forth in Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc. Chevron held when a government agency, like the EPA, determines the ambiguity in an agency-administered statute, the agency should interpret the ambiguity in a reasonable way to stay within the bounds of the agency’s authority.

A.

The Court held in a 5-4 vote that the EPA’s interpretation of the definition of “air pollutant” in Title V of the CAA did not meet the standard of review under Chevron. Title V explains in detail, the trigger for the regulation and permitting of stationary sources. This provision in the CAA explains which pollutants and how much of each pollutant a stationary

13. Id. at 2436-38.
14. Id.
15. Id.
16. Id.
18. Id. at 2439.
19. Id. at 2447.
22. Id.
source may legally emit. The EPA reasoned that the act-wide definition of “air pollutant” in the CAA is referring to any air pollutant including greenhouse gases. The EPA argued that in an earlier case, *Massachusetts*, the Court held that the act-wide definition of “air pollutant” is “any air pollution agent or combination of such agents” and that greenhouse gases are an airborne compound. Scalia disagreed with this argument. In our case he said when the term “air pollutant” appears in Title V of the CAA, it serves as an operative term. In the past, when the words “air pollutant” were used in a specific section of the CAA, the EPA has given the phrase a narrow meaning. Since 1993, the EPA has included the narrow interpretation of “air pollutant” in their regulations. For example in 1997, the EPA issued a regulation stating that enhanced monitoring should occur when any source has the potential to emit 100 tons per year of “any air pollutant.” Within the regulation they go on to interpret “any air pollutant” as specifically limited to only regulated pollutants. These regulated pollutants are those that are compiled under NAAQS, which do not include greenhouse gases. In our case, Scalia and the majority overturned the prior Court’s decision based on the belief that the EPA was not interpreting “air pollutant” in a reasonable way.

Additionally, Scalia recognized that under *Chevron*, the EPA has to interpret meaning within the bounds of its authority. The EPA argued that as an agency they had the right to adopt a reasonable reading of the statute, thus interpreting “air pollutant” to include the regulation of greenhouse gases was correct. Scalia said the EPA must take into consideration the specific language of “air pollutant” as well as the broader meaning of the statute in its entirety. The EPA acknowledged in their briefs that by addressing greenhouse gases under Title V, it would broaden the CAA structure so vastly that it would undermine the intent Congress had when they wrote the act. If the EPA considered greenhouse gases as a permitting trigger, the stationary sources with an annual permit would go from 800 sources to nearly 82,000 sources. These results go directly against Congressional intent as evidenced by Congressional reports discussing the intended accomplishment of the act. By interpreting “air pollutant” to include greenhouse gas emissions, the EPA is not acting with discretion but dramatically increasing their authority without the approval of Congress. The EPA did not merely use discretion in interpreting the ambiguity of “air pollutant.” Instead, the EPA increased the scope of their authority over permitting stationary sources and for this reason Scalia, joined by the majority, reversed the EPA’s interpretation of “air pollutant” in Title V of the CAA.

23. Id.
26. Id.
27. Id. at 2440.
28. Id.
29. Id.
31. Id.
32. Id.
33. Id. at 2443.
34. See id.
B.

In the second part of this decision, the Court agreed with the EPA’s interpretation to require “anyway” sources or previously permitted sources, to be subject to further regulation for greenhouse gas emissions. The Court held in a 7-2 vote that stationary sources that already have PSD permits for the release of NAAQS pollutants, have to follow the BACT requirements for greenhouse gas emissions as well.\(^{35}\) BACT technologies may include add-on equipment or simply a change in the factories production processes.\(^{36}\) BACT regulations are determined on a case-by-case basis and do not run the risk of becoming over-regulatory.\(^{37}\) In this case, the interpretation of the BACT technologies to include greenhouse gases is a far less open-ended interpretation than the first issue.\(^{38}\) The language in the statute reads that BACT is required “for each air pollutant subject to regulation under this chapter.”\(^{39}\) Scalia said that the phrasing used to describe BACT regulations is not ambiguous but rather straightforward.\(^{40}\) It is evident from the regulations that have been put into place regarding BACT technologies that Congress meant for “regulation under this chapter” to include all emitted pollutants. Likewise, if an individual believes the text to be ambiguous, the effects of regulating greenhouse gases through the use of BACT technologies would not harm the system nor the sources.\(^{41}\) Regulating “anyway” sources would modestly increase the EPA’s authority over already regulated sources.\(^{42}\) Scalia and the majority held that the EPA interpreted the BACT technology language in a reasonable way and did not exceed their authority therefore allowing greenhouse gas emissions to be regulated in already permitted sources.\(^{43}\)

Dissent

Justice Breyer delivered the dissenting opinion. Justices Ginsburg, Sotomayor and Kagan joined Breyer concerning the first issue.\(^{44}\) The Justices do not disagree with the notion that “air pollutant” should not be looked at to be so broad as to include every pollutant under the sun.\(^{45}\) However, the correct way to interpret the language is not to create an exception especially for greenhouse gases.\(^{46}\) Furthermore, the purpose of Title V and the CAA should be taken into consideration when interpreting the statutory definition. The Justices argue from a legal and administrative standpoint, the language was constructed as such to achieve a real-world purpose.\(^{47}\) The accompanying Senate report stated that Title V meant to regulate larger sources, not smaller sources such as dairy farms.\(^{48}\) Since the EPA was only looking to apply greenhouse

\(^{35}\) Util. Air Regulatory Grp., 134 U.S. at 2447.
\(^{36}\) Prevention of Significant Deterioration, supra note 1.
\(^{37}\) Id.
\(^{38}\) Util. Air Regulatory Grp., 134 U.S. at 2448.
\(^{39}\) Id.
\(^{40}\) Id.
\(^{41}\) Id.
\(^{42}\) Id.
\(^{43}\) Util. Air Regulatory Grp., 134 U.S. at 2448.
\(^{44}\) Id. at 2450 (Breyer, J., Dissenting).
\(^{45}\) Id. at 2451.
\(^{46}\) Id. at 2452.
\(^{47}\) Id. at 2453.
\(^{48}\) Util. Air Regulatory Grp., 134 U.S. at 2453 (Breyer, J., Dissenting).
gas regulation to large stationary sources, their interpretation and application of “air pollutants” is practical and is not over-arching.

Justice Alito and Justice Thomas dissented as to the second issue about regulating “anyway” sources for greenhouse gas emissions. 49 Alito said that Scalia and the rest of the Court abandoned the argument of an over-bearing interpretation of “air pollutant” in the first issue and adopted a more literal approach to discuss the interpretation of BACT technologies. 50 Alito points out that the language is very similar between the two issues, thus it should have been interpreted in the same manner to not include greenhouse gases. 51 Alito stated that the result of this case is a disjointed interpretation of the CAA. 52

**IMPLICATIONS FOR FUTURE CASES**

The holding in *Utility Air Regulatory Group* has some negative as well as positive effects on future cases. First, the holding that disallowed the EPA’s interpretation of greenhouse gases as “air pollutants” strictly limited the EPA’s authority. The holding limits the EPA’s ability to regulate greenhouse gases under the CAA. It was a reminder by the Court that the EPA must follow the statutory intention of Congress when interpreting the CAA. 53 Additionally, this case provides industrial parties with a basis to argue that the holding in *Massachusetts v. EPA* was incorrect. After comparing the holding in our case, industries could argue that the EPA does not have the authority to regulate greenhouse gases in new motor vehicles. 54 Because the Court in *Utility Air Regulatory Group* said the EPA cannot interpret Title V to include greenhouse gases, this has a direct effect on continuing viability of the holding in *Massachusetts*. As discussed earlier, Title V discusses the pollutants that the EPA can regulate if they are emissions from stationary sources. Stationary sources include motor vehicles. The holdings in the two cases appear to be contradictory and would allow industries to argue the regulation of greenhouse gases.

*Utility Air Regulatory Group* did make small steps in the direction of providing enhanced regulation of the environment. The Court allowed the EPA to regulate “anyway” sources for greenhouse gases by utilizing BACT. While the control may be limited as to how much the EPA can cut down on greenhouse gas emissions, it is a start. 55 Additionally, the EPA has the authority under the CAA to include any air pollutant within the NAAQS. Although it may be a long, drawn out process, this case signaled that it may be in the best interest of the agency to go through the administrative process to include greenhouse gases as an “air pollutant” to avoid the mistake of interpreting the statute too widely causing the EPA to overstep its authority.

49. Id. at 2455 (Alito, J., Dissenting).
50. Id. at 2456.
51. Id.
52. Id.
54. Id.
55. Id.
CONCLUSION

The *Utility Air Regulatory Group* decision was not a total loss for the EPA. Scalia admonished the EPA for interpreting “air pollutant” in a context that was too broad, because it gave the agency too much authority, which Congress never afforded them. However, Scalia gave the EPA some authority over regulating greenhouse gases. Scalia recognized that already permitted sources could be regulated through the use of BACT regulations without overstepping the authority granted to the EPA by Congress. This decision confirms that when a statute is ambiguous and unclear, it is the job of the EPA to interpret the language in such a way as to carry out its purpose, so long as the interpretation is not over-burdensome and is within the EPA’s authority.
**McCUTCHEON v. FEDERAL ELECTION COMMISSION: INVALIDATING THE FEC’S AGGREGATE CAMPAIGN CONTRIBUTION RESTRICTIONS**

Dennis W. Polio*

On April 2, 2014, the United States Supreme Court decided *McCutcheon v. Federal Election Commission*, which invalidated federal aggregate contribution limits.¹ The Supreme Court’s ruling in *McCutcheon* removes the arbitrary and unnecessary barriers to potential political donors, increasing the influence of individual contributors while still retaining some limits on large donors. The decision is consistent with the Court’s recent trend of invalidating and modifying overreaching campaign finance regulations by citing infringement of protected speech. While contentious, the Court’s decision was the correct one and may even lead to increased transparency in Federal campaign contributions.

In this 5-4 plurality decision, the Supreme Court ruled statutory aggregate campaign contribution limits on donations to all political organizations or candidates in the Federal Elections Campaign Act (“FECA”) unconstitutional. Relying heavily on *Buckley v. Valeo*,² the same case used as the foundation of other recent campaign finance decisions, the plurality determined these limits are unconstitutional as a violation of protected political speech.

**BACKGROUND, FACTS, AND PROCEDURAL HISTORY**

There have been many influences and motivations for the regulation of campaign finance, and in the century since its implementation, there have been innumerable changes. However, a number of events stand out as significant legislation or landmark court decisions. Given their importance, these events can influence congress and the federal courts in their actions.

*a. Campaign Finance, FECA, and Buckley*

There have been attempts to regulate federal campaign finance since at least 1867.³ It was this year Congress passed the first federal campaign finance regulation.⁴ The Naval Appropriations Bill of 1867 prohibited campaigns from soliciting donations from naval workers.⁵ This was an effort to counter the “shaking down” of post war (Civil War) naval workers by corporations.⁶ While this may seem like a trivial matter in today’s world of email solicitations and union protections, this was the start of modern federal campaign finance

---

² Id.
⁴ Id.
⁵ Id.
⁶ Id.
regulation, whether nineteenth century Americans realized it or not.

The Naval Appropriations Bill, in effect, became an utter failure. It was extremely narrow in its reach (only barring contributions from naval workers) and served as the impetus for greater solicitation of contributions from wealthy high-dollar contributors.\textsuperscript{7} The end of the Civil War brought about the rise of industrialization, and with it, the rise of large corporations and wealthy businessmen. Campaigns could no longer solicit contributions from the throngs of naval and dock workers so they turned increasingly to these new industrialists. These moguls of business and industry had built careers and successful businesses out of recognizing and taking advantage of opportunities. They were more than happy to contribute extravagant and disproportionate amounts of campaign funds and, in return, gain increased access to elected power holders.

The public’s outrage over this perceived impropriety in the electoral process came to a head following the presidential election of 1904. Theodore Roosevelt had won the election but was criticized for accepting large amounts in corporate donations.\textsuperscript{8} Motivated by this public sentiment, Roosevelt urged the implementation of laws stemming such conduct.\textsuperscript{9} The Tillman Act of 1907 banned corporate contributions to federal campaigns, a move no doubt motivated at least in part by Roosevelt’s campaign.\textsuperscript{10} These efforts and those that followed were extremely ineffective and were circumvented with little effort.\textsuperscript{11} It was not until 1971, over 100 years after the passage of the first federal campaign finance regulation, that congress was able to pass comprehensive campaign finance regulations.\textsuperscript{12}

FECA (1971) created a series of disclosure requirements.\textsuperscript{13} These requirements meant that campaigns had to disclose whom they were taking contributions from and in what amounts. FECA was amended many times after 1971 and it was amended significantly in 1974.\textsuperscript{14} In a response to the Watergate Scandal and alleged campaign abuses in the 1972 election, 1974 saw FECA become a truly effective campaign finance regulation tool. The 1974 amendments created an independent agency solely devoted to the regulation of federal campaign activities, the Federal Election Commission (“FEC”), and imposed numerous contribution limits.\textsuperscript{15}

FECA as amended by Bipartisan Campaign Reform Act (“BCRA”) placed two types of limits on campaign donations: Base limits and Aggregate limits.\textsuperscript{16} Base limits are restrictions on the amount of money a contributor may give to any one particular candidate or political committee. These limits are both aggregate (all donations made to that particular candidate or

\textsuperscript{7} Id.
\textsuperscript{12} Henry Brewster et al., Election Law Violations, 50 AM. CRIM. L. REV. 765.
\textsuperscript{14} Gerachi, supra note 3.
\textsuperscript{16} See Brewster, supra note 12.
committee during an election cycle) and periodical (all donations made to that particular candidate or committee during a set period of time, usually monthly or quarterly). An example of a base contribution limit would be Dennis Polio may give $2,600 to Senator Ted Kennedy’s Campaign in the 2000 election cycle, but no more.

Aggregate limits are restrictions on the amount of money a contributor may give to all candidates and committees. These limits were biannual. Under FECA as amended by BCRA, during the two years before the 2014 federal general election no donor could make over $46,200 in contributions to candidates, or $70,800 in any other contributions to federal committees, including national political parties. Under FECA and BCRA, an individual could comply with base limits but violate aggregate limits if she contributed to too many campaigns or committees. An example of an aggregate contribution limit would be Dennis Polio may give $2,600 each to Senator Scott Brown, Senator Elizabeth Warren, Congressman Christopher Shays, Senator Joseph Lieberman, Senator Ed Markey, and 12 other candidates for federal office, but cannot donate $2,600 to any other federal candidate within the same election cycle since the contributions would add up to more than $46,200 in aggregate total.

In 1976, the United States Supreme Court decided *Buckley v. Valeo*. Through *Buckley*, the Court extended two major cornerstones of modern campaign finance. First, the Court proffered the idea that the right to participate in the democratic process through contributions to political entities is protected by the First Amendment. Second, the Court said that even with this status as protected speech, the freedom to make political contributions (or political speech) is not absolute. Congress may regulate protected speech in order to serve a legitimate government interest. In the case of the regulation of political contributions, the legitimate government interest served is the protection against corruption or the appearance of corruption. However, the Court reinforced that the government may not regulate contributions simply to reduce the influence of some individuals or entities or enhance the relative influence of others saying:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

### b. Basis for McCutcheon’s Lawsuit

The decision in *Buckley* set the stage for Shaun McCutcheon’s suit almost forty years later. McCutcheon is a businessman, electrical engineer, and Republican activist from Alabama who has been a regular donor to political campaigns and committees for many years. During the 2012 federal election cycle, McCutcheon contributed amounts allowable under the base

---

19. Id.
20. Id.
21. Id.
22. Id.
23. Id. at 48-49.
limits of FECA as amended by BCRA. McCutcheon contributed $1,776 to sixteen different candidates for federal office.\(^{25}\) While complying with the base limits for each contribution, he was unable to contribute to twelve additional candidates for federal office, as he had wished to do. Contributing to any one of these twelve additional candidates would have violated the aggregate limits set by BCRA. McCutcheon, joined by the Republican National Committee (“RNC”), filed suit against the FEC in federal district court for the District of Columbia.\(^{26}\) They alleged aggregate campaign contribution limits did not serve any cognizable government interest and were therefore a violation of the First Amendment. McCutcheon asserted that he wished to make additional contributions in the future, all complying with the base limits, but was prevented from doing so because of the aggregate limits. The RNC joined McCutcheon in the suit because it wished to receive contributions from McCutcheon and others like him, and was prevented from doing so because of the aggregate limits of FECA and BCRA.

c. U.S. District Court: District of Columbia

A three-judge panel held that FECA’s aggregate limits on contributions were permissible and did not violate the First Amendment.\(^{27}\) They held that aggregate limits prevented corruption or the appearance of corruption and further served a purpose of preventing evasion of the base limits. Therefore, the limits serve a substantial government interest and were not overbroad. The District court granted the FEC’s motion to dismiss.\(^{28}\) McCutcheon and the RNC appealed to the United States Supreme Court. The Supreme Court granted certiorari.

**ISSUE**

The issue presented to the United States Supreme Court was whether aggregate campaign contributions limits were unconstitutional as a violation of the First Amendment.\(^{29}\)

**ANALYSIS OF THE COURT’S RULING**

a. Plurality Holding and Reasoning

Chief Justice Roberts authored a plurality opinion. He was joined by Justices Scalia, Kennedy, and Alito in reversing the District Court’s holding, finding FECA’s aggregate campaign contribution limits an unconstitutional violation of the First Amendment.\(^{30}\) Justice Thomas joined the plurality judgment in a concurrence. The plurality found there was a substantial mismatch between the Government’s interest in limiting aggregate campaign contributions and the way it sought to achieve those objectives. The Court found that even with the lower court’s standard of fulfillment of a substantial government interest, the limits failed.

The plurality, citing *Buckley* and *Citizens United v. Federal Election Commission*,\(^{31}\)

---

25. *Id.* at 1443.
26. *Id.* at 1436-37.
28. *Id.*
30. *Id.*
31. 558 U.S. 310 (2010) (a recent landmark campaign finance case where the Court lifted significant restrictions on independent expenditures).
found that spending large sums of money in connection with elections does not give rise to *quid pro quo* corruption or the appearance of corruption. However, the Court did not decide that base limits were unconstitutional. Justice Roberts said:

> The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse. . . . The difficulty is that once the aggregate limits kick in, they ban all contributions of any amount, even though Congress's selection of a base limit indicates its belief that contributions beneath that amount do not create a cognizable risk of corruption. \(^{32}\)

The Court recognized that while the line separating *quid pro quo* corruption and “general influence” can appear vague, the distinction is important to safeguard first amendment rights. In determining that distinction, the First Amendment demands the Court favor the protection of political speech rather than its suppression. \(^{33}\)

The plurality further suggested that there are multiple alternatives available to Congress that would serve the Government’s interest in preventing circumvention of base limits, and therefore *quid pro quo* corruption, while also avoiding an overbroad restriction of protected political speech. These alternatives include targeted restrictions on transfers of money between candidates and political committees, and tighter earmarking rules for campaign funds. The plurality also notes that the existing contribution disclosure requirements further lessen the possibility of abuse and corruption.

*b. Concurrent Holding and Reasoning*

Justice Thomas agreed with the plurality that aggregate limits are invalid under the First Amendment, but he would have overruled *Buckley v. Valeo* entirely. \(^{34}\) In overruling *Buckley*, Thomas would hold that any restriction of contributions would fail to serve any legitimate government interest. This would subject all contribution limits to strict scrutiny, ensuring they would fail constitutionality tests. Because all campaign contribution limits impose a direct restraint on political speech, Thomas would invalidate them in entirety.

c. Dissenting Holding and Reasoning

Justice Breyer authored the dissenting opinion joined by Justices Ginsburg, Sotomayor, and Kagan. \(^{35}\) The dissent stated that overturning the aggregate limits (along with other recent federal court holdings) allowed the Court to undermine or even destroy what restrictions are left in campaign finance reform, which could make it difficult for the Government to ensure democratic legitimacy. Further, the dissent stated that this created “huge loopholes” which could be used by individuals to funnel “millions” to candidates or committees.

\(^{33}\) Id. (Citing Federal Election Comm’n v. Wisconsin Right to Life, 551 U.S. 449, 457, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (opinion of ROBERTS, C.J.)).
\(^{34}\) McCutcheon 134 S. Ct. at 1462-63.
\(^{35}\) Id. at 1449.
IMPLICATIONS

While the McCutcheon decision may seem like it opens the floodgates for the super-rich to influence government through contributions to political campaigns, it actually has less of an effect than one may think. The extremely wealthy political donors have been writing 6, 7, and 8 figure checks well before McCutcheon, but they have been writing them to independent expenditure committees. Independent expenditure committees are able to collect much larger amount of contributions than campaign committees and since *Citizens United*, they have been able to produce express advocacy in limitless amounts. Donors that would have contributed to directly to a campaign committee if not for aggregate limits, could have contributed in whatever amount they would like to an independent expenditure committee who may support those campaign committees. The major downside to this approach, however, was that the donor could not decide where these funds were going (which candidates were supported or opposed).

Further, independent expenditure committees are perceived as being regulated less than candidates or their committees. Independent expenditure committees are unlimited in the amount of money they can receive in donations, however, contrary to what some believe, these donors are just as easily disclosed as donors to political committees. McCutcheon could actually lead to greater perceived transparency in politics, since it will enable more people to contribute to more candidates’ campaigns, who in turn disclose their donors to the FEC. McCutcheon could turn a great deal of so-called “Dark Money” (large amounts of money that is given to and spent by super-pacs and independent expenditure committees and therefore popularly thought of as harder to track) into “clean money,” money donated directly to candidate’s committees and required to be disclosed and reported to the FEC. This distinction is purely one of perceived transparency, however, as independent expenditure committees are required to report and disclose financial activity similarly to campaign committees.

Even if this decision does not lead to greater disclosure or greater perceived transparency, aggregate limits are simply arbitrary and capricious infringements on protected speech. As Shaun McCutcheon has said, “[s]omehow, [a donor] can give the individual limit, [then] $2,600, to 17 candidates without corrupting the system. But as soon as [a donor] give[s] that same amount to an 18th candidate, our democracy is suddenly at risk.” In the author’s view, aggregate limits lack the relevance and foundation that individual contribution limits rely on. There is no corruption in simply contributing to multiple candidates for public office, when giving to one single candidate does not trigger such concerns. Further, as soon as a person has reached the aggregate limit, FECA turned into an absolute bar to any further contribution, no matter how small. Therefore claiming to reduce corruption or the appearance of corruption through restriction of aggregate contribution limits is without merit, and the Court rightly stuck down such regulations.

Name ________________________________________________________________

Firm Name ______________________________________________________________________

Firm Address ______________________________________________________________________

City, State, Zip and Country ______________________________________________________________________

Office Phone _________________________________ Fax _____________________________

Cell Phone ______________________________________________________________________

E-mail ______________________________________________________________________

Web Site ______________________________________________________________________

Home Address _________________________________________________________________

Home Phone ___________________________________________________________________

Law School, w/ graduation year ______________________________________________________________________

In which states and/or countries are you licensed to practice law? ______________________________________________________________________

Which languages (besides English) can you read and/or speak fluently? ______________________________________________________________________

Areas of Practice (please select no more than three)

<table>
<thead>
<tr>
<th>Administrative</th>
<th>Estate Planning</th>
<th>Probate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adoption</td>
<td>Family Law</td>
<td>Product Liability (Plaintiff)</td>
</tr>
<tr>
<td>Antitrust</td>
<td>Franchise</td>
<td>Product Liability (Defendant)</td>
</tr>
<tr>
<td>Appellate</td>
<td>General Practice</td>
<td>Professional Disciplinary</td>
</tr>
<tr>
<td>Arbitration/Mediation</td>
<td>Health Care</td>
<td>Public Service</td>
</tr>
<tr>
<td>Banking</td>
<td>Immigration</td>
<td>Real Estate</td>
</tr>
<tr>
<td>Bankruptcy/Reorganization</td>
<td>In House</td>
<td>Real Estate Tax</td>
</tr>
<tr>
<td>Business</td>
<td>Insurance</td>
<td>Retired</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>Intellectual Property</td>
<td>Securities</td>
</tr>
<tr>
<td>Class Actions</td>
<td>Investment Banking</td>
<td>Social Security</td>
</tr>
<tr>
<td>Commodities</td>
<td>Judge</td>
<td>Tax</td>
</tr>
<tr>
<td>Commercial Litigation</td>
<td>Labor/Empl/Mgmt Relations</td>
<td>Torts</td>
</tr>
<tr>
<td>Construction</td>
<td>Litigation</td>
<td>Traffic</td>
</tr>
<tr>
<td>Corporate/Business</td>
<td>Malpractice</td>
<td>Training/Consulting/Education</td>
</tr>
<tr>
<td>Criminal</td>
<td>Accountant</td>
<td>Wills and Trusts</td>
</tr>
<tr>
<td>Customs/International Trade</td>
<td>Attorney</td>
<td>Workers Comp (Plaintiff)</td>
</tr>
<tr>
<td>Defamation</td>
<td>Medical</td>
<td>Workers Comp (Defendant)</td>
</tr>
<tr>
<td>Divorce</td>
<td>Municipal</td>
<td>Zoning/Planning</td>
</tr>
<tr>
<td>Educator</td>
<td>Patent &amp; Trademark</td>
<td></td>
</tr>
<tr>
<td>Employee Benefits</td>
<td>Personal Injury (Plaintiff)</td>
<td>Other ________________</td>
</tr>
<tr>
<td>Environmental</td>
<td>Personal Injury (Defendant)</td>
<td></td>
</tr>
</tbody>
</table>

Membership Status

Attorney    Judge    Retired    Law student
Membership Level & Annual Dues:
  Regular Member ($50)  Sponsor ($100)  Patron Sponsor ($250)  Law student (free)

Our newsletter is distributed electronically. If you prefer to receive a hard copy in the mail, check here

How did you learn about NIABA?
  Local Association  Web Site  The Digest Law Journal
  Referral from member
  Other

Would you like to make a contribution to the NIABA Scholarship Fund?
  $100 or more  $50  $25  Other

Include your check, made payable to NIABA Scholarship Fund

I certify that I am at least one of the following: a lawyer of Italian birth or extraction; a lawyer related by marriage to a person of Italian birth or extraction; a lawyer who is willing to support the purposes and objectives of this association. I further certify that I have been admitted to practice law and am in good standing in any country or jurisdiction; or have been granted and possess a law degree from a college of law in any jurisdiction and would qualify for admission to practice law; or am currently a law student in an accredited law school in any country or jurisdiction. All information I have provided is true and accurate to the best of my knowledge.

Signature  Date

Please mail this form along with your membership dues and any other amounts listed above, made payable to:

NIABA
PMB 932
2020 Pennsylvania Ave., NW
Washington, DC 20006-1846

www.niaba.org

Phone: 414-750-4404
Fax: 414-255-3615