STANDARDIZATION OF JUDICIAL PRACTICE IN ITALY

Andrea Salvatore Romito[*)]
Clara Tracogna[**)]

Abstract

The following study is meant to be a comprehensive overview on the Italian Judiciary: particular attention is paid on the Judiciary from both a static point of view (Judiciary as an organized administrative office) and a dynamic point of view (Judiciary as a power in action). Starting from the Constitutional rules on the Judiciary and offering a detailed description of the Courts system (organization of Courts, enrolment and careers of judges, their liability, number of magistrates and law cases), the Authors provide an in depth analysis of the rules and mechanisms aimed at a uniform interpretation in order to avoid the phenomenon of non unity of jurisprudence, which is although well-known in Italy due to several agents, such as an overwhelming amount of laws and law-cases. The study also offers an analysis of recent decisions at the top level Courts in Italy (Corte Costituzionale and Corte di Cassazione) and in Europe (European Court of Justice and European Court of Human Rights) pointing out the main issues and the solutions offered by Courts.

Keywords: *public law; Italian Judiciary; non unity of jurisprudence;* nomofilachia; stare decisis*; European Courts and Italian jurisprudence*

1. The Judiciary in Italy

1.1. Constitutional provisions on Judiciary. Title IV of the Italian Constitution provides a settle of rules related to the Judiciary. Art. 101 § 2 states that judges are only subject to law: magistrates as a whole constitute a body which is autonomous and independent from any other constitutional power (that is, legislative and executive); their independence is guaranteed by the Supreme Council of the Judiciary (*Consiglio Superiore della Magistrautra*, hereinafter "CSM"), whose president is the President of the Italian Republic and is composed 1/3 by members appointed among members of Parliament and 2/3 by magistrates

[*)] Judge Andrea Salvatore Romito is Magistrate at the Civil and Penal Court in Enna, Italy (andrea.romito@libero.it).

[**)] Dr. Clara Tracogna is PhD in Criminal Procedure at the University of Padova, Assistent Lecturer at the University of Udine and Attorney-at-law in Udine, Italy (clara.tracogna@unipd.it; clara.tracogna@tin.it).

The essay is a result of a study made by both Authors and has to be considered as a shared outcome. However, §§. 1.1, 1.2, 1.4, 1.5, 2.2 and 5 had been written by Judge A.S. Romito and §§ 1.3, 2.1, 3, 4.1, 4.2 and 6 had been written by Dr. C. Tracogna.

elected by their colleagues[1)].

CSM is in charge to designate, appoint and transfer, promote and carry towards disciplinary measures towards members of the Judiciary (art. 105 Constitution). CSM is thus a bulwark of the doctrine of separation of constitutional powers, since it grants magistrates' independence.

Moreover, magistrates have the right not to be moved from the place where their office is based, except when they ask for transfer. Art. 107 § 4 clearly provides that public prosecutors are compared to judges in that they are granted the same guarantees of independence.

It should be however noticed that the rules on judiciary are an issue of the Parliament (art. 101, § 2; art. 102, § 3; 103, § 2; 106, § 2; art. 108 of the Constitution) and should be ruled by a law approved by the Parliament (art. 70 and following of the Constitution).

This means that the executive power is in any case not allowed to rule by itself the subject: the Ministry of Justice is only allowed to present draft-bills to the Parliament and is in charge of the organization and functioning of the Judiciary from an administrative point of view (art. 110 of the Constitution)[2)]. During the law-making process, CSM and magistrates could be asked for advice.

The advice given in these cases is not mandatory: however, fair play among constitutional powers suggests to follow this best practice. Before presenting a draft-bill to the Parliament, the Ministry of justice asks for opinion to the C.S.M. In any case, the advice given is not binding.

Moreover, when approving laws on particular subjects, magistrates could be invited as experts to attend Parliament hearings: in this case, their contribution is technical and doesn't affect political issues. Finally, on a direct assignment from the Ministries, magistrates can be seconded from their office and functions to Governmental offices (such as Ministries or their branches).

1.2. Magistrates enrolment, training and career. Magistrates are appointed after a competition (art. 106 of the Constitution) on a national basis: only candidates with a degree in law proving to hold a further qualification can apply for the exam. In particular, lawyers who passed the bar-exam, PhDs, those who attended the School of Specialization for Courts Professions (which is organized among Universities, lawyers and Judges) and civil servants who are at a certain level of career are admitted to take the exam, which consists in two parts: a)

[1)] In detail, CSM is composed by the President of the Republic, who chairs the CSM; the First Chief Judge of the Court of Cassation; the Prosecutor General of the Court of Cassation; eight members appointed by Parliament *(laici)*; sixteen members appointed by judges and prosecutors *(togati)*.

[2)] However, notwithstanding the prohibition, there are some regulations approved by the Government on topics related to the judiciary: i.e. Decree of the president n. 916/1958 implementing law. 195/1958 on the establishment and functioning of the CSM.

written exam on three main subjects (civil, penal and administrative law); b) an oral exam on eighteen subjects. Each candidate can take the exam only three times in its life; however, there's no age limit to be admitted to the exam.

Those who successfully go through the exam procedure had been called *uditori giudiziari* until 2007, when Law no. 111 changed the name of the new appointed magistrates into *magistrati ordinari in tirocinio*, a definition that is closer to the function they have been selected for. They will attend a paid training period that lasts 24 months (considering also holidays and summer breaks at Courts) at the Court of Appeal in the district in which they are domiciled. At the end of the training period both CSM and a special committee at the Court of Appeal confirm or deny the suitability of the magistrate to be definitively appointed for judiciary functions: new magistrates then follow a training period in view of the exact functions they will be finally appointed to. Examinations scores are ranked and vacant posts are assigned on these scores.

Law no. 111/2007 provides that trainees should attend a Higher School of the Judiciary *(Scuola Superiore della Magistratura)* at least for six months, under the supervision of a mentor whom is a senior magistrate. The Higher School is expected to be created in four different cities (Benevento, Bergamo, Catanzaro, Florence). Moreover, magistrates follow refresher training courses all over their career: a special panel at the CSM is in charge of the professional updating. Furthermore, each magistrate has the possibility to attend at least one course per year, in the field of law related to its assignments.

There is no hierarchy among magistrates enrolled at Courts: they only differ for their functions. However, a magistrates' ruled career is not inconsistent with the Constitution. Law no. 570/1966 and Law no. 831/1977 introduced a system based mostly on the length of service: after a determined period, except for an opposite opinion expressed by CSM, the magistrate obtained a career move, i.e. qualification and salary related to the higher post, even when he remained at the same office. As soon as a post he was entitled to got free, he took charge of the higher post. This system has been changed by Law no. 150/2005, that introduced also merits criteria. Merit is checked through a competition among magistrates that are asked to prove their professional expertise. Moreover, even if the magistrate deserves a higher qualification, he can mention it only when he effectively takes charge of the higher post.

1.3. Courts organization. In Italy there are three types of Courts of first instance and their competence is based on the crime for which the accused person has been charged. *Corte di assise* has jurisdiction over the most serious crimes[3)]: it

[3)] *Corte di assise* has jurisdiction on crimes punishable with life imprisonment; life imprisonment with solitary confinement, which is the most severe punishment in Italy, and for those crimes for which the maximum sentence is at least 24 years, wiht some exceptions. Art. 4 of the criminal code of procedure states that in order to determine the jurisdiction of the different

is composed by six non professional judges and two magistrates (involving persons who are not part of the Judiciary is a way to implement art. 101, § 1 of the Constitution, which states that justice is run on behalf of the Italian people).

On the opposite, *Giudice di pace*, which is composed by an only judge whom is not a professional magistrate and is appointed after a procedure in which only qualifications are checked (such as holding a degree in law, be enrolled at the Bars, etc.), has jurisdiction on minor offenses that can be solved in a better way through mediation and negotiation. Indeed, the law specifies that in the on-going trial the judge must encourage, as much as possible, the reconciliation of the parties[4)]. If a defendant is convicted in this Court, the judge may not impose a sentence of imprisonment, but only a fine, or, in more serious cases, a sentence of house arrest or, upon the defendant's request, community service.

Tribunale stands in between the abovementioned Courts and has jurisdiction over criminal matters that are not within the jurisdiction of either the *Corte di assise* or the *Giudice di pace*. However, as part of recent organization, there are now two forms of tribunal, one is a solo judge Court, the other is a panel of three magistrates. *Tribunali* are based both on a general principle that these offences may be punished to more than a ten-years maximum sentence. Offences that are not assigned to the three magistrates panel are to be tried in front of a solo judge Court at the *Tribunale*.

As for intermediate Courts, it should be mentioned that, in general, parties can seek for appeal of the decision only when the remedy is provided by law (art. 568 of the Criminal Code of Procedure).

There are two intermediates Courts of appeal for seeking review of the lower Courts decisions. *Corte di appello* is a panel of three magistrates who decides on attacks towards Tribunale decisions. The Court of appeal can confirm or change the first-instance Court decision; otherwise, it can annul it (art. 604, 605 of the Criminal Code of Procedure).

Both the defendant and the prosecutor may seek review of *Corte di assise* decisions by the *Corte di assise di appello*, which is a panel composed by two professional judges and six non professional judges.

Finally, there is the Court is the *Corte di cassazione*, which is the top court, in charge of granting and promoting the exact application and uniform interpretation of laws, the unity of national body of rules and the respect of limits to jurisdiction, solving competence conflicts. The Supreme Court is divided into five panels for private law trials (including labour and tax law) and seven panels for penal trials. In most important cases as well as in case of conflicts on issues of law (i.e., its interpretation and its correct application) among different sections of the *Corte di*

Courts it is necessary to consider the punishment set out for the crime, excluding enhancement for recidivism, and excluding any circumstances that could increase the punishment, unless the penal code establishes a different punishment for certain circumstances.

[4)] See art. 2 of the *decreto legislativo* n. 274/2000.

cassazione itself, the overall sections form a sole panel (so called *sezioni unite civili* for private law and *sezioni unite penali* for penal law) which is in charge to solve conflicts on the interpretation and application of law provisions.

The Court is involved only in expressed cases (art. 606 of the Criminal Code of Procedure: i.e., breach in the interpretation of law, lack of reasoning, loss of a relevant evidence, a misuse of power by the lower judge when the power belongs to another public body) by those who have been parties in the trial and seek for review of the decision by appellate Courts. As the appeal to the *Corte di cassazione (ricorso)* can be presented only in a limited range of hypothesis, jurisprudence and lawyers created a legal irregularity case, the so called "*abnormità*", which stands for a breach in the system that allows a party to seek review of the decision by the Supreme Court.

As a matter of fact, the Supreme Court decides only in two cases on merits, that is: a) in extradition and surrender procedures, because the first-instance Court in these procedures is the Court of Appeal and the defendant is then given only two level of jurisdiction; b) when deciding on pre-trial measures proceedings.

However, there is a general rule that allows an attack to first instance decisions to be held directly by the Supreme Court: it's a kind of "leap frog procedure", which is also known as *ricorso per saltum*, provided by art. 569 of the Criminal Code of Procedure. Moreover, even when there are no other means to seek review (i.e. appeal), art. 111, § 7 of the Constitution allows a direct remedy towards lower Courts decisions that decide upon defendant's freedom (including pre-trial measures, decisions passed at the end of the trial, decisions passed in the enforcement procedure): anyway, the Supreme Court cannot decide on merits, but only on points of law: this Court is not allowed to review evidences and it can only check if both substantive and procedural law has been applied in the proper way.

The Supreme Court can decide to confirm, annul (with or without sending the case back to the lower Court whose decision has been annulled), or reform the decision.

Unlike common law countries, Supreme Court decisions have effect only in the trial they are related to. However, they are usually respected by lower Courts, especially when it comes to consider *sezioni unite* decisions: this is the way through which its role to ensure the exact observance and uniform interpretation of the law (known as *nomofilachia*) is expressed.

Among other tasks, the Supreme Court rules on conflicts of jurisdiction in terms of both territory and subject-matter. The Supreme Court is in fact the judge of legitimacy: its sole function is to take care that lower Courts apply correctly and in a uniform way the law.

To complete the framework, it has to be mentioned that the issue of constitutionality belongs only to the *Corte costituzionale*, that is a separate body with fifteen judges (5 elected by the Parliament, 5 by the President of the

Republic and 5 among judges at the higher posts of the Judiciary) independent of the professional judiciary, and is charge with judicial review of legislation. This can be either direct or indirect: however, judges may ask for the Constitutional Court pronunciation only when they are going to decide a case with the law that is suspected to breach the Constitution: in these cases, the Court could be asked for a preliminary ruling by a judge (both at lower Courts and at the Supreme Court level) who has to apply a law in the on-going trial. If the law that should be applied in the case *(rilevanza)* is likely to breach the Constitution *(non manifesta infondatezza)*, then the judge must engage the Constitutional Court. It in turn, the Constitutional Court must check the constitutionality of the law and eventually declare its annulment.

Eventually, art. 25 of the Italian Constitution should be mentioned, as it forbids the creation of special judges, which means *ad hoc* panels that have jurisdiction on a fact after the fact itself happens: however, there are special judges who already existed when the Constitution entered in force and that are in charge to deal with special subjects[5)].

From another perspective, specialization within Courts and Tribunals depends on district dimensions upon which they have jurisdiction. The territorial distribution of Courts in Italy dates from XIXth Century and has never been substantially changed. There are several branches of the Court that are detached in towns and cities with less than 20.000 residents. On the other hand, in main cities (i.e. Milan, Rome, Naples) there are specialized branches within the Court, reflecting also the particular social background of the place where they are based: that is, there are sections for private law, labour law and penal law that are themselves specialized in different branches of law that require special expertise[6)].

[5)] As for the special Courts, should be mentiond: Administrative jurisdiction, exercised by the *Tribunali Amministrativi Regionali – TAR* (Regional Administrative Courts), whose decisions may be appealed before the *Consiglio di Stato* (Council of State); Auditing jurisdiction, exercised by the *Corte dei Conti* (State Auditors' Department) for matters concerning public accounts; Military jurisdiction, exercised by the *Tribunali Militari* (Military Courts), by the *Corti Militari di Appello* (Military Appeal Courts) and by the *Tribunali Militari di Sorveglianza* (Military Surveillance Courts), for military offences committed by members of the Armed Forces; Fiscal jurisdiction exercised by the *Commissioni Tributarie Provinciali* (Provincial Fiscal Commissions) and by the *Commissioni Tributarie Distrettuali* (District Fiscal Commissions), for matters concerning taxes. Moreover, *Tribunale Regionale delle Acque Pubbliche* (Regional Court of Waters) and the *Tribunale Superiore delle Acque Pubbliche* (High Court of Waters), competent for controversies on waters that belong to the State.

[6)] The civil section of Rome Tribunal has sections divided among: family and liability section (n. 1), public administration affairs (n. 2); company law (n. 3); eforcement (n. 4); real estate rights (n. 5, 6, 7); market law (n. 8, 9, 10, 11); liability law (n. 12, 13); insolvency law; agrarian law; deontological bodies decisions. The penal section is formed by: ten subsections and six *Corti di assise*; the office of the judge competent to decide on issues arising during public prosecutors investigations; Court competent on crimes committed by Ministries when exercising their powers and functions.

1.4. Disciplinary, civil and criminal liability of the members of the Judiciary. A magistrate who fails in his duties or whose conduct, inside or outside the office, is such as to make him unworthy of the trust and esteem in which he must be held, or who jeopardises the prestige of the judiciary, will be punished (art. 18 of Decree no. 511/1946). The general nature of the relevant rule gives broad powers to the disciplinary judge: as there are no strict definitions of the facts consisting in breaches of discipline, magistrates' conduct must in fact be assessed by the disciplinary judge by referring to general models or clauses, which are reflected, according to the wordings of art. 18, in the trust and esteem that citizens hold to a magistrate and in the prestige of the judiciary as a whole.

As for disciplinary sanctions, these consist in: a) a warning indicating the breach of conduct and inviting the magistrate to comply with his duties; b) a reprimand, which consists of a formal reproach for the breach committed by the magistrate; c) loss of seniority, that is postponing, by no less than two months and no more than two years, admission to a higher post; d) dismissal from the office, which consists of the definitive exclusion from the judiciary in cases where, as a result of his conduct, the accused magistrate is objectively unable to perform judicial functions in any office and at any level; e) loss of office, which is the same as a dismissal except for the fact that it is linked to a criminal conviction. This is not an automatic consequence of a criminal conviction, but depends on the seriousness of the offence. Enforced transfer can be added to the sentence, when it is more serious than a warning.

Disciplinary proceedings are instituted at the initiative of the Minister of Justice in the form of a request to the Prosecutor General of the Court of Cassation. This way, the Minister exercises the "power" assigned by art. 107 of the Constitution.

A disciplinary action may, however, also be commenced by the Prosecutor General of the Court of Cassation in his capacity as public prosecutor attached to the disciplinary division. In any event, it is the Prosecutor General who pursues the action, whether by requesting the disciplinary Division of the C.S.M. to start an investigation or by advising the Division that he is commencing summary proceedings. The investigation may therefore be conducted either by the Prosecutor General of the Court of Cassation in the case of summary proceedings or by a member of the Disciplinary Division in the case of ordinary proceedings. In the pre-disciplinary phase, the Minister may delegate the General Inspectorate to gather information.

Disciplinary proceedings are judicial in nature and are regulated, until the disciplinary Court's ruling, by the 1930 rules of criminal procedure integrated by the specific disciplinary proceedings rules. In order to safeguard the person concerned, disciplinary proceedings must be commenced no later than one year after the day in which the entities in charge of instituting the disciplinary proceedings have been informed of the fact on which the charge is based.

The disciplinary Court consists of a panel of judges known as the Disciplinary Division, which is made up of six members: the Vice President, who is a member by right and chairs the Court, and five members elected by the CSM among its members, one of whom doesn't belong to the Judiciary, one is a magistrate with the rank and functions of a Court of Cassation magistrate, two are judges and one is a prosecutor. In his capacity as President of the CSM, the Head of State may avail himself of the right to chair the Disciplinary Division and, in that case, the Vice President is excluded from the panel.

The magistrate charged of a disciplinary breach has the right to defend himself and by a colleague in the disciplinary proceedings. During the investigations or the trial, the Disciplinary Division may suspend the magistrate from his functions and freeze his salary at the request of the Minister of Justice or the Prosecutor General. Suspension is mandatory in cases where the magistrate has been arrested. The sentenced magistrate, the Minister and the Prosecutor General can seek review by the Civil Divisions of the Court of Cassation.

Secondly, civil liability is the liability that a magistrate undertakes towards the parties or other entities involved in the trial he is in charge to decide, and which results from any mistake or non-compliance affected in the exercise of his functions. The civil liability of judges and prosecutors, which is similar to that of any other public servant, is based on article 28 of the Constitution and is now provided by Law no. 117/1988. This law affirms the principle of the right to compensation for any unfair damage resulting from the conduct, decision or judicial order issued by a magistrate either with "intention" or "serious negligence" while exercising his functions, or resulting from a "denial of justice". The law nevertheless clarifies that the activities of interpreting the law and assessing the facts and evidence cannot be considered as a breach that leads to such liability. In this respect, in any such cases, it is the procedure itself which safeguards the parties, i.e. by resorting to the system of appeals against the order assumed to be defective. Without prejudice to the fact that in relation to the merits the judicial activity is an issue of the magistrate, something can nevertheless be done in respect of a magistrate's disciplinary liability in cases where – according to the CSM Disciplinary Division's case law – an exceptional or evident breach of law has been committed, or the judicial function has been exercised in a distorted way.

It should be stressed that the liability for compensating damage is on the State, to whom an injured party may start a legal action. If the State's liability is established, then the State may in turn claim compensation from the magistrate.

A liability action and relevant proceedings must comply with specific rules. The most important of these rules provides that the liability proceedings are subject to: the lodging of all ordinary means of appeal, including any other remedy for amending or revoking the measure that is assumed to have been the cause of unfair damage; the existence of a deadline for exercising such action; a

decision on the action's admissibility, for the purposes of checking the relevant prerequisites; observance of the terms; an assessment of the evidence to see whether the charges are grounded; and the judge's power to intervene in the proceedings against the State.

In order to guarantee the fairness of the proceedings, the system provides for the jurisdiction over such proceedings to be transferred to a different judicial office, in order to ensure that the proceedings are not assigned to a judge of the same office as the office of the magistrate whose activity is assumed to have given rise to the unfair damage.

Thirdly, in their qualification as public officials, magistrates can be charged for crimes committed in the exercise of their functions (i.e. abuse of office, corruption, corruption connected with judicial duties, extortion, failure to perform official duties etc.). Parallel to this, they may act, in conjunction with the State, in their capacity as victims of a crime committed by private individuals against the public administration (a typical example is that of contempt of Court and, in particular, contempt of Court directed against the judge). In this respect, Law no. 420/1998 provides new rules on jurisdiction upon such proceeding: in addition to transparency, the aim of this reform was to ensure a judge's maximum autonomy of decision when called on to try cases in which other colleagues are involved for whatever reason. Significant changes were made to the rules of criminal procedure (art. 11 of the Code of Criminal Procedure and 1 of the implementing rules of the Code of Criminal Procedure), by creating a mechanism for establishing the competent judge to avert the risk of "crossed" jurisdictions (which happens when the Court A is competent on the crimes committed by a judge who is in the Court B and *vice versa*)[7)].

1.5. Italian Judiciary in numbers. In Italy there are 846 *Giudice di pace* offices; 387 Tribunals; 29 Courts of Appeal; 166 Public Prosecutor offices. The Judiciary counts 8.359 magistrates, among whom 2.105 are public prosecutors and 6.254 are judges.

Referring to the 2010 CEPEJ Report[8)], which is based on data collected until 2008, facing a trial in Italy is a beyond compare experience: civil judges have to deal with an amount of 2.842.668 new trials per year while penal judges take care of 1.280.282 new trials per year. Compared to the forty-six Council of Europe Member States, Italy is the Member State with more trials pending at civil Courts (3.932.259) and first instance penal Courts (1.205.576).

[7)] See, in detail, The Italian Judicial System, CSM report on Judiciary independence, available at http://www.csm.it/documenti%20pdf/sistema%20giudiziario%20italiano/inglese.pdf.

[8)] The CEPEJ (Commission européenne pour l'efficacité de la Justice) 2010 "Evaluation Report of the European Judicial System – Efficiency and quality of Justice", can be found at https://wcd.coe.int. See also Gioacchino Natoli, "La verità sui magistrati italiani n. 2", available at http://www.associazionenazionalemagistrati.it/media/71603/Dossier_Europa2010.pdf.

Public prosecutors offices ranked at the third position both for the amount of new cases per year (3.270.906), after France and Spain, and for the amount of cases per year that are brought to Courts at the end of preliminary investigations (624.266), after England and Wales and France.

As for the budgetary issues, among Council of Europe members, Italy spends more than any other Country for the whole functioning of the Judiciary. However, considering the percentage related to the number of residents, results should be reconsidered: in 2008, Italy invested 7.278.169.362 euros in the judiciary, decreasing the total amount of 6,9 % compared to 2006 data. This is in offbeat with other Countries (i.e. Spain, where there was a growth of 26,8%). The main part of the budget for Tribunals (3.008.735.392 euros) is spent for salaries (2.390.027.432 euros), while the remaining part goes to IT tools (73.987.488); to general judicial expenses (287.571.836); to buildings and structures maintenance costs (253.913.969); to refresher training courses.

The average expense is 50,5 %, while the average expense in the other Countries is 37%. However, Italy is ranked, for instance, after Slovenia, Swiss and The Netherlands.

Referred to 2006 results, the government decreased to 17,3% the expenses for Public Prosecutors Offices, increased those for the Tribunals up to 8,1% and to 17,6% that for the legal aid.

The economic crises affecting Europe turned into a reduction of the salaries of 15% for all civil servants working in the judiciary in 2009, and of 27% for magistrates in 2010.

2. Jurisprudence and *stare decisis* principle

2.1 *Diritto vivente, nomofilachia, precedente* and unity of jurisprudence. It's a common opinion among Scholars and practitioners that jurisprudence is not part of the sources of law in the Italian system. Art. 1 of the Preliminary dispositions to the civil code (so called *Preleggi*) provides a list of the sources of law, mentioning statutory law, regulations and custom but not jurisprudence. Italian judges are obliged to apply and respect laws (art. 101, § 2 of the Constitution) according to the given rules on interpretation (art. 12 *Preleggi*) among which it's not possible to find a rule allowing judges to mention Court decisions in order to clarify the meaning of a new rule and to fill gaps among the sources of law.

The rationale of such an outcome is the need to balance multiple interpretations and creative dimension of jurisprudence, from one hand, and uniformity and predictability of judicial decisions, on the other hand, in light of the equality principle, the certainty of law principle and the judge independence in the interpretation of laws.

However, it is commonly accepted that jurisprudence has a fundamental role in a judge's deciding proceeding and thus in lawyers arguments. Moreover, a

constructive function (so called *nomopoietica*) should be acknowledged to all bodies that are given authority, so that also Court decisions ought to be considered among sources of law. In any case, even if considered as a source of law, jurisprudence has its own peculiarities, such as flexibility and relativity.

Jurisprudence is also known in Italy as *diritto vivente* (law in action), which, in light of the Italian Constitutional Courts decisions, stands for a solid tendency that is rooted and won't change except for a decision coming from the Court itself or for a new law approved by the Parliament.

The Supreme Court in fact stresses the difference between rules and wordings: wording is a part of a document which is still to be interpreted by judges; while the rule is the outcome of interpretation. Thus, the sources of law theory should be renovated in light of the fundamental role of jurisprudence and the function of the Supreme Court known as *nomofilachia*, which stands for uniform interpretation of rules.

The ground for this function has to be found in articles 65 and 68 of the Royal Decree organizing the Judiciary (no. 12/1941). Art. 65 provides as follows: *Corte di cassazione*, as the Supreme Court upon Courts, provides the correct and uniform interpretation of laws, the unity of the national laws and the limits of jurisdiction among different judges, solving conflicts of competence and jurisdiction and any other task assigned by law. Art. 68 states that within the Supreme Court there is a special branch *(Ufficio del massimario)*, established in 1941, which has the task to promote the Supreme Court *nomofilachia* function at first creating a uniform interpretation (through studies and papers prepared before hearings) and, after that, taking care of law reporting activities. This way, *Ufficio del massimario* gives a cultural aid to magistrates' activities and realizes the legitimacy function of the *Corte di cassazione*.

Moreover, the statutory decree n. 40/2006 modifying the civil procedure code, introduced also some rules stressing the Supreme Court *nomofilachia* function.

A confirm also comes from:

– art. 363 of the Code of Civil Procedure, which allows a decision of the Supreme Court in the interest of the law, even when parties withdrawn the proceedings or the appeal is out of time limits, after a special request by the General Attorney at the Supreme Court. In this case the Court gives a decision stating the exact interpretation and the principle that the lower Courts would have respect in the case. The same rule is applied when the appeal is not admissible (because it doesn't match the specific hypothesis for which it is allowed) but the Supreme Court itself considers relevant the issue and offers its interpretation in order to assure unity on the interpretation of a rule.

– art. 77 of the Royal Decree no. 12/1941, that allows the public prosecutor to appeal for annulment, revocation or review of the lower Courts decisions to the Supreme Court in the interest of law. This provision should also be read in light of art. 112 of the Constitution, that provides the mandatory prosecution principle,

which is itself an expression of the principle of legality.

– art. 374 of the Civil Code of Procedure and art. 618 of the Criminal Code of Procedure stating that, in case of conflicts among Courts on the interpretation of a rule, the decision should be given by the Supreme Court's main panel *(sezioni unite)*.

– art. 393 of the Civil Procedure Code, which states that if the proceedings is withdrawn and a new action is proposed, then the Supreme Court decision given in the previous trial should be applied in the renovated trial.

– art. 118 of the implementing dispositions of the Code Of Civil Procedure, that forbids to judges to mentions Scholars and Lawyers studies and books in the reasoning of their decision: this rule is applied, by means of a broad interpretation, also in criminal proceedings, due the lack of a similar specific rule in the criminal code of procedure[9)].

– art. 64 of the statutory Decree no. 165/2001 (civil servants labour law) and art. 420 *bis* of the Code of Civil Procedure (labour law trials), that provided a peculiar preliminary ruling aimed at interpreting the rules and the effectiveness and validity of national collective agreements. Art. 420 *bis* of the Civil Code of Procedure states that, pending a labour law trial, the judge is allowed to decide on the interpretation, validity and efficacy of the agreement. The party towards whom the interpretation given is adverse can then seek review by the Supreme Court on the same issues within 60 days after the decision: in this case, the on-going trial can be suspended until the Supreme Court has passed its decision. Art. 64 of the statutory Decree provides for a procedure in which the judge first involves trade unions representatives in order to give its interpretation on civil servants collective agreements: if it's not possible to share a common outcome, the judge offers its interpretation towards it's possible to seek review by the Supreme Court within 60 days.

– art. 388 of the Civil Code of Procedure, which provides that the whole copy of the Supreme Court decision (and not only a summary of it) is sent (also by means of email or fax) to the lower Court: this is meant to realize in fact the Supreme Court *nomofilachia* function, through a circulation of decisions assuring

[9)] Apparently, this rule seems to create a barrier between Scholars and judges: however, the connections between jurisprudence and doctrine have become closer in time. In Italy there are several Law reviews as well as law websites reporting and commenting Courts' decisions. Of course these reviews are also read by judges for their professional refreshment: this brings a virtuous circulation of points of views and reasoning on different issues. It should be also mentioned that doctrine and jurisprudence sometimes have a close collaboration in that there persons from the Academy are appointed as members of some special Courts (i.e. Constitutional Court, Administrative Courts) or in some institutional bodies (Scholars are appointed as members of the CSM and have an important role in the refreshing committees). As for the relation with the law-making process, Scholars from the Academy had an important role in the introduction of the criminal code of procedure, in that Professors and researches have been appointed in the commissions in charge to draft the code of criminal procedure that is now in force.

the persuasive effect of the Supreme Court decision.

In this framework, *stare decisis* principle, even if it's not a general principle in the Italian system, has developed in a particular way. *Stare decisis* is referred in Italy to the so called *precedente*, which stands for a former decision, considered as an advice to solve the present and similar case, or at least to give suggestion for a comparison.

Precedente is not legally binding, however, when it comes to consider its effect, several aspects should be mentioned: a) decision of a last instance overbears that of the lower Courts; b) last instance Court decision efficacy is in inverse proportion to the amount of decisions on the same rule; c) *precedente* efficacy lays upon decisions' circulation among judges (i.e. through databases and law reports).

Depending on the kind of decision given, Supreme Courts decisions have different efficacy:

a) vertical *precedente*: in case the Supreme Court reviews the lower Court decision and returns back the trial to it, the lower Court has to apply the rule as interpreted by the Supreme Court (civil procedure code: art. 384, § 2; art. 143 of the implementing rules; criminal procedure code: art. 627, § 3; art. 628; art. 173, § 2 of the implementing rules).

b) *autoprecedente*: if, after the decision of the lower Court which respects the ruling of the Supreme Court, the parties seek again review to the Supreme Court in the same case, the Supreme Court itself must respect the ruling already given.

c) horizontal *precedente*: decision ruled by the main panel of the Supreme Court has a consistency duty effect for the Supreme Court small panels (Code of Civil Procedure: art. 374, § 3; Criminal Code of Procedure: art. 610, § 2; art. 618; art. 172 of the implementing rules).

d) in other cases, judges can decide not to respect previous decision ruling, however they are asked to explain with a strong reasoning their decision, using the distinguishing technique, when *precedente* is related to a different case, or the overruling technique, when the previous ruling is inadequate and another principle should be applied in order to solve the case. If they fail in this, their decision will probably be reviewed by the Supreme Court.

The problem of the creation of *precedente* presents a strong link with the style of the decision: in other words, there is a connection between the length of *precedente* upon the years and the reasoning techniques, that should be short, simple and, if possible, contextual with the decision (art. 281-*sexies* of the Civil Code of Procedure and art. 544 of the Criminal Code of Procedure). Recent laws provided simple decisions *(ordinanza)* with a short reasoning in civil proceedings (art. 375, 380-*bis*, 380-*ter*), while art. 610, § 1, of the Criminal Code of Procedure (modified in 2001) has established the seventh criminal section at the Supreme Court. The seven section is in charge to check the admissibility of the appeals to the Supreme Court before sending them to the competent panels. It decides

through a decision with a short reasoning *(ordinanza)*. Since it was established, the seventh section decides finally around the 48% of the total amount of the appeals presented to the Supreme Court.

In 2007 the main panel of the Supreme Court civil section ruled 1.427 decisions, while the main panel of the Supreme Court criminal section ruled 30 decisions.

However, it should be noticed that the number of decisions passed by the Supreme Court main civil and criminal panels are decreasing.

2.2. *Massimario* task towards jurisprudence harmonization. This is in part due to important role of the *Ufficio del Massimario*, that has the task to study and analyse jurisprudence by means of continuous monitoring of the Supreme Court panels decisions. In particular, *Massimario* indexes civil seeks; makes summaries of civil and penal selected decisions; points out pending conflicts of jurisprudence and those that have been solved and main tendencies; prepares studies for the main panels and updates on jurisprudence and lawyers tendencies on specific issues[10)].

Criteria for choosing which decisions should be summarized are provided by President of the Supreme Court decrees approved on 11th July 1991, 27th May 1992 and 23rd January 2004, in force since 1st February 2004.

For each selected decision, *Massimario* prepares a short, clear and simple summary, so called *massima*, that is a short statement (usually five to ten lines) concerning the legal rule that has been used in the decision considered: it is stated in very general terms, usually without any reference to the facts of the specific case, and it takes into account only the legal side of the decision. It may contain a restatement of the statutory rule that was applied in the decision, or a statement concerning an interpretation of a rule, or a legal principle used by the Court. The *massima* is extracted from the opinion included in the judgment; it concerns every general statement of law that may be found in the opinion. Therefore several *massime* can be derived from the same judgments, when it touches several legal problems. Perhaps the most important feature of such a system is that *massime* are usually stated without any effective connection with the facts in issue and with the particular aspects of the single case. Correspondingly, it cannot be said that a *massima* contains the *ratio decidendi* of the case.

The summary has to show the rationale at the basis of the decision, pointing out the concrete rule that judges should bear in mind when deciding similar cases. Before each summary relevant laws applied are mentioned, while at the end of the summary previous decisions on the same or on similar cases are mentioned, even

[10)] In 2007, *Massimario* prepared 7.700 civil law summaries and 2.936 criminal law summaries. Moreover, *Massimario* prepared 745 studies, 515 updates for the main panels; 144 reports for the criminal section; 136 reports for the criminal section.

when they ruled different principles (so called *ipertesto*).

Among decision sent every year to *Massimario* (13.500 on civil law, 25.000 on criminal law), around 30% of the civil ones and 12% of the criminal ones are selected to be summarized. The record counts respectively 480.000 summaries in civil law and 140.000 summaries in criminal law.

As for databases, Supreme Court and lower Courts decisions in civil, penal and administrative law are collected within a period of two months after their official publication, on a database ran by the Supreme Court *Centro Elettronico Dati* (CED) called Italgiure (www.italgiure.giustizia.it). It collects decisions dating from the Sixties and they are published through a summary or in they complete reasoning. Magistrates have free access at the website, while privates have to subscribe in order to obtain a login password. Each decision available in the website points out previous decisions (both similar or different) on the same case in order to check if the decision summarized represents a unique decision or is part of a general tendency.

Since 2004, *Massimario* is also in charge to update constantly the *"servizio novità"* (updates service) on the website of the Supreme Court (www.cortedicassazione.it), which offers a free reporting service for both professionals and individuals. A relevant part of the website is the one where recently decided and pending contrasts, scheduled to be decided in short time by the Supreme Court in its main panel, are mentioned: this is a useful instrument to check the tendency of recent jurisprudence. Furthermore, at the beginning of every years *Massimario* publishes a complete collection of the most important cases in criminal and civil law, explaining the contrasts pending as well as the one solved the year before.

The website provides selected Supreme Court decisions as well Constitutional Court, European Court of Justice and European Court of Human Rights decisions. Moreover, also national and European laws can be found in the browser as well as relevant documents and papers.

There are other services offered upon subscription that provides decisions of Supreme and lower Courts, often adding an overview of Scholars publications in law reviews.

3. Constitutionality issue, interpretation and application of EU and European Convention on Human Rights rules. Speaking of the constitutionality issue, the only thing that a judge can do by himself in order to avoid an appeal for the intervention of the Constitutional Court is, while interpreting the national law, to do the utmost to save the constitutionality of the law. This means he needs to find an interpretation that could be consistent with the Constitution. If this is not possible unless causing a breach in the system, the judge should ask the Constitutional Court to annul the statutory law. The Constitutional Court itself, prior to declaring the unconstitutionality of the law,

should try to offer an interpretation coherent with the Constitution. It should be mentioned that the outcome of the decision of the Constitutional Court on the constitutionality issue is binding *erga omnes*.

The same rule effect comes from the rulings of the European Court of Justice (art. 274 of the EU Treaty).

A close examination on this point should also mention the relation between, from one side, EU law and European Convention of Human Rights and, on the other side, Italian laws.

The articles of the Constitution by means of which the Convention could receive acknowledgement in our legal system are four: art. 10, paragraph 1, which states that "The legal system of Italy conforms to the generally recognized principles of international law"; art. 11, on the basis of which "Italy […] agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends"; art. 2, which states that "The republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity"; art. 117, paragraph 1 on the Legislative power, which has been modified in the year 2001 and whose wording is: "Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European union law and international obligations".

The turning point for Italy is represented by two "twin" decisions that the Constitutional Court handed down in 2007: the Court passed the interpretation that, due to the new art. 117, paragraph 1 of the Constitution, the articles of the Convention can be used as criteria to check whether an Act of Parliament can be considered constitutional[11)]. In other words, as art. 117, paragraph 1 mentions "European union law and international obligations" and as the Convention is, as a matter of fact, an international obligation, an Act of Parliament or a law made by a local Parliament (which exist in each Italian region) must respect, apart of course from the Constitution, even the rules of the European Convention of Human Rights. This means that an Act of Parliament can't change the law which implemented the Convention and can't breach its rules without being declared unconstitutional.

From the point of view of the Italian Courts, the decision means that, since the issue of constitutionality belongs only to the Constitutional Court, a judge who has to apply a law which seems to violate the European Convention of Human Rights must engage the Constitutional Court. It in turn must check the constitutionality of the law and eventually declare the annulment of the law.

As stressed by the Court itself, this is different from what happens when a national rule breaks the European Union law: after many years of debate between

[11)] See Constitutional Court decisions nn. 348 and 349, handed down on 24th October 2007.

the Constitutional Court and the European Court of Justice, the outcome is that, in case a law violates the European Union law, a judge (both at Trial Courts level and at the Supreme Court level) can decide not to apply that law in the concrete case but to directly apply the European union law instead. This is possible because EU law has a special position in the hierarchy of the sources of law and is able to produce direct effects on our legal system.

In 2010 the Constitutional Court passed two decisions in which it is stated that, depending on their content, the rules of the Convention find their acknowledgement not only in art. 117, paragraph 1, but also in art. 10, paragraph 1, of the Constitution: as a matter of fact, art. 117, paragraph 1, will be the basis of the acknowledgment in our legal order when referring to rules of the Convention which are new in the international landscape, while art. 10, paragraph 1, will be the basis when the rules of the Convention are only reproducing through their wordings a generally recognized principle of international law (i.e. prohibition of torture)[12)].

Recently, the Constitutional Court confirmed its outcome, stating on the consequence of the reform of art. 6 of the EU Treaty, as modified by the Lisbon Treaty. As a matter of fact, the new wordings of art. 6, §§ 2 and 3, provide that: «2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law». The question presented to the Constitutional Court was: as the European Convention is now part of the EU rules and as the EU is going to sign the Convention, will it be possible for the judge applying a national law which breaks the European Convention to decide not to apply the Italian law and to directly apply instead the principles of the Convention?

The Constitutional Court passed that, as the EU has not signed the Convention yet, therefore art. 6 § 2 doesn't produce any effect. The rules of the Convention find then their acknowledgment not in art. 11, but still in art. 10 and 117, § 1 of the Constitution: thus, as stated by the Court in 2010, a national judge who suspects that a national law is not consistent with the European Convention should involve the Constitutional Court to possibly annul it[13)].

The framework resulting from the decisions mentioned above shows that the Convention rules cannot breach any of the rules of the Constitution. On the other hand, as the Convention still keeps its nature of international treaty, its rules cannot be forced or changed in their meaning in light of the Constitution.

Nevertheless, for sure the Constitutional Court decisions seem to pave the way for the acknowledgment of the Convention as a Constitutional charter of

[12)] See decisions nn. 311 and 317 respectively passed on 16th and 30th November 2009.

[13)] See Constitutional Court decision n. 80, passed on 11th March 2011.

fundamental rights, pursuing eventually the aim to place the Convention and the Constitution altogether at the top of the source of law hierarchy.

4. European Court of Justice decision and ECHR decisions effects in light of recent Italian jurisprudence

4.1. European Court of Justice preliminary ruling decision effects. European Court of Justice preliminary rulings have direct effect in the trial that provoked the European Court of Justice decision: as stated in art. 274 of the EU Treaty, the Italian judge who asked for a preliminary ruling is bound by the result given by the Court. The only possibility given to the judge is to ask for a new preliminary ruling in order to solve different problems, except the one already ruled by the Court.

As for different trials, a European Court of Justice *precedente* allows the national judge not to ask for a preliminary ruling in a similar case (which is mandatory for last instance judges), but still the judge can ask for a preliminary ruling in order to obtain an overruling decision on a similar case. Both Constitutional Court and Supreme Court acknowledge an *erga omnes* effect to European Court of Justice preliminary rulings decisions, that overbears national inconsistent laws[14)].

The binding effect is acknowledged not only to the command but also to the obiter dicta, that are the part of the decision An *obiter dictum* is a remark or observation made by a judge that, although included in the body of the Court's opinion, does not form a necessary part of the Court's decision. In a Court opinion, *obiter dicta* include, but are not limited to, words introduced by way of illustration, or analogy or argument. This is valid for rulings both on interpretation and on the annulment of a European rule or act.

4.2. ECHR decisions effects in light of recent Italian jurisprudence. As stated in art 46, paragraph 1, of the European Convention, "if the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party". The Committee of Ministers is competent in identifying the public administration of the sentenced Country in charge of the payment of the "just satisfaction".

A second effect is the obligation to conform to the sentence purview: the State has the duty to reproduce the situation existent before the breach of the Convention and to adopt any needed measure to stop the violation, delete its consequences or prevent other similar violations.

[14)] See Constitutional Court decisions no. 113, passed on 19th of April, 1985; no. 389, passed on 11th September 1989; Supreme Court decisions no. 2787, passed on 28th March 1997 and no. 9653, passed on 3rd October 1997.

The practice of the Committee of Ministers in supervising the execution of the Court's judgements shows that in exceptional circumstances the re-examination of a case or a reopening of the proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*. As a matter of fact, in the year 2000 the Committee of Ministers approved a Recommendation inviting the member States to adopt measures in order to assure the injured person's *restitutio in integrum*, also by means of a re-examination of the case, including reopening of the proceeding[15]. In particular, when the violation consists in the breach of the defendant's right to take part at the trial, ECHR jurisprudence states that "a retrial or the reopening of the case, if requested, represents in principle the appropriate way of redressing the violation", all the same confirming that it's not her duty "to indicate how any new trial (or re-examination of the applicant's appeal) is to proceed and what form it is to take"[16].

Recently, on January, 15th 2010, the State Duma of the Russian Federation has voted in favour of the draft law ratifying Protocol no. 14 to the European Convention on Human Rights. On February, 19th 2010, the President of the Court has received the depositing by the Russian Federation of its instrument of ratification. Protocol no. 14 will be effective three months after its deposit. As for what matters to the present study, it is relevant that art. 46 of the Convention will be amended: the new provisions are more strict in introducing an infringement procedure towards the State which does not respect its obligation to adopt measures requested by the ECHR decision.

A large number of States adopted special legislation providing for the possibility of re-examination of the case or reopening of the proceedings. In other States this possibility has been developed by the Courts and national authorities under existing law. The two missing States are Spain and Italy. From the Italian perspective, the question becomes ticklish when it comes into consideration that the Italian criminal procedure law doesn't provide any remedy against the execution of a decision adopted in breach of the ECHR principles. Nor the Italian criminal procedure code gives the opportunity to replace the trial with a new one that respects the Convention rules. The revision of the final decision is an extraordinary remedy on an otherwise final judgment conviction. Such an attack is allowed only when there is new evidence which alone, or in connection with other evidences, shows that the defendant must be acquitted, or that the conviction was based on false or fabricated evidence. This remedy is not available to a condemned person who seeks a more favorable disposition or for a mild punishment[17].

---

[15] See Recommendation R (2000) 2 of the Committee of Ministers.

[16] See the following ECHR decisions: Pititto v. Italy, 12th November 2007; Kollcaku v. Italy, 8th February 2007; Zunic v. Italy, 21st December 2006; Alì Ay v. Italy, 14th December 2006; Sejdovic v. Italy, 1st March 2006; Somogyi v. Italy, 18th May 2004.

[17] See art. 630 of the Italian criminal procedure code.

Up till now, this problem has only been solved by case law. The action chosen was to interpreting the rules of the Italian code of criminal procedure that were provided for different kinds of situations. In these decisions, judges acted as substitutes of the Parliament because a specific law for the case was lacking.

The first decision passed by the Supreme Court *(Corte di Cassazione)* is related to the "Cat Berro case". ECHR sentenced Italy because the trial at the end of which the accused was sentenced was unfair. Therefore, the defendant's counsel asked the competent Court of Appeal to annul the execution of the sentence. The Court of Appeal rejected the request and the defendant sought review by the Supreme Court, which stated that the matter of the effects of ECHR decisions on a final conviction issued at the end of an unfair trial cannot be decided by the Court of Appeal pending the execution, but should be analyzed in a cross-examination procedure. Accordingly, the Supreme Court annulled the Court of Appeal decision, which had to decide again on the point, but rejected the defendant's request a second time[18)].

A more insightful decision has been handed down in the "Somogyi case". An Hungarian citizen sentenced in Italy for trafficking weapons appealed to the ECHR at the end of an *in absentia* trial. The ECHR sentenced Italy for violating the defendant's right to be present at the trial because there was no evidence of the fact that the defendant was aware of the ongoing trial. After that, the Supreme Court stated that the defendant could appeal the first instance decision in accordance with art. 175 of the code of procedure, which entitles a person who, without his fault, was not aware of the trial to appeal the decision even if the time period to apply has expired[19)].

The third one is known as "Dorigo case": Mr. Dorigo was sentenced in a final instance in 1996 to thirteen years in prison. After Mr. Dorigo's appeal, the ECHR sentenced Italy because the conviction was based on statements made during the investigations by three witnesses who, once the trial came to the Court, took the right to refuse to answer[20)]. This caused a breach of the defendant's right to confront and question the witness against him provided by art. 6 of the Convention.

After the ECHR decision, Mr. Dorigo asked the competent judge (Court of Appeal in Bologna) to stop the execution of the final decision condemning him, taking advantage of ECHR decision. However, the Court of Appeal, refused to accept the request and asked the Constitutional Court to decide whether the Italian rule which provides the review only in the abovementioned hypothesis (i.e.

[18)] See ECHR, Cat Berro v. Italy, 28th August 1991; ECHR, Cat Berro v. Italy, 25th November 2008; Cassazione penale, sez. I, September, 22nd 2005, n. 35616; Corte d'assise d'appello di Milano, 30th January 2006, Cat Berro.

[19)] See ECHR, Somogyi v. Italy, 18th May 2004; Cassazione penale, sez. I, 18th May 2006, n. 56581.

[20)] This was possible according to the version of art. 513 of the criminal procedure code in force before the amendment introduced in 1997.

discovery of an evidence which alone, or in connection with other evidences, shows that the defendant must be acquitted) was respectful of the principles of the Constitution.

In 2008, Constitutional Court stated that only the Parliament is competent to decide whether a trial can be reviewed: according to the Italian *principio di tassatività delle impugnazioni*, the circumstances in which it is possible to apply for appeal are limited by the statutory law. Therefore, it's a duty of the Parliament to find a remedy in case a final decisions is passed at the end of trials that the ECHR considers unlawful accordingly to the European Convention rules.

At the same time, the Public prosecutor in Udine, competent for the execution of the sentence condemning Mr. Dorigo and aware of the critical situation, asked the execution judge to declare that Mr. Dorigo's detention was not lawful because based on a final decision which was the outcome of an unlawful trial. However, the execution judge rejected his request stating that: a) the execution judge should only check the existence of a final decision, no matter what happened during the trial; b) there's no instrument to renew a trial in this case, and a decision stopping the execution would create the strange situation in which a final decision is suspended without closure to the procedure.

The Public prosecutor sought review by the Supreme Court, which admitted the Public prosecutor's claim stating that, whenever ECHR sentences Italy for unlawfulness of a trial, the defendant has the right to ask for a review of the decision and Italy should respect the ECHR decision, according to art. 46 of the Convention. Even if the Italian code of criminal procedure doesn't allow a review for this particular case, the judge in charge of the execution should declare that he cannot execute the decision condemning the defendant, because in doing so he would breach the Convention rules for two times in the same case (in particular, a breach of art. 5 of the Convention)[21)].

According to art. 670 of the Code of Criminal Procedure, should the judge stop the execution, the defendant will once more have the time to apply for the appeal. However, in the Dorigo case, the Supreme Court only blocked the execution, stating nothing about the renewal of the trail. By doing this, the Supreme Court avoided a breach of art. 5 of the Convention but still didn't solve the problem of the right of a review of the final decision.

In the "Drassich case", Mr. Drassich was sentenced to eight years and three months in prison for corruption. Seeking review by the Supreme Court, he said that the crime has lapsed, but the Court rejected his claim giving a different qualification of the fact committed: instead of "simple" corruption, the conduct was considered corruption of the judiciary. This has a more severe punishment which results in a longer prescription time and in the final conviction of Mr.

[21)] See ECHR, Dorigo v. Italy, 16th November 2000; Cassazione penale, sez. I, 1st December 2006, n. 2800; Corte costituzionale, 30th April 2008, n. 129.

Drassich. Therefore, Mr. Drassich presented his appeal to the ECHR. It sentenced Italy because the change in the indictment after the trial in factual instance had been completed was not respectful of art. 6 of the European Convention: neither the defendant nor the Public prosecutor had the possibility to discuss the new qualification. Taking advantage of the ECHR decision, Mr. Drassich asked to the competent judge to stop the execution on the basis of art. 670 of the Italian Criminal Procedure Code, as the Supreme Court stated in the "Dorigo case". Nevertheless, in this case the Supreme Court, though stating that the final decision couldn't be executed, didn't apply art. 670 of the Criminal Procedure Code. As a matter of fact, its decision was based on art. 625-*bis*: however, art. 625-*bis* provides an extraordinary remedy useful only in case of mistake on fact[22)].

On February 2010 the Supreme Court decided the "Scoppola case". Mr Scoppola was final sentenced to life-imprisonment because he murdered his wife and tried to kill one of his sons. During the first-instance trial, Mr. Scoppola asked to apply for a special proceeding *(giudizio abbreviato)* that grants the defendant to obtain: a) reduction of the punishment by 1/3 if he is found guilty; b) a change from in life imprisonment to thirty years imprisonment; c) no daytime isolation during life imprisonment[23)].

The first-instance Court admitted Mr. Scoppola's request and sentenced him to thirty years in prison. However, on the day of the decision, a law entered into force providing an interpretation of the said special proceeding: according to that law, Mr. Scoppola should have been sentenced to life imprisonment because the punishment for murder together with other crimes he committed is punishable with life imprisonment and daytime isolation. Then, thanks to *giudizio abbreviato*, it would have turned into life imprisonment.

On this basis, the Public prosecutor applied to the Court of Appeal, which admitted the claim and sentenced Mr. Scoppola to life imprisonment, stating that, in respect of the *tempus regit actum* principle, the judge should apply the new law to the pending case.

The core question is: if that law is considered as a procedural law, then the judge should respect *tempus regit actum* principle. If, instead, is considered as a substantive criminal law, the judge should apply the rules which provide the lesser punishment, in respect of art. 2 of the criminal code, art. 25 of the Constitution and, last but not least, art. 7 of the European Convention.

[22)] See ECHR, Drassich v. Italy, 11th December 2007; Cassazione penale, sez. VI, 12th November 2008, n. 45807. The Supreme Court, however, not only solved the single case suggesting art. 625-*bis* of the code of criminal procedure as a special remedy, but also gave a general solution if the breach of the right to confrontation happens during the second-instance trial: in this case, the defendant has the opportunity to apply a claim to the Supreme Court by using the general remedy of art. 606, lett. c of the criminal code of procedure, which entitles the defendant to seek review whenever a criminal procedure rule has been violated during the proceedings.

[23)] See art. 438-443 of the Criminal Code of Procedure.

Firstly, the Court explained that "Article 7, paragraph 1, of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the Courts must apply the law whose provisions are most favourable to the defendant".

Secondly, the Court considers that Article 442, paragraph 2, of the Criminal Procedure Code is a "provision of substantive criminal law concerning the length of the sentence to be imposed in the event of conviction following trial under the summary procedure. It therefore falls within the scope of the last sentence of Article 7 § 1 of the Convention". In respect of this reasoning, the ECHR sentenced Italy because of violation of art. 7 of the Convention[24)].

Therefore, taking advantage of the "Drassich case" decision, Mr. Scoppola asked for the special remedy provided by art. 625-*bis*. The Supreme Court accepted this request, thus revoking the final decision sentencing Mr. Scoppola to life-imprisonment and stating itself on points of punishment, in order to avoid another trial at a lower Court, which is normally competent to decide in these cases: eventually, the punishment has been the conviction to 30 years in prison[25)]. Even if the outcome is in line with the European Court ruling and result is consistent with fair trial principles, once again this decision points out the problem related to the fact that there is not a proper law to rule the issue of the re-opening of final decisions, after a European Court of Human Rights' decision stating that the trial was unfair.

From the examples mentioned above, we can say that Italian jurisprudence found a solution using a technique that, from the victim's rights point of view, deserves approval. However, even Scholars agree that, following the Constitutional Court decision, the Parliament should approve a specific law in order to avoid uncertainty and discrimination among defendants. In evidence of the fact that the solution is not completely welcomed by the judges of the Supreme Court itself, all the sections of the Supreme Court will take part in a meeting at the end of April to decide whether to submit the question to the plenary session, in order to find a shared solution given that a law on the point is lacking.

The only relevant reform has been introduced on the 28th November 2005 with the decree of the President of the Italian Republic no. 289, which provides a new ruling for the criminal records, stating that the ECHR decisions must be added to the defendant's criminal record below the Italian final decision to which they are referred. Even if this is not practically useful, it has the implicit meaning of a first step towards a modification of the effects of the Italian decision.

[24)] See ECHR, Scoppola v. Italy, 19th September 2009.

[25)] Cassazione penale, sez. V, 28th April 2010, n. 230, Scoppola.

The above mentioned Recommendation R (2000) 2, encourages "the Contracting Parties to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the Court leads to the conclusion that: (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings".

Bearing in mind these wordings, from 1998 on, several draft bills have been presented to the Parliament in order to introduce an instrument that allows a renewal of the trial or a revision of the decision passed at the end of a trial considered unlawful by the ECHR, but none of them has been approved nor even discussed by the two Chambers of the Parliament yet.

The drafts choose among two options: modify art. 630 of the Criminal Procedure Code, which provides four cases in which it is possible to ask for a revision of the decision condemning the defendant, or introduce a specific rule for the case.

Analysing the drafts, it's possible to notice that they entitle the sentenced defendant to apply for a renewal of the trial only if criminal procedure rules have been violated during the trial. Nothing is provided in case the breach is related to substantial rules. Some of them are even more strict, limiting the possibility to seek review only when a breach of art. 6 of the Convention is committed. Of course this is not in line with the Committee of the Ministers Recommendation R (2000) 2 and would exclude from the remedy a large number of cases. From the above mentioned cases, we can mention the last one (Scoppola), as an example in which ECHR sentenced Italy for violation of art. 7 of the Convention.

Secondly, some of the drafts provide the special remedy only if the defendant has been sentenced to prison, or to any other non-pecuniary punishment, thus excluding all the unlawful trials at the end of which the defendants are obliged to pay a fine.

The competent judge will be the Court of Appeal, and the judge should renew only the part of the trial in which ECHR ascertained a violation of the Convention.

The revision of the final decision is admitted in the Italian system only if it could lead to the defendant's acquittal. However, this is not always useful for the situations we are analyzing, because the Convention does not demand that should incorporate the possibility of the defendant's acquittal. The draft-bills suggest that at the end of the new trial which respects the rules of the Convention, there are two options for the competent judge: a) confirm the first decision, b) annul it.

Moreover, as suggested by Scholars, three more questions arise: 1) in case the trial was held against two or more defendants and only one of them applied to the ECHR, what should happen to the co-accused who didn't apply to the ECHR?; 2) what is going to happen to the victim who already had her compensation for the damages suffered?; 3) how is the new law going to solve the matter that both judge and participants to the trial should face in terms of possible loss of evidence due to the period elapsed.

These questions were still pending when the Constitutional Court, asked again to check whether the wordings of art. 630 of the Code of Criminal Procedure are in line with the Constitution by means of art. 117, which provides that Italian laws are bound by International and European rules, decided, on 4th April 2011, that art. 630 is not consistent with the Constitution in that it doesn't provide the review remedy in case the European Court of Human Rights states that the Italian trial was not fair and thus ordering the renewal of the trial. The 2008 Constitutional Court decision on the same issue ruled that it's a duty of the Parliament to find a remedy in case a final decisions is passed at the end of trials that the ECHR considers unlawful accordingly to the European Convention rules. The aim of the decision was to respect the role of the Parliament and wait for the approval of a law in order to introduce the proper instrument in this particular case: however, as mentioned above, no further steps since 2008 have been made by the Parliament. This is why, after two years and a half, the Constitutional Court decided from a certain point of view to replace the Parliament stating that, without any other provisions, art. 630 of the Criminal Code of Procedure should be applied in these cases. Moreover, this is also a way to overcome the solutions given by the Supreme Court as far as regards art. 670 and art. 625-*bis* of the Code of Criminal Procedure.

However, within the reasoning of the 2011 decision, the Court stated that this is a temporary solution, while waiting a new law on the issue, and that it doesn't affect the Parliament competence to choose for another and more suitable instrument to offer a review of the case[26)].

5. The World coming in: Italian jurisprudence and globalisation at a glance. The globalization phenomenon offers several grounds for debate among judges and Scholars: as a matter of fact, movement of persons and relations between people living in different countries is at interest of new and incoming decisions at courts. In particular, there at least three main issues that could be mentioned as a consequence of globalization.

First of all, in the criminal field, could a behaviour that is considered as a crime in our Country don't be punished because in the foreign Country from which the defendant comes is expression of a cultural and ethnological heritage?

[26)] Corte cost., sent. 4th Aprile 2011, no. 113.

The main interesting case is related to infibulation in Islamic Countries: it's an habit in the Middle East and Africa, while it's of course an injury all over Europe. Different theories have been proposed by Scholars and jurisprudence, considering different rules applied in analogy with the present case: i.e. the exercise of a rule in force among the ethnical community the accused lives in; the right not to be discriminated because of the national origin; the case of the crime committed with the agreement of the victim. However, jurisprudence tends not to acquit such conducts on the abovementioned grounds because the right to healthiness and not to be injured is a Constitution provision that can be applied in two perspectives: that of the victim, who has to be protected (usually, an underage person) and that of the defendant, who has to respect Italian laws that crash with the ethnic habits he was used to respect when he lived in his Country.

Secondly, thinking about the victim, another question may rise: is the victim entitled to ask for damages even if he is not a citizen in our Country? A first theory limits the right only to the cases in which an Italian citizen would have the same right in the Country where the victim in fact lives. A second theory, applying the Constitution, affirms that the right to damages is a right to which all injured persons are entitled to. A third theory limits the right only to particular damages (i.e. "moral" damages, related to sufferance that comes from a crime are not part of the amount of damages the victim is entitled to ask). The Supreme Court ruled in this case that the right to ask for damages, even related to moral injuries, is generally acknowledged to persons, regardless the place where they come from[27)].

Finally, speaking of victim's relatives entitled to ask for damages, there is a debate going on when it comes to consider the quantification of the restoration to relatives of a foreigner victim who has been injured (or killed) in Italy but comes from abroad: a first theory, approved by the Supreme court, considers that if the relatives live in another Country, then restoration should be calculated only considering the economic and the cost-living index of that Country. The other theory instead applies the same rules used in Italy for Italian victims' relatives. The debate is still going on and affects not only law interpretation and principles application, but also law-and-economics issues, related both to different levels of wealth among Countries as well as the idea of the World as a whole on points of fundamental rights[28)].

6. Conclusions. Non unity of jurisprudence is a known phenomenon in Italy. Several agents lead to the possibility of multiple and opposite decisions.

First of all, a judge who is going decide a case has to face the mass of Italian legislation, which is now more than a little intimidating; the body of national and

[27)] See, Tribunale di Catania, 13th June 2005, no. 1807; Corte di Cassazione, 24 febbraio 2010, no. 4484.

[28)] See, Tribunale di Torino, 19 july 2010, no. 4932; Corte di Cassazione, 14th February 2000, no. 1637.

regional laws and regulations and their accompanying judicial exegesis appears overwhelming. The Italian system suffers of a compulsive statute-making. Apparently, there are from 150,000 to 200,000 statutory laws, although the exact number of the laws in force is not known. Also regional laws and regulations and the European Union rules must be added. This causes uncertainty in finding the rule that should be applied to concrete case and may lead to confusion among persons and within Courts.

Sometimes, however, referring the issue of the implementation of ECHR decisions sentencing Italy on points of unfairness of its trials, it should be noticed that jurisprudence often acts, as there are no laws ruling the issue, interpreting the existent laws in order to avoid the risk of breaching ECHR guarantees and principles: Supreme Court and Constitutional Court have been involved several times, trying to fill the gaps in the statutory laws, offering sometimes different solutions, with the main aim to respect European and International duties and individual rights.

Secondly, as mentioned above, the number of cases discussed at Courts leaves and impression: beyond the thousands of magistrates and inferior judges, *Corte di cassazione* decides close to 50,000 cases (both in criminal and civil trials) per year. The final administrative Court, *Consiglio di Stato*, decides over 10,000 cases per year, while the Constitutional Court decides less than 400 cases per year. A clear reason behind the volume of judgments delivered by Italian Courts, and one that hampers the development of the *stare decisis* principle is the constitutional condition that neither the Court of Cassation, nor the Council of State, are permitted any discretion in selecting cases: they must to accept and decide on appeal any judgments from lower Courts. The Constitutional Court, asking for the requisite of the abovementioned *rilevanza* and *non manifesta infondatezza*, avoids this situation. Also the seventh criminal section at the Corte di cassazione, in halting proceedings before sending them to Courts when they don't deserve any further analysis because they fail to match the requisites upon which an appeal is possible, tries to limit the number of cases passed by the Supreme Court.

Thirdly, if the Italian legislation is difficult to manage and case law is overwhelming, from a constitutional law perspective, the system needs to balance, on one hand, multiple interpretations and creative dimension of jurisprudence and, on the other hand, uniformity and predictability of judicial decisions, in order to assure respect of the equality principle, the certainty of law principle and the judge independence in the interpretation of laws. As a matter of fact, as magistrates have only to respect law and the Judiciary is independent from the executive, judges gradually became aware that they are the protagonists of the law in action, and not merely bureaucratic enforcement bodies.

Although the specific instruments mentioned in the study have an important role in controlling the tendency of jurisprudence as well as in the creation of *precedente* (rules on *nomofilachia* function, *Massimario*, databases), among judges and among lawyers in general there is still a widespread consciousness and awareness that law-

cases have only a persuasive authority and it's just hard to figure out if and when *stare decisis* principle will deserve in Italy more than a fundamental rule in the judges' reasoning proceedings and will ever become a mandatory rule.

References

Allegrezza, S., "Violazione della Cedu e giudicato penale. Quali contaminazioni? Quali rimedi?", in R. Bin-G. Brunelli-A. Pugiotto-P. Veronesi (eds.), *All'incrocio tra Costituzione e Cedu*, Torino, Giappichelli, 2007, p. 15 ss;

Aprile, E. (2007). *Diritto processuale penale europeo e internazionale*, Padova, Cedam;

Biondi Dal Monte, F. & Fontanelli, F. (2008). *The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System*, in *German Law Journal*, p. 889 ss;

Caravita, B. (ed.) (1994). *Magistratura, C.s.m. e principi costituzionali*, Roma-Bari, Laterza;

Cadoppi, A. (2007). *Il valore del precedente nel diritto penale. Uno studio sulla dimensione* in action *della legalità*, Giappichelli, Torino;

Caianiello, M. (2009). *La riapertura del processo ex art. 625-bis c.p.p. a seguito di condanna della Corte europea dei diritti dell'uomo*, in *Cass. pen.*, p. 1465 ss;

Canzio, G., *Il ruolo del precedente e delle massime nella formazione ed evoluzione della giurisprudenza di legittimità. Il Massimario della Corte di Cassazione: attualità e prospettive, http://appinter.csm.it/incontri/relaz/16566.pdf*.

Capone, A. (2010). *Iura novit curia - Studio sulla riqualificazione giuridica del fatto nel processo penale*, Cedam, Padova;

Carbone, E. (2005). *Funzioni della massima giurisprudenziale e tecniche di massimazione*, in *Pol. dir.*, p. 135 ss;

Chiarloni, S. (2001). *Un mito rivisitato: note comparative sull'autorità del precedente giurisprudenziale*, in *Riv. dir. proc.*, p. 614; ss;

Chiavario, M. (2008). *Giudicato e processo «iniquo»: la Corte si pronuncia (ma non è la parola definitiva)*, *Giur. cost.*, p. 1522 ss;

Cipriani, F. (2008). *Ricorsi alla cassazione e quesito di diritto*, in *Foro it.*, I, c. 116 ss;

Cocco, G. (a cura di) (2005). *Interpretazione e precedente giudiziale in diritto penale*, Cedam, Padova;

Comoglio, L.P. & Carnevale, V. (2004). *Il ruolo della giurisprudenza e i metodi di uniformazione del diritto in Italia*, in *Riv. dir. proc.*, p. 1037 ss;

De Matteis, L. (2009). *Condanna da parte della Corte europea dei diritti dell'uomo e revoca del giudicato*, in *Cass. pen.*, p. 1474 ss;

De Matteis, L. (2009). *Tra Convenzione europea dei diritti dell'uomo e Costituzione: la Corte costituzionale in tema di revisione a seguito di condanna da parte della Corte di Strasburgo*, in *Cass. pen.*, p. 3994 ss;

De Salvia, M. (2008). *L'obbligo degli Stati di conformarsi alle decisioni della Corte europea e del Comitato dei Minsitri del Consiglio d'Europa*, in A. Balsamo-R.E. Kostoris (eds.), *Giurisprudenza europea e processo penale italiano*, Giappichelli, Torino, p. 67 ss;

Evangelista, S. & Canzio, G. (2005). *Corte di cassazione e diritto vivente*, in *Foro it.*, V, c. 82 ss;

Gabrielli, C. (2009). Decisum *del giudice europeo e parziale rimozione del giudicato*, in *Giur. it.*, p. 2295 ss;

Gialuz, M. (2007). *Il caso Dorigo: questione mal posta, ma con qualche (tenue) speranza di essere accolta*, in R. Bin-G. Brunelli-A. Pugiotto-P. Veronesi (eds.), *All'incrocio tra Costituzione e Cedu*, Torino, Giappichelli, p. 123 ss;

Gialuz, M. (2009). *Il riesame del processo a seguito di condanna della Corte di Strasburgo: modelli europei e prospettive italiane*, in *Riv. it. dir. e proc. pen.*, p. 1881 ss;

Gorla, G. (1990). *Precedente giudiziale*, in *Enc. Giur. Treccani*, Roma, XXIII, p. 4 ss;

Iacoviello, F.M. (2011). *Il quarto grado di giurisdizione: la Corte europea dei diritti dell'uomo*, in *Cass. pen.*, p. 794 ss;

Irti, N. (2001). *Norma e luoghi. Problemi di geo-diritto*, Laterza, Bari;

Kostoris, R.E. (2009). *Diversa qualificazione del fatto in Cassazione e obbligo di conformarsi alle decisioni della Corte europea dei diritti dell'uomo: considerazioni sul caso Drassich*, in *Giur. it.*, p. 2514 ss;

Lambert-Abdelgawad, E. (2008). *The execution of judgements of the European Court of Human Rights*, Council of Europe Publishing, Strasbourg;

Lavarini, B. (2009). *Giudicato penale ed esecuzione delle sentenze della Corte europea dei diritti dell'uomo*, in R. Gambini-M. Salvadori (eds.), *Convenzione europea sui diritti dell'uomo: processo penale e garanzie*, ESI, Napoli, p. 129 ss;

Lonati, S. (2007). *Il «caso Dorigo»: un altro tentativo della giurisprudenza di dare esecuzione alle sentenze della Corte europea dei diritti dell'uomo in attesa di un (auspicato) intervento legislativo*, in *Rivista italiana di diritto e procedura penale*, p. 1538 ss;

S. Lonati, *Il "caso Drassich": continua l'opera di supplenza della giurisprudenza di fronte alla perdurante (e sconcertante) inerzia del legislatore italiano in tema di esecuzione delle sentenze della Corte europea dei diritti dell'uomo*, in *Cass. pen.*, 2011, p. 263 ss;

MacCormick, D.N. & Summers, R.S. (eds.). (1997). *Interpreting precedents. A comparative study*, Aldershot-Brookfield, USA;

Mangiaracina, A. (2006). *La revisione del giudicato penale a seguito di una pronuncia della Corte europea dei diritti dell'uomo. (I) La progettualità italiana e l'esperienza del Regno Unito*, in *Riv. it. dir. e proc. pen.*, p. 985;

Marinelli, V. (2002). *Precedente giudiziario*, in *Encicl. dir.*, Aggiornamento-VI, Giuffrè, Milano, p. 871 ss;

Mattei, U. (1996). *Precedente giudiziario e* stare decisis, in *Digesto disc. civ.*, Utet, Torino, vol. XIV, p. 148 ss;

Mazzamuto, S. (ed.) (2001). *Il Consiglio superiore della magistratura. Aspetti costituzionali e prospettive di riforma*, Giappichelli, Torino;

Montanari, L. *Il sistema integrato delle fonti: analisi e prospettive in relazione all'ordinamento italiano dopo l'intervento della Corte costituzionale con le sentenze 348 e 349 del 2007*, paper of the presentation at the Conference "Il sistema integrato delle fonti e la giurisprudenza della Corte europea dei diritti dell'uomo", held by the High Council of the Judiciary in Rome, 23rd September 2009;

Musio, C. (2011). Il «caso Scoppola» dalla Corte europea alla Corte di cassazione, in *Cass. pen.*, p. 208 ss;

Negri, D. (2007). *Rimedi al giudicato penale e legalità processuale: un connubio che gli obblighi internazionali non possono dissolvere*, in R. Bin-G. Brunelli-A. Pugiotto-P. Veronesi (eds.), *All'incrocio tra Costituzione e Cedu*, Torino, Giappichelli, p. 169 ss;

Pace, A. (2010). *I poteri normativi del C.S.M.*, in *Rassegna parlamentare*, p. 369 ss;

Palombino, F. M. (2009). *Esecuzione delle sentenze della Corte europea dei diritti dell'uomo e integrazione analogica dell'art. 625 bis c.p.p. (in margine al caso Drassich)*, in *Giur. it.*, p. 2296 ss;

Parlato, L. (2006). *La revisione del giudicato penale a seguito di una pronuncia della Corte europea dei diritti dell'uomo. (II) L'esperienza della Repubblica federale tedesca e di altri Paesi dell'Europa continentale*, in *Riv. it. dir. e proc. pen.*, p. 1010 ss;

Pisani, M. (2010). *Breve storia delle Sezioni unite penali*, in *Riv. it. dir. e proc. pen.*, p. 1537 ss;

Pollicino, O. (2009). *Margine di apprezzamento, art. 10, c.1 Cost. e bilanciamento "bidirezionale": evoluzione o svolta nei rapporti tra diritto convenzionale nelle due decisioni nn. 311 e 317 della Corte costituzionale?*, *Forum di Quaderni costituzionali*, http://www.forumcostituzionale.it.;

Pollicino, O. (2008). Constitutional Court at cross road between constitutional parochialism and cooperative constitutionalism", *European Constitutional Law Review*, p. 363 ss;

Pollicino, O. "La Corte costituzionale, su un rinvio della Corte di cassazione, richiama all'ordine il giudice amministrativo in merito alla assente diretta applicabilità della CEDU", http://www.diritticomparati.it/;

Randazzo, B. (2006). *Nuovi sviluppi in temai esecuzione delle sentenze della Corte europea dei diritti dell'uomo*, in *Diritti dell'uomo, cronache e battaglie*, (2), p. 11 ss;

Randazzo, B., in N. Zanon. (2006). *Le pronunce della Corte europea dei diritti dell'uomo: effetti ed esecuzione nell'ordinamento italiano*, in *Le Corti dell'integrazione europea*, ESI, Napoli, p. 295 ss;

Repetto, M. (2009). *La Corte costituzionale respinge 'ipotesi di "revisione europea": un'occasione mancata?*, in *Dir. pen. e proc.*, p. 929 ss;

Rivello, P. (2007). *La vicenda Somogyi di fronte alla Corte di Cassazione: un'importante occasione di riflessione*, in *Riv. it. dir. e proc. pen.*, p. 1071 ss;

Rordorf, R. (2006). Stare decisis*: osservazioni sul valore del precedente giudiziario nell'ordinamento italiano*, in *Foro it.*, V, c. 279 ss;

Saccucci, A. (2002). Obblighi di riparazione e revisione dei processi nella Convenzione europea dei diritti umani, in *Riv. dir. int.*, p. 618 ss;

A. Saccucci, *La riapertura del processo penale quale misura individuale per ottemperare alle sentenze della Corte europea*, in A. Balsamo-R.E. Kostoris (eds.), *Giurisprudenza europea e processo penale italiano*, Giappichelli, Torino, 2008, p. 81 ss;

Scella, A. (2006). Il vaglio d'inammissibilità dei ricorsi per cassazione, Giappichelli, Torino;

Sciarabba, V. *Il problema dell'intangibilità del giudicato tra Corte di Strasburgo, Corte costituzionale e… legislatore? (osservazioni a margine della sentenza della Corte costituzionale n. 129 del 2008)*, in *Europeanrights.eu* (May, 30, 2008);

Sciarabba, V. (2008). *Tra fonti e corti: diritti e principi fondamentali in Europa*, Giuffrè, Milano;

Sciarabba, V. (2009). *La riapertura del giudicato in seguito a sentenze della Corte di Strasburgo: questioni generali e profili interni*, in *Giur. cost.*, p. 513 ss;

Sciarabba, V. (2009). La riapertura del giudicato in seguito a sentenze della Corte di Strasburgo: profili di comparazione, *Dir. pubb. comp. eu.*, p. 917 ss;

Silvestri, G. (2004). *la massimazione delle decisioni penali della corte di cassazione: i nuovi criteri*, in *Foro it.*, V, c. 17 ss;

Taruffo, M. (1994). *Precedente ed esempio nella decisione giudiziaria*, in *Riv. trim. dir. e proc. civ.*, p. 19 ss;

Taruffo, M. (2007). *Precedente e giurisprudenza*, ESI, Napoli;

Tega, D. (2008). *Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la Cedu da fonte ordinaria a fonte "sub-costituzionale" del diritto*, in *Quaderni Costituzionali*, p. 133 ss;

Ubertis, G. (2008). L'adeguamento italiano alle condanne europee per violazione dell'equità processuale, inA. Balsamo-R.E. Kostoris (eds.), *Giurisprudenza europea e processo penale italiano*, Giappichelli, Torino, p. 99 ss;

Zacché, F. (2009). *Cassazione e* iura novit curia *nel caso Drassich*", in *Dir. pen. e proc.*, p. 781 ss;

Zanon, N. & Biondi, F. (2008). *Il sistema costituzionale della magistratura*, Bologna, Zanichelli;

Zanon, N. *I pareri del Consiglio Superiore della Magistratura tra leale collaborazione e divisione dei poteri"*, paper of the speech given at the University of Rome on the issue "Problems of the Judiciary", organized by the Associaction of Constitutional law Scholars, http://www.associazionedeicostituzionalisti.it/materiali/convegni/roma 20090608/zanon_aic.pdf.