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# **Introduction to the Italian Legal System. The Allocation of Normative Powers: Issues In Law Finding**

MARINELLA BASCHIERA \*

## **Introduction**

### **I.1. A choice: the use of comparative methodology to describe one's own national legal system.**

In this paper I will try to describe my country's legal system through the lens of comparison. Before turning to the specific topic I have decided to explore, I will give an account of the reasons why I have preferred comparative methodology to portray the Italian legal system instead of referring to traditional partitions of law or to abstract normative declensions of the category "sources of law."

The first reason is related to three characteristics which are specific to the comparative method: functionality, flexibility of the categories applied and openness to observation of the borderline materials which, though not strictly legal, nonetheless interact with legal sources and may play a significant role in the arena of law in action.<sup>1</sup> Comparative studies generally aim either at discussing the solutions given to a specific problem by two or more legal systems (micro-comparison), or at analysing the general legal issues or institutions belonging to each of the different legal environments under scrutiny (macro-comparison).

Following the former perspective, comparative lawyers will focus their attention not only on the sources of law, but also on the techniques and

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<sup>1</sup> The reference to the three distinctive features of the comparative method does not here imply any general methodological assumption: in fact there is no uniformity of views among scholars on this specific issue. Some methodological options are discussed in VAN HOECKE, M. (ed.) *Epistemology and Methodology of Comparative Law*, Oxford and Portland Oregon, Hart Publishing, 2004.

styles of legislation, the methods of interpretation and the functions performed by the different formants, to mention but a few of the recurring issues. In the latter case, comparative lawyers select a problem or a legal institution and compare factual patterns and rules, the functions played by the different actors in the legal arena in order to understand the different solutions provided by each legal system to the problem selected. In order to achieve their aim(s) they have to deal with both linguistic and content-related discontinuities between the legal systems under scrutiny and try to focus on essential similarities beneath the apparent differences or, if necessary, on the profound differences beneath the apparent similarities. Hence, the research pattern will concentrate on functionality, pursuing the specification of those juridical elements that work in a functionally equivalent manner in the selected legal systems.<sup>2</sup> From the functional approach there also stems the procedure of building a loose structure of concepts and categories that would allow the identification and analysis of the functional equivalents. These peculiar aspects of a comparatist's task resemble the undertakings of a librarian, "*who needs a supranational system of concepts if he is to arrange his foreign materials in topical categories rather than simply in national groupings.*"<sup>3</sup>

The second justification for the choice of the comparative option stems from the very nature of the topic under discussion and is connected to the aforementioned third feature of comparative analysis of law. By the term "system" we refer to: a complex set of elements organically related to one another; a set of principles and propositions logically connected to each other and related to a scientific discipline.<sup>4</sup> In Western tradition and in particular in Romano-Germanic legal culture both definitions have been applied to legal systems<sup>5</sup>: the idea of an organic body of rules and institutions endowed with

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<sup>2</sup> For a critical assessment of the functional pattern see in particular SAMUEL, G. "*Epistemology and Comparative Law: Contributions from the Sciences and Social sciences*", in VAN HOECKE, M. (2004) *supra* fn.1, at pp.35-77. Samuel also accounts for the hermeneutical approach to comparative studies fostered by Pierre Legrand; the two epistemological options are definitively evaluated in view of the debate on the harmonisation of European law.

<sup>3</sup> See ZWEIGERT, K. KÖTZ, H. *Introduction to Comparative Law*, 3<sup>rd</sup> revised ed., Oxford, Clarendon Press, 1998, at p. 45. The functional approach to comparative research is explained at pp.43-44.

<sup>4</sup> See MODUGNO, F., heading '*Sistema Giuridico*', in *Enciclopedia Giuridica*, Vol.XXIX, Rome, Istituto della Enciclopedia Giuridica Treccani fondata da Giovanni Treccani, 1993.

<sup>5</sup> From the sixteenth century onwards the Latin word "*systema*" began to denote academic theories of law; later it also came to denote the law *itself* as both an object of systematization and its results. In Renaissance thought we may find traces of the

an inner rationality and obeying pre-determined principles of logics is deeply rooted in civil law's tradition, to the point of being widely assumed as one of its distinctive hallmarks.<sup>6</sup> Comparative law has devoted extensive attention to

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*“esprit de système”* as a unitary set of elements characterized by inner rationality, even though the first account of the legal system described as a rational and stable organic body is due to Christian Wolff, in his major work *“Jus Naturae methodo scientifica pertractatum”* (1740-1748). The echo of Cartesian notions, borrowed from mathematics and applied to law led to the creation of a so called *mos geometricus*, aimed at finding rational and immutable justifications for the sovereign authority of the state. Friedrich Carl Von Savigny referred to the law as a system, *i. et* an organic set of concepts, institutions, social relationships and praxes endowed with an inherent principle of order. In his view this inherent ordering principle also constituted the logical basis for the scientific systematization of legal institutions and rules; see VON SAVIGNY, F.C. *System des heutigen römischen Recht* (1840-1849); see LARENZ, K. *Methodenlehre der Rechtswissenschaft* (1960), Italian translation *Storia del metodo nella scienza giuridica*, Milan, Giuffrè, 1966, p.16. The evolution of the concept is analysed in depth by MODUGNO, F., (1993) *supra* fn.1, p.3-12. An account of the philosophical trajectories of civil law jurisprudence might be found also in BARBERIS, M. *Filosofia del diritto*, Bologna,, Il Mulino, 1993. The relationship between philosophy and legal science is nevertheless complex and often debated. As regards Italian legal science, see the impressive description provided by MERRYMAN, J. *“The Italian Style I: doctrine”*, 18 *Stanford Law Review*, 39 (1965-1966): 39-65. On this point, Merryman acknowledges the “schism” between philosophy and legal science which is still present in the Italian legal culture.

<sup>6</sup> See ZWEIGERT, K. KÖTZ, H. (1998) *supra* fn. 3, at p. 69: *“Another hallmark of a legal system or family is a distinctive mode of legal thinking...[...] on the Continent the system is conceived as being complete and free from gaps, in England lawyers feel their way gradually from case to case.”*. See also VAN HOECKE, M. WARRINGTON, M. *“Legal cultures, legal paradigms and legal doctrine: a new model for comparative law”*, in *International and Comparative Law Quarterly*, 47 (1998): 495-536: *“In comparison with the other three legal cultures, we can distinguish two principal characteristics of Western legal culture: individualism and rationalism...[...] [T]he law, for Europeans, is above all a system, a form of logic, a geometry, a coherent assembly where everything can be reduce to principles, to concepts and to categories”*, at p.504. For the importance of the theoretical layer of law in the development of civil law systems see, as first reference, SAWER, G. *The Western Conception of Law*, in *International Encyclopedia of Comparative Law, The Legal systems of the World. Their Comparison and unification*, Vol.II, Chapt. I, , J.C.B. Tübingen -Mohr, The Hague- Mouton, 1975: 14-48; See also DAVID, R. , BRIERLEY, J.E.C., *Major Legal Systems in The World Today*, 3<sup>rd</sup> ed., London, Stevens and Sons, 1985, where the paramount importance of the doctrinal formant is clearly acknowledged: *“The idea of law such it was understood for centuries in European universities has not been abandoned. The legislators can, and indeed must, aid in defining the law, but the law itself is something more than legislation. It is not to be confused with the will of legislators; it can only be discovered by the combined*

the problem of identifying the hallmarks of legal systems, with a view both to selecting relevant materials for comparison and clarifying its own methodology. In doing so, it has brought to the surface the ideological layer present in the legal systems, whose meaning is tailored by lawyers' interpretation.<sup>7</sup> In other words the legal system has proved to be a static image (*eidolon*) of a constantly variable set of institutions, rules and social praxis (internal dimension). Furthermore, the internal legal order is influenced by phenomena of "contamination" resulting from its interaction with different legal systems, at the supranational and the international level (external dimension).

These assumptions imply that the description of a legal system has to be geared not only to the legal order set up by the sources of the law but also to those legal phenomena that engender its transformation; moreover the account has to make explicit the ideological layer of the system.<sup>8</sup> If these assumptions are kept in mind, the use of 'rules of thumb' derived from comparative law is likely to contribute to the achievement of two important goals:

- a) a set of flexible concepts will be of great help to foreigners who are to deal with the substance of a legal system, since they allow the observer to go beyond the technicalities and the ideological layers of the system as accounted for in national legal culture;
- b) the combination of the functional and the cultural approaches is likely to gear the design of the legal system towards a better appreciation of the dynamics of the law.

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*efforts of all jurists... [...] [I]n conformity with tradition, Romano-Germanic laws remain a system that can be described as a jurist's law (Juristenrecht)" at p.106. A historical account is provided by VAN CAENEGEM, R.C. *European Law in the Past and the Future. Unity and Diversity over two Millennia*, Cambridge, Cambridge University Press, 2002.*

<sup>7</sup> With reference to the Italian system, see the analysis provided by MONATERI, P.G., CHIAVES, F.A. "Shifting Frames: Law and Legal Contaminations", in MATTEI, U.; LENA, J.S. *Introduction to Italian Law*, The Hague- London- New York, Kluwer Law International, 2002: 21-30.

<sup>8</sup> See MATTEI, U. "Three patterns of law: taxonomy and change in the World's Legal systems", in *American Journal of Comparative Law*, 45 (1997): 5-45. On the conception of law as a "system of rules" and on the problem raised by this conception at Common Law, see TWINING, W. MIERS, D. *How to do things with rules*, 4<sup>th</sup> ed., London, Butterworths, 1999, at pp.131-156.

In this perspective, I will address the following two macro-questions: who are the actors that set the rules in the Italian legal system and how do they set these rules? In answering these questions I will present both institutional actors and quasi-institutional actors taking part in the law-making process; moreover, I will address the way they operate and indicate the discontinuities between the static legal framework provided by the constitutional model and the legal system “in action.” Without neglecting the importance attached to the contribution to legal change made by non-institutional actors, my choice aims to highlight the balances negotiated and achieved in the paradigm of the separation of powers through the allocation of law-making functions.

## **I.2. General features of the Italian system**

Comparative lawyers have grouped legal systems in very different ways, depending both on the criteria used to select elements of comparison and on the different evaluations of the importance possessed by these elements.<sup>9</sup> Different classifications might also result from the general approach taken, thus varying according to the main areas of law considered to be influential in the structuring of the legal system.<sup>10</sup> In line with the descriptive aims of this paper I will not search for original taxonomies nor I

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<sup>9</sup> An inventory of groupings and theories is offered by ZWEIGERT, K. KÖTZ, H. (1998) *supra* fn. 3, at p. 64-73. Though acknowledging the “*vulnerability to alteration*” of the grouping itself according to the variables of time and private law/constitutional law approaches, the authors suggest a classification in four legal families: 1. Romanistic family; 2. Germanic family; 3. Nordic family; 4. Common Law family; four other legal systems are considered in separate sections: 1. People’s Republic of China; 2. Japanese law; 3. Islamic law; 4. Hindu Law. Zweigert and Kötz believe that legal *style* is the distinctive hallmark of each legal system and make use of the following criteria to define it: a) historical background and development; b) characteristic mode of thought in legal matters; c) distinctive institutions; d) typology of legal sources; e) ideology. David and Brierley propose the following classification criteria: a) techniques of enunciation of rules; b) types of sources of law; c) legal reasoning. Applying these criteria the authors distinguish three main legal families along with a comprehensive group of “*other systems*”. See DAVID, R., BRIERLEY, J.E.C., (1985) *supra* fn.6, at pp.20-23. More emphasis has been recently placed on *legal culture*, especially on social practices that constitute the living layers of legal rules, institutions and doctrinal conceptions. In line with this approach four cultural families have been devised: 1. African family; 2. Asian family; 3. Islamic family; 4. Western family (that which has European roots). See VAN HOECKE, M., WARRINGTON, M., (1998) *supra* fn.6, at p.502.

<sup>10</sup> Examples of minor stream approaches may be found in RAVA, T. *Introduzione alla civiltà europea*, Padua, Cedam, 1982.

will apply any. Despite the variety of classification results, the Italian legal system is always presented as belonging either to the Romanistic family or to the Romano-Germanic one.<sup>11</sup> Among classification criteria, a crucial role is played by the historical background, as is shown by the representation of Italy as the “*cradle of Western legal culture*;”<sup>12</sup> other criteria commonly used to describe the Italian legal system are the characteristic mode of thought in legal matters and the typology of legal sources. Since these features seem to be general hallmarks of the system and their consideration is common to most comparative accounts I will give specific attention to an examination of each of them.

### I.2.1 Historical Background

The key word, if we are to understand the reason why Italy is currently regarded as “the cradle of European legal culture,” is *continuity*. The historical approach to the study of the Italian legal system and in particular, that of its Roman Law foundations, is currently gaining new momentum in the perspective of the “harmonization of European private law.” It is assumed that the system of private law “endured the change of republican to imperial government under the Caesars, the rise and fall of a vast empire, the conversion of the people from paganism to Christianity and finally the shifting of the centre of government itself from Rome in the West to Constantinople in the East”.<sup>13</sup> In early medieval times Roman legal tradition was kept alive by the Catholic Church, allowing it to survive during the dark ages of barbarian invasions. During the thirteenth century the study of Justinian’s *Digest* gained a new momentum with the school of the *Glossatori di Bologna*, initiated by *Irnerius* who happened to re-discover the only surviving copy of the *Codex Laurentianum*.

It is not possible here to give a full account of such a rich historical process; nevertheless I would like to highlight a possible point of intersection between historiography and legal research which clearly shows the importance of the historical layer in the set-up of a legal system. Nineteenth-century historiography placed emphasis on the peculiarities which characterised different national legal experiences, thus closely adhering to the

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<sup>11</sup> In ZWEIGERT, K. KÖTZ, H. (1998) *supra* fn. 3, at p.250-276; in DAVID, R., BRIERLEY, J.E.C., (1985)*supra* fn.6, at p.97-113. In SACCO, R. *Sistemi giuridici comparati*, in SACCO, R. (gen. Ed.) *Trattato di diritto comparato*, Turin, Utet, 1996, at p.363-411.

<sup>12</sup> See WATKIN, T.G., *The Italian legal tradition*, Aldershot-Sydney, Ashgate, 1997.

<sup>13</sup> See WATKIN, T., (1997), *supra* fn.12, at p.1.

political purpose of strengthening national identities. Later comparative studies have shown that between the fifth and the eleventh centuries there existed a vast area of *ius commune* in Europe. Seminal differentiation between common law system and civil law systems took place during the twelfth century, though this process of differentiation rested largely upon a common background of rules, legal language, and patterns of thought shared by Catholic Europe.<sup>14</sup> According to a different analysis, the *Western legal tradition* originated in the Gregorian reform, which took place between the eleventh and the twelfth century, and is considered to be the common ground of legal culture in Europe.<sup>15</sup>

The historiographical debate briefly summarized here has been recently challenged as being a means to support “strategies of legitimization of a “Western” supremacy in the field of law, through the pursuit of genealogies.”<sup>16</sup> The challenge points to the “Western root” of modern law and aims at proving that the “*tree of Western civilization*” has its roots in the soil of many different lands. Both the scope and the relevance of the ideological layer lying beneath different currents of historiography are unambiguously revealed by the fact that the *ius commune* heritage has been placed at the core of one, among many, contributions to the current “harmonization of European private Law” debate.<sup>17</sup> However, the opposite approach, that is, that of emphasising the common roots of Civilian tradition as opposed to the “isolated” development of Common law,<sup>18</sup> might also serve ideological

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<sup>14</sup>See LUPOI, M. *Alle radici del mondo giuridico Europeo*, Rome, Istituto Poligrafico e Zecca dello Stato, 1994. BELTON, A. (trans.) *The origins of European Legal Order* New York, Cambridge University Press, 1999.

<sup>15</sup>See BERMAN, H.J. *Law and Revolution The formation of the Western Legal Tradition*, Cambridge, Massachusetts, Harvard University Press, 1983.

<sup>16</sup>See MONATERI, P.G. “*Black Gaius A Quest for the Multicultural Origins of the “Western Legal Tradition”*”, in *Hastings Law Journal* 51 (2000): 479-555 and references there contained. For the echo in Italian doctrine see also COSTANTINI, C., “*L’anima apologetica della comparazione e la ‘geopolitica’ del diritto. Riflessioni in margine alla fondazione della Tradizione Giuridica Occidentale*” in *Rivista critica del diritto privato* (2005):183-190. The author also reviews further publications concerning Roman Law and the critical analysis of its findings in the light of comparative science: see *ibidem*, fn. n. 3, 13 and 18.

<sup>17</sup>See ZIMMERMANN, R. *The law of Obligations: Roman foundation of the Civilian Tradition*, Oxford, Oxford University Press, 1996; *idem*, *Roman Law, Contemporary Law, European Law. The Civilian Tradition today*, Oxford, Oxford University Press, 2001, especially at 108-189.

<sup>18</sup>See for instance LEGRAND, P. “*European Legal systems are Not converging*”, *International and Comparative Law Quarterly*, 45, (1996): 52-81. For a paradigmatic exercise in comparison between the structure of Gaius’ *Institutiones*

purposes, though it is generally acknowledged that the range of differentiation between civil law systems should not be underrated<sup>19</sup>. By way of conclusion, the Roman Law foundations of Italian legal system and its later developments in early medieval times are currently considered as playing fields where arguments both *for* and *against* the convergence between common law and civil law systems oppose and contend with one another; moreover, the historical and comparative approach enters into the debate on European private law harmonization, thus taking a step that underscores its ideological construction and its influence in the development of the European legal system.<sup>20</sup>

### I.2.2 Characteristic Mode of thought in legal matters

Always acknowledged as a pivotal factor of differentiation between common law systems and civil law systems, this peculiar style of legal thinking has been labeled as “*systematic conceptualism*”, as opposed to an “*inductive problem solving approach*” that would constitute the heart of legal reasoning at Common Law.<sup>21</sup> Nevertheless, the supposed unbridgeable opposition must be mitigated and the description of the perspective of the Italian legal system to the problem of *qualification* might be useful in signaling not too slender commonalities between common law and civil law mode of thought in legal matters.

The civilian pattern of legal reasoning might be connected both to the above-mentioned historical background and to the type of education system set up in the “*Universitates studiorum*” during the twelfth and thirteenth

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and the systematisation of English Common Law, see BIRKS, P. “*This heap of good learning: the Jurist in the common Law tradition*”, in MARKESINIS, B. (ed.), *Law making, Law finding and Law Shaping. The diverse influences*”, Oxford, Oxford University Press, 1997, 113-138.

<sup>19</sup> The variety of practical solutions offered by European legal systems to a given issue in contract law, for instance, has been explained by appealing to historical arguments, such as the different layers contained in the *Digest*, the interpretation of classical jurists offered by Justinian and the process of “*generalization of rules and institutions, concepts and criteria [which] is a characteristic feature of the civilian tradition*”: see ZIMMERMANN, R. (2001) *supra* fn.17, at p.113.

<sup>20</sup> See ZIMMERMANN, R. (2001) *supra* fn.17, at p.187-189.

<sup>21</sup> See ZWEIGERT, K. And KÖTZ, H. (1998) *supra* fn. 3, at p. 259. Anyhow “*one of the weaknesses of many traditional accounts of legal interpretation is that they concentrate, explicitly or implicitly on a single standpoint – typically that of the impartial judge or of a neutral expositor*”: in TWINING, W. MIERS, D.(1999) *supra* fn.8, at p.171.

century. Two main constituents of early European legal education had a seminal influence on the development of a distinctive mode of thought: on the one hand, the study of law was mainly pursued by *doctores*, that is, professors at Universities; on the other hand, the presence of a text endowed with *authority/prestige* qualified the methods used to interpret it and, therefore, also conditioned the development of legal doctrines. This element had an impact on the style of the judiciary, but it also led to a process of differentiation between two broad categories of interpreters of a legal text (the doctrine and the judges) which evolved in two different formants that have contributed to the substantial creation of legal rules up to the present times.<sup>22</sup> On the one hand, the doctrine interprets legal texts by employing the tools provided by logic; in doing so it appeals to subjacent conceptions of justice which work as a common frame of reference that is functional to the understanding of the law itself.<sup>23</sup> On the other hand, judges need to identify the relevant facts under discussion in order to come up with a rule on the case; the selection of relevant facts in the case is functional to their identification with an abstract pattern of facts provided by the law.<sup>24</sup> Once the applicable fact pattern is identified, the process of *qualification* is completed by applying the rule to the case in hand.

We may find that at common law the distinction between “questions of facts,” “question of law” and “questions of mixed facts and law,” blurred as it comes out from the analysis of case law, is often used as a ‘purpose oriented’ instrument. In practice, it has been acknowledged, “treating a question as one of fact allows the law to reflect cultural standards as they vary across time and place, to be applied relatively easily by lay magistrates or juries...[...]...To counter the criticism that the law will be uncertainly and inconsistently applied, a question may instead be treated as one of law.”<sup>25</sup>

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<sup>22</sup> See ASCHERI, M. *Tribunali, giuristi e istituzioni. Dal Medioevo all’Età moderna*, Bologne, Il Mulino, 1989.

<sup>23</sup> See RESCIGNO, G. U. “*Il giurista come scienziato*”, in *Diritto Pubblico* (2003):833-864. The paper describes the general outlines of a jurist’s work in order to show it has scientific status. As pivotal characteristics of jurists’ discourse, Rescigno examines: a. philological enquiry; b. logic test; argumentative exposition: at pp.841-847.

<sup>24</sup> The process of logic applied is known as “*subsumption*” and it aims at bringing the case under a rule. For a clear picture of methods and problems concerning the interpretation and application of legal rule at Common Law, see TWINING, W. MIERS, D. (1999) *supra* fn.8, at p.157-220.

<sup>25</sup> See TWINING, W. MIERS, D. (1999) *supra* fn.8, at p.163-164. An illustration of examples is provided in ZWEIGERT, K. And KÖTZ, H. (1998) *supra* fn. 3, at p. 259.

This purpose-oriented method of interpretation does not differ substantially from that of the Civil law tradition, at least as far as the approach and purposes are concerned.

### I.2.3 Typology of legal sources

This criterion of classification, though very popular, has proven to be unsatisfactory when applied either to specific subject matters or to definite issues. The main reason for this inadequacy has to be imputed to a necessary characteristic of the legal discourse on the sources of law, which has devised its rationale in the interpretation of the norms governing the lawmaking processes.<sup>26</sup> Consequently, an analysis based on the sources formally acknowledged would not reflect the actual state of law in action and the functionality pattern is illuminating on this point.

The inadequacy of the criterion is even more evident if applied to the problem under scrutiny, since both the allocation of legislative power and the scope of the traditional systematisation of legislative acts as sources of law (“*atti-fonte*”) have undergone seminal transformation in the Italian legal system.<sup>27</sup>

## **II. Law Making**

A taxonomy of the sources of law is expressly provided in art.1 of the Preliminary disposition of the Italian Civil code. They are hierarchically ordered as follows: a. statutes; b. secondary regulations; c. usages. However, the promulgation of Italian Constitution changed the features of hierarchical order among sources of law and acted directly upon the contents of specific sectors of the legal systems. Moreover, the implementation of the new institutional design led to distinctive political practices and to peculiar arrangements of balance between the institutional powers which, in turn, gave way to major developments in legislative actions.

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<sup>26</sup> My claim here is that the formal theory of the sources of law does not provide an illuminating picture of the legal system in action, thus it cannot be used heuristically in the framework of this study. However, the standpoint taken by constitutional lawyers on this point has to be assessed with a view to clearing fundamental issues about competence, hierarchy, validity and conflict. On this point see PIZZORUSSO, A, FERRERI, S. *Le fonti del diritto Italiano. vol.I, Le fonti scritte*, in SACCO, R. (gen. ed.) *Trattato di diritto Civile*, Turin,, UTET, 1998, at p.37-39.

<sup>27</sup> The analytical description of the written sources of law see PIZZORUSSO, A, FERRERI, S., (1998) *supra*, fn.26, at pp.16-27 and at pp.73-187.

If we now turn to the substance itself of the processes of law finding, attention at first should be directed to the role of written legislation, in the form of statutes and legislative acts. However, in this respect, and taking into account mainly the private law system, it must be acknowledged that a pivotal re-adjustment in the shape of the role played by judges, who became increasingly influential in law making, has taken place in the Italian legal system. This process was also accompanied by a movement of de-codification that occurred in the '80s due to a continuous flow of legislative reforms, especially in the private law sub-sectors. Arguably, a counter-movement of re-codification is currently occurring, so that the pendulum is swinging back to such an extent that some commentators believe that the Civil Code has re-gained its role as focal point of the Italian private law system. Moreover, the fact that this process has been complemented by an independent – but not un-influential – process of ‘codification’ of administrative law proves that at least the idea of comprehensive written legislation is still a staple feature of the Italian legal system.<sup>28</sup>

#### II.1.1 The relationship between the Constitution and ordinary legislation

The Italian Constitution came into force on 1 January 1948, thus setting fundamental framework provisions regulating Italian political institutions and the legal system.<sup>29</sup> These basic rules of law govern a variety of matters such as the formation, composition, term of office and

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<sup>28</sup> See the analysis by SACCO, R. “*Il Codice Civile: un fossile legislativo?*”, in PIZZORUSSO, A, FERRERI, S., (1998) *supra*, fn.26, at pp.441-470.

<sup>29</sup> The Italian Constitution provides for fundamental principles at art.1-12. The first part, (art.13-54) enshrines constitutional rights and duties in social, economic and political relationships. This part follows the traditional distinction between liberty rights (simply granted to the individual) and welfare rights (obliging the State to take positive action to provide the individual with the necessary means to exert the right). The second part of the Constitution (art.55-139) deals with the organization of the State, setting the fundamental framework rules defining the limits and form of legislative power, executive power and the judiciary to exert their functions.. In the fifth title of the second part fundamental provisions concerning Regions, provinces and city councils are laid down. In this part a system of check and balances on the Parliamentary form of Government is also established. A. direct democracy instruments: referendum (art.75) and citizens’ right to propose a statute (art.71, 2<sup>nd</sup> paragraph). B. Judiciary C. Constitutional Court. Provisional dispositions for implementation and interpretation are also provided. The text of the Constitution is available at the following website: [www.quirinale.it](http://www.quirinale.it)

powers of the supreme bodies of the State. Hence, legislation must conform to constitutional rules (the vertical dimension), since they possess an higher rank than ordinary legislation and executive regulations; individuals and private entities must also conform to constitutional rules to varying extents, according to the functions and scope of the provision under scrutiny. Constitutional dispositions cannot be amended by ordinary legislation; a special procedure for constitutional revision is provided for in the Constitution itself, in order to ensure that any amendment to the Constitution is the outcome of a broad political consensus.<sup>30</sup>

The promulgation of the Constitution did not only impose a hierarchical criterion in assessing the legitimacy and the scope of ordinary legislation. On the one hand it also profoundly changed the purport of existing legislation; on the other hand it gave a direct legal basis which allowed new political values enshrined in it to be implemented. The foregoing statements illustrate the meaning attributed to the scope of the Constitutional text and its inclusion in the categories of so-called “long constitutions,” but they also represent the normative portrait of the political project enshrined in the Constitution.<sup>31</sup>

As for the former phenomenon, some of the constitutional provisions are regarded as having binding force as general principle. Therefore, they might steer the interpretation of lower ranking provisions; hence, judges made use of constitutional provisions in order to re-create an interpretative framework for ordinary legislation that would be capable of fulfilling the constitutional vision of social relations. A clear example is offered by the interpretation of art.844 of the Civil Code, which prohibits

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<sup>30</sup> FOR AN ANALYTICAL DESCRIPTION OF THE CONSTITUTIONAL TEXT, SEE COMBA, M “*CONSTITUTIONAL LAW*”, IN MATTEI; U., LENA, J.S. (2002) *SUPRA* FN.7, 31-62. SEE ALSO WATKIN, T.G., *SUPRA* FN. 13, AT P.77-95. HOWEVER, FAR FROM BEING RIGID IN A TECHNICAL SENSE, THE PROCEDURE FOR CONSTITUTIONAL AMENDMENT HAS PROVEN TO BE DEPENDENT UPON POLITICAL CONJUNCTURES. FOR AN IMPARTIAL DESCRIPTION OF THE POLITICAL PROCESSES CONNECTED WITH RECENT CONSTITUTIONAL REFORMS SEE D’ATENA, A. “*LA NUOVA RIFORMA DEL TITOLO V, LA COSTITUZIONE A RIGIDITÀ DEBOLE ED IL BIPOLARISMO DI COALIZIONE*”, IN ATTI DEL SEMINARIO “*DISEGNO DI LEGGE COSTITUZIONALE CONTENENTE MODIFICHE ALLA PARTE II DELLA COSTITUZIONE*”,ROME, LUISS GUIDO CARLI, 16TH OF MAY 2005, AVAILABLE AT: [HTTP://WWW.ASSOCIAZIONEDEICOSTITUZIONALISTI.IT](http://www.associazionedeicostituzionalisti.it) .

<sup>31</sup> See briefly, PIZZETTI, F. “*La ricerca del giusto equilibrio tra uniformità e differenza: il problematico rapporto tra il progetto originario della Costituzione del 1948 ed il progetto ispiratore della riforma costituzionale del 2001*”, in *Le Regioni*,4 (2003): 599-627.

acts of nuisance to neighbouring landowners. A systematic interpretation of the Code's provision in connection with art.42 of the Const. which acknowledges the "social function of private property", was at first suggested by doctrine: after long debate judges agreed to the extension of the scope of art.844 of the Civil Code pursuant to such a systematic interpretation, thus affording protection to individual rights referring to broader social values, though still connected with private property and ownership, such as for instance, the right to a healthy environment.<sup>32</sup>

Moreover, constitutional norms were intended as a direct legal basis of individual rights and obligations. The principles and values enshrined in the Constitution have both vertical and horizontal normative effects. Though still a matter of debate among constitutionalists, the horizontal effect (*drittwirkung*) of constitutional provisions might be defined as the possibility of a direct application of constitutional provisions in order to ensure a means of protection to individual rights without the need to appeal to a statute or a legislative act. An express acknowledgement of the principle is not enshrined in the Italian Constitution, as is the case of Germany, for instance, where the direct effect of constitutional provisions is granted in art.1, par. 3 of its "Fundamental Law" (*Grundgesetz*). However, the direct effect argument has been applied on several occasions by both the Italian Constitutional Court and the *Corte di Cassazione*.

The Constitutional Court has made use of *drittwirkung* with a view to granting: a) protection to the individual's right to health pursuant to art. 32 Italian Constitution<sup>33</sup>; b) protection of the worker's right to a minimum wage pursuant to art.36 Italian Constitution.<sup>34</sup> Far from being an example of a piecemeal application of this principle, these judgements represent the purport of a more general attitude of the Constitutional Court that has: a) encouraged the use of *drittwirkung* in order to supplement deficient legislation in specific sectors;<sup>35</sup> b) encouraged judges to make use of it in

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<sup>32</sup>See BIGLIAZZI GERI, BRECCIA, BUSNELLI, NATOLI, *Diritto Civile*, vol.II, Turin, UTET, 1997. MAUGERI, R.M., *Le immissioni*, Padua, Cedam, 1999. For the latest case law see, among others, TAMPIERI, M., "Il danno esistenziale da immissioni acustiche nell'universo del danno alla persona", in *Responsabilità civile e previdenza*, 4-5 (2003): 1209-1217.

<sup>33</sup> See Constitutional Court, decisions n. 122/1970 and n. 88/1979. Case law of the Constitutional Court is available, though in Italian only, at the following website: [www.cortecostituzionale.it](http://www.cortecostituzionale.it).

<sup>34</sup> See Constitutional Court, decisions n.156/1971 and 177/1984.

<sup>35</sup> See Constitutional Court, decision n.333/1991.

their gap-filling activity;<sup>36</sup> c) removed legislative obstacles hindering the applicability of the principle.<sup>37</sup>

The *Corte di Cassazione* has also made use of the ‘direct effect argument’ on several occasions, fostering a change in the interpretation to be given to private law rules and institutions and radically revising sector specific disciplines.<sup>38</sup>

### II.1.2 The referendum and the Constitutional Court: from a system of checks and balances to the role of actors in law-making process.

As part of a unitary institutional design, a system of checks and balances on the parliamentary form of government was provided in the constitutional text. Two main constituent types of the system were set up: direct democracy instruments (the referendum, at art.75, 138, 123 and 132, and the right of citizens to propose a statute at art.71, 2<sup>nd</sup> par.) and judicial control (the organization of judiciary and the Constitutional Court). In my discussion of law finding, I will examine here one constituent of each type, in order to underscore their implications for the dynamics of the balance between sources of law in the realm of law in action.

Ordinary legislation and constitutional laws may be repealed by means of a referendum pursuant to art.75 and 138 of the Italian Constitution; administrative statutes, regional and local acts can be repealed pursuant to art.123 and 132 of the Italian Constitution. Despite the obligation to implement a mandatory constitutional provision, the enactment of a statute enabling the use of this instrument took place only in 1970 (Law n.352). From a political and constitutional standpoint, the

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<sup>36</sup> See Constitutional Court, decision n.34/1973.

<sup>37</sup> See Constitutional Court, decision n.313/1990.

<sup>38</sup> The *Corte di Cassazione* is the Italian Supreme Court, which serves as a court of last resort for criminal and civil disputes. For a brief description of functions performed by *Corte di Cassazione*, see TARUFFO, M. “*Civil procedure and the path of a civil case*”, in MATTEI, U., LENA, J.S., (2002) *supra* fn.7, 159-180, at pp.176-177. The *Corte di Cassazione* applied the argument on the grounds that art.2 Italian Constitution, which affords protection to human rights and provides a legal basis for the direct effect principle. See *Corte di Cassazione*, case n.3775/1994. In reference to contract law, see case n.10511/1999; in relation to personal injury (the so called “*danno alla persona*”) see cases n.7713/2000, n.8828/2003 and 233/2003.

most important type of referendum is that concerning ordinary legislation and constitutional laws.<sup>39</sup>

The Constitutional Court, however, has extended the scope of legitimacy control to any situation in which a clash with constitutional norms is foreseeable.<sup>40</sup> In particular the Court decided to drop referendum proposals' which might create a legislative *vacuum* in vital sectors of democratic life.<sup>41</sup> The extent of the legitimacy control is consistent with the approach taken by the same Court in the field of constitutionality control over national and regional statutes: the doctrine applied is that of legislative and institutional continuity. The Constitutional Court in fact has repeatedly stated that the repealing effect of constitutional *ius superveniens*, whether promulgated by the Parliament or set forth in the Court's decisions, needed to be interpreted in a flexible manner, as long as it concerns matters in which the "organizational layer" is predominant.<sup>42</sup> The doctrine developed by the Constitutional Court clearly indicates that

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<sup>39</sup> The proposal procedure may be initiated either by five Regional Councils or 500.000 voters. The proposal is reviewed by *Corte di Cassazione* which checks procedural legitimacy. Then it is sent to the Constitutional Court for a substantial control of compatibility with the limits set in art.75. Not every piece of legislation is suitable for legislative intervention by means of a referendum, since the institution is bound both by formal limits and by limits concerning regulated matters. Hence, by means of a referendum it is possible to repeal (partially or totally) only statutes and government acts provided which have the force of law. As regards the limits *ratione materiae*, tax or budget laws, amnesties or pardons as well as laws authorizing ratification of international treaties are not subject to referendum.

<sup>40</sup> See Constitutional Court, case n. 16/1978.

<sup>41</sup> Two clusters of parameters come into play in the exercise of constitutional control over the legitimacy of referendum proposals: one concerning the limits posed by art.75 of the Italian Constitution, the other concerning the result of the referendum, which must conform to the constitution and be compatible with an efficient legislative framework. Ten are the criteria deployed by the Constitutional Court in order to evaluate referendum proposals in relation to the afore-mentioned parameters; for an analytical description of more than 20 decisions and a tentative reading of the Court's orientation, see MODUGNO, F. "Ancora una rassegna sull'ammissibilità dei referendum abrogative vent'anni dopo", in *Giurisprudenza Costituzionale*, 3 (2001):1785-1799.

<sup>42</sup> The doctrine is known as "*principio di continuità*" and is to be applied in case of succession of laws; see Constitutional Court, decisions n.13/1974 and 376/2002. The comparison between legitimacy control on referendum and legitimacy control of national and regional statutes is made explicit in LUCIANI, M. "L'autonomia legislativa", in *Le Regioni*, 2/3 (2004):355-380, at p.363.

the control of constitutionality tends to have equal scope regardless of the type of source of law considered.

Major reforms of Italian private law have been either rejected or accomplished by means of referenda, as occurred in the case of the statute introducing divorce in family law<sup>43</sup> and in the case of the statute regulating the right to interrupt a pregnancy that is either undesired or at-risk.<sup>44</sup> In the past decades, the constant use of the referendum, not only by citizens, but also and mainly by interest groups, has clearly shown that it may play the role of a 'functional tool' in the political arena.<sup>45</sup> For this reason some constitutional lawyers maintain that the use of referenda has been altering the constitutional form of parliamentary government.

As regards the second constituent mentioned above, the setting up of a Constitutional Court is regarded as a necessary step toward the democratization of a legal system.<sup>46</sup> prominent control functions are assigned

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<sup>43</sup> Divorce was introduced into the framework of Italian family Law in 1970, after a long political debate that took place at the levels both of parliament and civil society. L.898/1970 was finally enacted, with a majority vote of 33 votes only. As a consequence Catholic pressure groups have challenged the statute many times proposing referenda aimed at repealing the statute. At last a referendum was held in 1974 and 59.3 per cent of voters expressed their will (desire / determination) to keep the statute. Later the so-called Fortuna-Baslini Act was amended by the Act n. 436/1978 and the Act 74/1987. For a brief introduction to Italian family law see FERRANDO, G. " *Famiglia e Matrimonio* " in *Familia*, , 4 (2001): 939-965. See also BIANCA, C. M. *Diritto Civile, vol.II La Famiglia. Le successioni*, 4th revised ed., Milan, Giuffrè, 2005.

<sup>44</sup> Law n.194/1978 acknowledged an individual's right to interrupt a pregnancy under strict medical control but only under definite circumstances, mainly related to the protection of her physical or mental health and well-being. Three referendum proposals have been put forward in order to repeal the statute. In 1981 68 per cent of the voters expressed their desire to maintain Law n.194 in force.

<sup>45</sup> An analysis of the political dynamics connected with referendum voting is to be found in ULERI, P.V. " *On referendum voting in Italy: YES, NO or non-vote? How Italian Parties learned to control referendum* ", in *European Journal of political research*, 41(2002): 863-883; " *One peculiarity that sets the Italian referendum experience apart from that of most other democracies is that the decision to hold referendum generally has been taken not by government or governing parties, but rather by non-governing parties or political groups* ", at p.868.

<sup>46</sup> See also the conclusions presented by ECONOMIDES, C. *Rule of Law and independent courts*, CSCE Seminar of Experts on Democratic Institutions, (Oslo, 4-15 November 1991) in Appendix II to the General Report. The Works of the Conference took place within the general framework of the institutional activities

to the Constitutional Court, entrusted with the judicial review of legislation (art.134-137) and with the jurisdiction on the conflicts of attribution that may arise between different institutional powers of the State. The Italian system is akin to the Austrian model, in which the adjudicative function is reserved to a special judge, as opposed to the North American model, in which the adjudication competence is spread throughout the judicial system.<sup>47</sup>

However, the bare model of the Constitutional Court's functions and capacities does not account for the real scope of its activities in the legal

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held by the Venice Commission, Council of Europe. The functions of the Constitutional Courts are expressly linked to the 'rule of law' principle and are described as being functional to the preservation of democratic dynamics between institutional powers: ".....[...] 4. It is consequently imperative that the jurisdictional power shall be independent of the other two State functions - legislative and executive - if it is to be able to carry out its mission freely, objectively, impartially and effectively, in the common interest. We can go so far as to say that this independence is the prime condition for the rule of law. It is guaranteed in fact first by a set of functional guarantees, then by a set of personal guarantees for magistrates, and lastly by means of guarantees which for the most part are inherent in jurisdictional proceedings. A. Functional guarantees The jurisdictional function is exercised by courts established by the law, made up of independent magistrates. Their mission is to settle on the basis of the law, and in accordance with organized judicial proceedings, any question coming within their sphere, by means of decisions which are binding on the parties. The functional independence of the courts is ensured vis-à-vis the other two State powers as follows: a. Vis-à-vis the legislative power I. Whenever the courts are confronted with legislative enactments whose contents are contrary to the constitution, they must either, depending on circumstances, set in motion through the intermediary of the competent organ the procedure for the jurisdictional verification of the constitutionality of those enactments, or themselves carry out such verification- if they are empowered to do so - and refuse to apply the anti-constitutional laws. Verification of the constitutionality of laws by the courts is a fundamental function in a State based on the rule of law."

<sup>47</sup> The Court exercises its judicial functions by two main procedures of adjudication: a) *Ricorso in via principale*: the government or the Regions challenge the constitutionality of a statute having the force of law, with a view to proving that Parliament has illegitimately taken away their normative power; b) *Ricorso in via incidentale*: either the parties to a case or the judge may question the legitimacy of a statute that should be applied in the case. If the judge believes that the legitimacy problem is relevant to the case and well-grounded, the 'question of constitutionality' is sent to the Court to be examined.

For a comparative survey on European Constitutional Courts and their compositions, see Council of Europe, Venice Commission, *Revised Report on the Composition of Constitutional Courts*, Strasbourg, 3rd of July 1997/CDL-JU(1997)010, available on [http://venice.coe.int/docs/1997/CDL-JU\(1997\)010rev-prov-e.asp](http://venice.coe.int/docs/1997/CDL-JU(1997)010rev-prov-e.asp).

system, as already noted when examining referendum voting. In fact, to regard the Constitutional Court's role as that of a mere *arbiter* of legitimacy would be reductive; the Court also plays a pivotal part in steering the political process and policymaking.<sup>48</sup> In the juridical framework the possible clash between institutional functions belonging to the Court and other powers of the State is a consequence of the counterbalancing functions assigned to the Court which are associated with the different sources of legitimacy for the Court's action. The aggregate effect has been interpreted either as a purely "anti-majoritarian" device or as an instrument of "deliberative democracy."<sup>49</sup> In relation to the internal balance of the Italian legal system it has been noted that the Constitutional Court performs a "smoothing-out" function, trying to mitigate the effect that its decisions might have on the system as a whole. The Court also plays this role in its jurisprudence based on the doctrine of "continuity," as noted earlier.<sup>50</sup> Furthermore, a recent reform proposal concerning several constitutional provisions, among which also art.135 of the Italian Constitution, dealing with the appointment procedure of Constitutional judges, strengthened the perception of the Court as a true institutional mediator.<sup>51</sup> In particular, at art.51 of the Legislative draft<sup>52</sup> provides for a

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<sup>48</sup> An illuminating reading of the role played by the Italian Constitutional Court in policy making processes is offered by VOLCANSEK, M. L. "Constitutional Courts as veto players: Divorce and decrees in Italy", *European Journal of Political Research*, 39 (2001): 347-372. The figures prove the assumption: a complete data set is contained in ULERI, P.V. (2002) *supra* fn 45.

<sup>49</sup> The former theory is advocated by Hans Kelsen; the latter by Jürgen Habermas. An inventory of the judicial reviews of Constitutional Courts is given and analysed in SADURSKI, W. (ed.) *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a comparative perspective*, The Hague, Kluwer Law International, 2002. As regards the Italian Constitutional Court, see, ROLLA, G. GROPPi, T. "Between Politics and the Law. The development of Constitutional review in Italy", in SADURSKI, W. (2002):143-161. See also GROPPi, T. "Verso una giustizia costituzionale 'mite'?" *Recenti tendenze dei rapporti tra Corte Costituzionale e Giudici Comuni.* In *Politica del Diritto*, 2 (2002):217-235.

<sup>50</sup> See GROPPi, T. "Verso una giustizia costituzionale mite?", (2002) fn.44, at p.225-230. As for the doctrine of continuità, see *infra* fn. 42.

<sup>51</sup> See FIORILLO, M. "La Corte Costituzionale nella transizione infinita", in *Quaderni Costituzionali*, 1 (2005):144-147. See also DI COSIMO, G. "Delegificazione e tutela giurisdizionale" in *Quaderni Costituzionali*, 2 (2002): 241-254.

<sup>52</sup> The Constitutional reform draft, *Disegno di Legge Costituzionale n.2544, XIV legislatura*, is available at [www.senato.it](http://www.senato.it) [Note the Constitutional draft has been approved by Italian Senate on the 16th of November 2005. The text however is not yet in force. On the 23th of November the Chancery of the

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**High Court (*Suprema Corte di Cassazione*) received a referendum proposal, pursuant to art.138 Italian Constitution, aimed at repealing the constitutional reform. The text of the referendum proposal is published in the Official Bulletin of the State, 24<sup>th</sup> of November 2005].** Art.51 runs as follows: “ 1.

*L’articolo 135 della Costituzione è sostituito dal seguente: «Art. 135. – La Corte costituzionale è composta da quindici giudici. Quattro giudici sono nominati dal Presidente della Repubblica; quattro giudici sono nominati dalle supreme magistrature ordinaria e amministrative; tre giudici sono nominati dalla Camera dei deputati e quattro giudici sono nominati dal Senato federale della Repubblica, integrato dai Presidenti delle Giunte delle Regioni e delle Province autonome di Trento e di Bolzano.*

*I giudici della Corte costituzionale sono scelti fra i magistrati anche a riposo delle giurisdizioni superiori ordinaria ed amministrative, i professori ordinari di università in materie giuridiche e gli avvocati dopo venti anni di esercizio. I giudici della Corte costituzionale sono nominati per nove anni, decorrenti per ciascuno di essi dal giorno del giuramento, e non possono essere nuovamente nominati.*

*Alla scadenza del termine il giudice costituzionale cessa dalla carica e dall’esercizio delle funzioni. Nei successivi tre anni non può ricoprire incarichi di governo, cariche pubbliche elettive o di nomina governativa o svolgere funzioni in organi o enti pubblici individuati dalla legge.*

*La Corte elegge tra i suoi componenti, secondo le norme stabilite dalla legge, il Presidente, che rimane in carica per un triennio, ed è rieleggibile, fermi in ogni caso i termini di scadenza dall’ufficio di giudice.*

*L’ufficio di giudice della Corte è incompatibile con quello di membro del Parlamento, di un Consiglio regionale, con l’esercizio della professione di avvocato e con ogni carica ed ufficio indicati dalla legge.*

*Nei giudizi d’accusa contro il Presidente della Repubblica intervengono, oltre i giudici ordinari della Corte, sedici membri tratti a sorte da un elenco di cittadini aventi i requisiti per l’eleggibilità a deputato, che la Camera dei deputati compila ogni nove anni mediante elezione con le stesse modalità stabilite per la nomina dei giudici ordinari».*

2. All’articolo 2 della legge costituzionale 22 novembre 1967, n. 2, le parole: «dal Parlamento» sono sostituite dalle seguenti: «dalla Camera dei deputati».

3. L’articolo 3 della legge costituzionale 22 novembre 1967, n. 2, è sostituito dal seguente:

*«Art. 3. – 1. I giudici della Corte costituzionale nominati dal Senato federale della Repubblica e quelli nominati dalla Camera dei deputati sono eletti a scrutinio segreto e con la maggioranza dei due terzi dei componenti la rispettiva Assemblea. Per gli scrutini successivi al terzo è sufficiente la maggioranza dei tre quinti dei componenti la rispettiva Assemblea».*

As regards the legislative draft n.2544, see also the opinion given by the Italian association of Constitutional lawyers at the request of the Senate Committee: D’ATENA, A, “*Pareri resi richiesti all’AIC dalla prima*

mechanism of appointment that directly links the composition of the Constitutional Court to the balances of democratic representation in the Parliament and in the new Federal Senate. In a *de iure condito* perspective and with particular reference to the legitimacy control to be exercised on the Government's regulatory power, the Constitutional Court has been presented as the best institution to bring about the mediation between administrative and legislative powers.<sup>53</sup>

From a political viewpoint, the Italian Constitutional Court has been judged as a significant example of *veto player*<sup>54</sup>, in other words as an influential actor (or agent) in the policy-making process. By way of example, both interpretations of the action of the Constitutional Court may be traced indeed in the history of the aforementioned legislative reforms concerning divorce and abortion. Lastly, if one looks at the traditional features of the legal system, the study of the contribution made by Constitutional Court to the development of sector-specific disciplines is undisputed, as will clearly emerge when the role of judiciary in rule making is examined.

### 1.3 The law-making process: the legislator(s)

Law-making power has always had a crucial importance in representing the ordering design of the State: consequently, in a hierarchical paradigm of sources of law, prominence had to be assigned to legislation enacted by Parliament, as the supreme manifestation of State's will and a

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*Commissione del Senato della Repubblica in merito al disegno di legge di riforma costituzionale AS 2544*", available at: <http://www.associazionedeicostituzionalisti.it/materiali/speciali/pareri2544/datena.html>.

<sup>53</sup> See DI COSIMO, G. (2002) *supra* fn. 51, at p.251: "...[...] *la Corte dovrebbe applicare la Costituzione in funzione di limite esterno all'azione normativa del regolamento...[omissis]. La condizione principale per attivare il libero scambio fra giurisdizione amministrativa e giurisdizione costituzionale si ricollega all'idea che l'istituzione della Corte serva a tutelare interessi lesi da atti che nel precedente ordinamento sfuggivano a qualsiasi controllo in quanto espressione di potere politico*".

<sup>54</sup> See VOLCANSEK, M. L. (2001) *supra* fn.48, at p.347-351 for the definition of "veto player": "*constitutions enumerate the rules for what the executive and parliament can or cannot do, but someone is required to keep an eye on them, and that is how courts enter the political space. Where courts with the power to review legislation exist to monitor the rules, the bargaining becomes three-way*", at p.352. As for the portrait of the staple features of the Italian system, see *ibidem*, at pp.364-367. The role of the Constitutional Court is also examined in relation to the major phenomena of the "presidentialization of parliamentary regimes".

symbol of the unitary processes of representative democracy. The Italian legal system is no exception to this generalized way of representing the State, but in the past decades the situation has changed considerably to the extent that at present the Constitution may also be defined as a negotiated set-up of balances between the institutional powers to assign portions of sovereignty: moreover, the functions performed by state laws now extend to the different aim of presiding those negotiated balances. In other words, the fragmentation of the normative unity of the State has transformed what used to be a static picture of so-called “*normative pluralism*” under the umbrella of state law into a process of integration and cooperation, whose limits need to be negotiated both with other ‘regulators’ and different groups of regulatees.<sup>55</sup> The main critical phases of this process may be clarified by analysing the way in which law-making power has shifted from Parliament to other institutional bodies.

The original design, which goes back to a liberal conception of the State is outlined in the Constitution at art.70, according to which the legislative function originally rests mainly with Parliament. The system can be characterised as *monistic*, since the executive power and the Regions can enact statutory law (laws having the force of primary legislation) only within pre-determined limits and under the “supervision” of Parliament.<sup>56</sup> Only delegated legislation and urgent decrees, art.76 (*decreti legislativi*) and 77 (*decreti legge*) can be enacted by the Executive Power. These statutes have the force of law but their binding force of law is subject to limited conditions

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<sup>55</sup> This opinion is fleshed out in a synthetic paper by MANFRELLOTTI, R. “*Esercizio di funzioni normative e partecipazione dei soggetti privati: a proposito dei regolamenti della società di gestione della borsa*”, in *Rivista Italiana di diritto pubblico e comunitario*, 5 (2000):1007-1021. See also the references to a vast literature concerning the transformation of the State, its impact on the balance between institutional powers and the system of sources of law, fns. N19-27.

<sup>56</sup> Legislative procedure is set forth in art.70-74 and can be divided in four stages, as follows. Legislative procedure begins with a proposal of a legislative draft: this can be proposed either by single deputies or senators, by the Government or by 500.000 citizens. After a parliamentary session in which the draft is discussed and if necessary amended, the approval of both chambers is needed. Once the draft law is passed by Parliament, a further step required for the law to be enacted is its promulgation by the President of the Republic, who may send the law back to the Chambers if a clash with constitutional provisions is expected from the implementation of the act. However, the President’s denial of the promulgation may be overturned by a second vote of both Chambers with a simple majority. The final phase of legislative procedure consists in the publication in the Official Bulletin of the State: then the act is ready to come into force automatically in 30 days after the publication, unless expressly provided for otherwise.

and granted upon exceptional circumstances; they need either *ex ante* authorization or *ex post* ratification by Parliament within sixty days from their promulgation.

The shift from a monistic to a dual model has occurred because of a constant increase in the use of both legislative tools by the Government over the past decades. The causes underlying the transformation of the model are mainly political ones: by enacting a *decreto legge* the Government avoids the risk of presenting the draft bill to Parliament. Until the Constitutional Court's decision n.360/1996, the Government's practice was to re-enact the decree at the expiry date, thus prolonging its validity *ad libitum*. The Constitutional Court finally put an end to this practice on the grounds of its constitutional illegitimacy. At present the executive power is granted more room to manoeuvre by means of *decreti legislativi*. Important reforms, such as the reform of the taxation system, have in fact been enacted by means of these acts.

The model for the allocation of legislative power was already latent in the system, that is, it needed to be found in the balance, supposedly reached from time to time, between the Parliament and Executive power. However, this phase came to an end with the enactment of Law n.1/1999 and Constitutional law n.3/2001, a constitutional reform which re-allocated legislative spheres of competence between the State and the regional level.

In the previous formulation of art.117 Italian Constitution, seventeen different subject matters were listed. The Regions might then enact regional statutory laws concerning these matters, within the limits of the fundamental principles set out in national laws. Regional statutes, moreover, were to undergo a control of legitimacy to be carried out by the national government. Art.118 stated that Regions with ordinary Statute held executive power in the same fields as those listed in art.117, but the national government could also delegate further administrative competences to the regions.

Constitutional law n. 3/2001 radically changed this scenario; it now lists: a) seventeen fields in which the State has exclusive legislative competence; b) eighteen fields in which State and Regions have concurrent competence. All other matters are subject to regional competence.<sup>57</sup>

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<sup>57</sup> Art 117 Italian constitution lays down as follows: "*La potestà legislativa è esercitata dallo Stato e dalle Regioni nel rispetto della Costituzione, nonché dei vincoli derivanti dall'ordinamento comunitario e dagli obblighi internazionali.*  
*Lo Stato ha legislazione esclusiva nelle seguenti materie:*

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- a) politica estera e rapporti internazionali dello Stato; rapporti dello Stato con l'Unione europea; diritto di asilo e condizione giuridica dei cittadini di Stati non appartenenti all'Unione europea;
  - b) immigrazione;
  - c) rapporti tra la Repubblica e le confessioni religiose;
  - d) difesa e Forze armate; sicurezza dello Stato; armi, munizioni ed esplosivi;
  - e) moneta, tutela del risparmio e mercati finanziari; tutela della concorrenza; sistema valutario; sistema tributario e contabile dello Stato; perequazione delle risorse finanziarie;
  - f) organi dello Stato e relative leggi elettorali; referendum statali; elezione del Parlamento europeo;
  - g) ordinamento e organizzazione amministrativa dello Stato e degli enti pubblici nazionali;
  - h) ordine pubblico e sicurezza, ad esclusione della polizia amministrativa locale;
  - i) cittadinanza, stato civile e anagrafi;
  - l) giurisdizione e norme processuali; ordinamento civile e penale; giustizia amministrativa;
  - m) determinazione dei livelli essenziali delle prestazioni concernenti i diritti civili e sociali che devono essere garantiti su tutto il territorio nazionale;
  - n) norme generali sull'istruzione;
  - o) previdenza sociale;
  - p) legislazione elettorale, organi di governo e funzioni fondamentali di Comuni, Province e Città metropolitane;
  - q) dogane, protezione dei confini nazionali e profilassi internazionale;
  - r) pesi, misure e determinazione del tempo; coordinamento informativo statistico e informatico dei dati dell'amministrazione statale, regionale e locale; opere dell'ingegno;
  - s) tutela dell'ambiente, dell'ecosistema e dei beni culturali.

Sono materie di legislazione concorrente quelle relative a: rapporti internazionali e con l'Unione europea delle Regioni; commercio con l'estero; tutela e sicurezza del lavoro; istruzione, salva l'autonomia delle istituzioni scolastiche e con esclusione della istruzione e della formazione professionale; professioni; ricerca scientifica e tecnologica e sostegno all'innovazione per i settori produttivi; tutela della salute; alimentazione; ordinamento sportivo; protezione civile; governo del territorio; porti e aeroporti civili; grandi reti di trasporto e di navigazione; ordinamento della comunicazione; produzione, trasporto e distribuzione nazionale dell'energia; previdenza complementare e integrativa; armonizzazione dei bilanci pubblici e coordinamento della finanza pubblica e del sistema tributario; valorizzazione dei beni culturali e ambientali e promozione e organizzazione di attività culturali; casse di risparmio, casse rurali, aziende di credito a carattere regionale; enti di credito fondiario e agrario a carattere regionale. Nelle materie di legislazione concorrente spetta alle Regioni la potestà legislativa, salvo che per la determinazione dei principi fondamentali, riservata alla legislazione dello Stato.

Spetta alle Regioni la potestà legislativa in riferimento ad ogni materia non espressamente riservata alla legislazione dello Stato.

“Concurrent competence” means that in these matters a Region can enact pieces of legislation abiding by the fundamental principles set by national primary regulation. On the basis of this, some commentators have observed that the reform has fostered a re-allocation of legislative power between national and regional institutions rather than a simple distribution of competences for the enactment of pre-determined sources of law.<sup>58</sup> As examples of pivotal subject matters attracted in the sphere of concurrent regional legislative powers, one could mention health protection and scientific research.<sup>59</sup> Where a subject matter is not expressly included in the State competence, the power to regulate it rests with the Regions; nonetheless the Constitutional Court has adopted a softening approach in implementing the reform, by the use of a broad interpretation of the range of regulatory powers

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*Le Regioni e le Province autonome di Trento e di Bolzano, nelle materie di loro competenza, partecipano alle decisioni dirette alla formazione degli atti normativi comunitari e provvedono all'attuazione e all'esecuzione degli accordi internazionali e degli atti dell'Unione europea, nel rispetto delle norme di procedura stabilite da legge dello Stato, che disciplina le modalità di esercizio del potere sostitutivo in caso di inadempienza.*

*La potestà regolamentare spetta allo Stato nelle materie di legislazione esclusiva, salva delega alle Regioni. La potestà regolamentare spetta alle Regioni in ogni altra materia. I Comuni, le Province e le Città metropolitane hanno potestà regolamentare in ordine alla disciplina dell'organizzazione e dello svolgimento delle funzioni loro attribuite.*

*Le leggi regionali rimuovono ogni ostacolo che impedisce la piena parità degli uomini e delle donne nella vita sociale, culturale ed economica e promuovono la parità di accesso tra donne e uomini alle cariche elettive.*

*La legge regionale ratifica le intese della Regione con altre Regioni per il migliore esercizio delle proprie funzioni, anche con individuazione di organi comuni.*

*Nelle materie di sua competenza la Regione può concludere accordi con Stati e intese con enti territoriali interni ad altro Stato, nei casi e con le forme disciplinati da leggi dello Stato.*

<sup>58</sup> See PIZZETTI, F., (2003) supra fn.31, at p.601: “i vincoli ed i limiti indicati dalla nuova norma costituzionale si rivolgono infatti esplicitamente alla potestà legislativa e non alla fonte legge, e men che mai alla legge statale o a quella regionale considerate nella loro specificità di fonti normative individuate, tipizzate e distinte.”

<sup>59</sup> Foreseeable problems of implementation are connected with the promulgation of concurrent legislation in matters where State framework legislation is still – illegitimately- lacking; see, as an example of how to detect possible consequences in the area of health protection and clinical trials on drugs: DEL NEVO, A. “Sperimentazione clinica”, in CENDON, P (ed.), *I nuovi contratti nella prassi civile e commerciale*, vol.III, T.1 *Persone e Famiglia.*, Turin, Utet, 2004, pp.3-55, at p.8-15.

in “diagonal” matters granted to the State pursuant to the second paragraph of art.117.<sup>60</sup>

The reform is an attempt to introduce the subsidiarity principle in the Italian legal system, though choosing a path alternative to that of the German model: in fact, art.74 German Constitution states that the *Länder* can legislate in the fields listed in art.74 as long as the *Bund* does not take the competence upon itself (*Subsidiarität à l'allemande*). Both the aforementioned constitutional law and the new formulation of art.114 set up a complex institutional design which aims at emphasizing regional and local legislative responses to regulatory needs. Accordingly, *ex ante* State control on regional legislation has been repealed in constitutional law n.3/2001; at the same time the revised text of art.118 provides for the application of subsidiarity principle to administrative spheres of competences, which now rest with Municipalities (comuni), if it is not necessary for the Regions or the State to exert them. The implementation of Constitutional Law n.3/2001 has to be conceived as a process, since the exact definitions of legislative and regulatory spheres of competences and their balance with administrative powers must still be tested on a daily basis; the increasing number of decisions rendered by the Constitutional Court in its struggle to define clear-cut confines for each competence shows that only in time will it be possible to assess the proper functioning of the new allocation of legislative power.<sup>61</sup>

This shift has had various seminal consequences at many levels. For our present purpose, it must first be noted that the legislative and the regulatory competence of the Regions are now more penetrating, from both a quantitative and a qualitative standpoint. In practical terms, the enhancement

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<sup>60</sup> See Constitutional Court, decision n.303/2003. In the same decision the Court also clarified that the principle underpinning the reform is that of subsidiarity, thus rejecting the academic *querelle* on the differentiation of principles governing legislative and administrative functions in the design of the devolution system. But for an academic assessment of this provision as a suitable means to avoid excessive internal regulatory differentiation and the subsequent discontinuities, see PIZZETTI, F., (2003) *supra* fn. 31 at p.609. See also CARETTI, P. “*La Corte e la tutela delle esigenze unitarie: dall'interesse nazionale al principio di sussidiarietà*”, in *Le Regioni*, 2-3 (2004):381-389.

<sup>61</sup> See for instance Constitutional Court, decision n.303/2003, where the Court advocates the need to foster a systematic interpretation of the Constitutional text, with express reference to art.117 and 118. In 2004 alone, the Court gave 18 decisions concerning art.117, 11 of which concerned the amended text of the provision. In particular see decision n.6/2004, where the systematic interpretation argument is deployed to attract subject matters in the sphere of State competence.

of legislative spheres of competences also carries along with it an enhancement of regulatory and administrative functions, pursuant to art. 114 and art. 118 of the Italian Constitution, though within the limits set in art. 120 of the Italian Constitution. A second effect of the reform might be to upgrade the role of the judiciary in the task of tailoring the system: apart from the tailoring function performed by the Constitutional Court, which I touched upon describing the outline of the reform, the judiciary might be able to perform a control function on the coherence of the system, the Corte di Cassazione granting at the same time an appropriate level of uniformity in the interpretation of framework rules and general principles.

The goals of this reform that affects the core of legislative functions must be evaluated in terms of simplification, legitimacy and accountability. The first criterion remains unsatisfied, since the definition of the scope of the competence and the extent of the subject matters has still to be reached by the Constitutional Court in its capacity of mediator between institutional powers.<sup>62</sup> Moreover, the uncertainty created by the reform has jeopardized the attainment of any improvement in the legitimacy of the legislation produced and in the accountability of regulators towards civil society, since the very rules governing the process are still unclear.

Nevertheless, it would be unfair to draw the line at this transitional phase; constitutional law n.3/2001 paved the way for developing an internal “multilevel governance”. In this perspective the staple dialogue between the Constitutional Court and both the Regions and the State legislator will make institutional cooperation and coordination a real possibility.

### **III. Law finding and law shaping**

In broad terms, there could be two ways of conceiving the law-making power of quasi-institutional actors, that is, those groups of actors that perform a function in the legal system, which, in theory, would not enable them to take part in active law-making. In this paper I will focus my attention on two types of quasi-institutional actors: the lawyers and the judges.

In a strong sense, law-making power may be identified mainly in the judicial review of legislation, the major implications of which will be, in the first place, the full acknowledgement of the influence exerted by the judiciary in counterbalancing the legislative and executive powers, *i. e.* the intervention

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<sup>62</sup> On this point see the possible related risks for the Constitutional Court in CARETTI, P., (2004) *supra* fn. 60, at p.388.

of the judiciary in the political sphere; a second implication will be the participation of the judges in the ‘*promotional function*’ of the law, *i.e.* the implementation of public policies by the judges acting in their capacity.<sup>63</sup> The unveiling of the political layer contained in the judicial review of legislation is expressly connected to the development of the Liberal State and the growth of welfare functions consequently attributed to the State; moreover, it is claimed that, albeit to varying degrees according to the context under scrutiny, the reasons underlying this trend can be seen clearly in most contemporary democracies.<sup>64</sup>

In a weaker sense, the law-making power of the judges may be identified with the power to set general norms that hold validity in the legal system.<sup>65</sup> In this case it is also possible to refer to the *law-shaping* functions of the judiciary and indeed the expression emphasizes the results of the interpretative activity of the judges, rather than its legitimacy from the standpoint of a positivistic theory of the sources of law.<sup>66</sup> In continental

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<sup>63</sup> See FRIEDMAN, M.L. “*Is there a Modern Legal Culture?*” in *Ratio Juris*, 7/2 (1994):117-131.

<sup>64</sup> See CAPPELLETTI, M. “*The Law-making power of the judges and its limits*”, in *Monash University Law Review* 8 (1981-1982): 15-67, in particular at p.31. See also GUARNIERI, C., PEDERZOLI, P. *The Power of Judges. A comparative Study of Courts and Democracy*, Oxford, Oxford University Press, 2001: “*The gap between the traditional notion of the judicial role and its present political significance is most obvious in civil law countries. The declaratory approach has been much more persistent in continental Europe, where it is connected to the bureaucratic structure of the judiciary*”, at p.5. GUARNIERI and PEDERZOLI agree with Cappelletti’s main conclusion, that is a renewed emphasis on the promotional function of the Law via judicial activity. The authors also maintain that the development of a ‘third giant’ is more likely to be a politically sensitive issue in Continental Europe than in the USA, where a more effective system of checks and balances is provided.

<sup>65</sup> The term *validity* does not here refer to formal requirements conferring force of law to the norm. It rather indicates that, despite a given list of formal sources of law, these norms deploy their efficacy in the realm of law in action by: a) raising spontaneous compliance; b) conforming interpretation; b) fostering similar practices by means of suasion and/or *auctoritas*. In relation to the law-shaping power of judges, for instance, trends of case law and cross referenced decisions are to be taken into consideration.

<sup>66</sup> Law-shaping functions can be performed not only by judges but also by other classes of jurists such as academics, lawyers or notaries: for an analysis of the law making power of notaries, see for instance RICHTER, G-J. “*The notarial function in making law*”, XXIII International Congress of Latin Notaries, Athens, 2001. Papers presented by the German delegation are available in English at: [http://www.bnotk.de/BNotK-Service/Publikationen/UIINL-Berichte/XXIII.kongress/Berichte\\_EN.htm](http://www.bnotk.de/BNotK-Service/Publikationen/UIINL-Berichte/XXIII.kongress/Berichte_EN.htm) . Private parties also shape the law when

Europe the avowal of the function played by judges in shaping the law was brought about by a German movement called “*Freirechtsbewegung*” at the beginning of the Twentieth century; its major proponent, Herman Kantorowicz, argued in favour of the law-making power of judges, but only in the case of gaps (*lacunae legis*) in the legal system; therefore, this way of conceiving the role of the judges was not revolutionary as regards the legislative outcomes of positivism.<sup>67</sup>

The approach gained new momentum with the crisis of the positivistic theory of law; hence challenging currents of investigation have started to focus their attention on the problem of interpretation and on the scope of the judge’s functions in the legal system, with special reference to private law rules.<sup>68</sup> The investigation, accomplished with the comparative method, has disclosed the creative constituent of interpretation, regardless of the class of interpreters involved. These studies have also revealed the ideological grounds for those theories of interpretation that consigned the autonomy of the judge to restricted areas such as, for instance, that of the clarification of the legislator’s intention. Lastly, these findings also show how the law-making power of the judges is shaped from time to time, according to the dominant conceptions of Law and its authoritative fundamentals. However, as earlier mentioned, law-shaping powers are also related to the role played by the judiciary’s decisions in the pursuit of public policy objectives. The idea is that since the range of public policies pursued by legislative and administrative action shows a constant trend in its growth, the judicial enforcement of individual rights, whether between individuals, or in disputes between individuals and a public body, becomes a crucial instrument for “[...]channelling for the articulation of political demands” as well as for meeting individual and collective demands for justice.<sup>69</sup> In line with this

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establishing good practices, codes of conduct or standards not formalized in trade usages.

<sup>67</sup> See art. 1 Swiss Civil Code 1901: “*La loi régit toutes les matières auxquelles se rapportent la lettre ou l’esprit de l’une de ses dispositions. A défaut d’une disposition légale applicable, le juge prononce selon le droit coutumier, et, à défaut d’une coutume, selon les règles qu’il établirait s’il avait à faire acte de législateur* ». See the comparative analysis conducted by GORLA, G. « *La giurisprudenza come fattore del diritto* », in GORLA, G. *Diritto Comparato e diritto Comune Europeo*, Milan, Giuffrè, 1981, pp.263-301. A study of the role of the Italian Courts (Siena and Florence) in a historical perspective is also carried out in ASCHERI, M., (1989) *supra* fn. 22.

<sup>68</sup> As regards Italy, see GORLA, G. , (1981) *supra* fn.67; the essays presented in the book however date from the early ‘60s.

<sup>69</sup> See GUARNIERI, C. , PEDERZOLI, P. (2001) *supra* fn.64, at pp.7-12.

approach, it is also necessary to underscore the role played by a different type of interpreter – the lawyers – in law shaping.

### III.1.1 The Judiciary

In this sub-section I will briefly present some of the characteristics of the Italian judiciary: in this regard, it has to be borne in mind that crucial roles are played not only by the legal framework in which the machinery of justice is bound to operate, but also by the vast array of factors that influence the execution of justice. The multi-layered organizational and legal hallmarks of the judiciary must both be considered when analysing the judicial power as a formant of law in action, as well as when assessing the interaction between the political sphere and the judiciary; for the purposes of this paper, only the latter layer will be taken into account, since my aim is to describe the way in which the judiciary plays a role in shaping legal rules, rather than the possible paths of cooperation or confrontation between the judiciary and the political actors.<sup>70</sup> The Italian Constitution provides the framework rules for the lawful exercise of power by the judiciary at art.101-113.<sup>71</sup> Most of the organizational aspects of the judicial system are covered by a “*riserva di legge*,” thus implying that they have to be regulated by acts having the binding force of law (art.102, 1<sup>st</sup> par. and art.108, 1<sup>st</sup> par.). A similar principle dominates the

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<sup>70</sup> Useful representations of the judiciary by means of flowcharts are contained in PASCUZZI, G. “*How to find the law*”, in MATTEI, U., LENA, J.S. (eds), (2002) *supra* fn.7, pp.455-472, at 457; GUARNERI, C., PEDERZOLI, P., (2001) *supra* fn.64, at p.91. Analytical description, although not updated, is to be found in WATKIN, T.G., (1997) *supra* fn. 12, at pp.96-157. A complete outline of the system is offered by *Consiglio Superiore della Magistratura* (the independent governing body of the judiciary) at:

<http://www.csm.it/documenti%20pdf/sistema%20giudiziario%20italiano/italiano.pdf>. Acts, Statutes and regulations concerning the Judiciary, together with a brief description of the Courts system can be found on the of the Ministry of Justice website: <http://www.giustizia.it>.

<sup>71</sup> The basic principles there established deal with the constitution of the fundamental conditions for the judiciary to both exercise its control functions and ensure the impartiality of the performance of ordinary judicial activity: the organizational and functional independence of the judiciary (art.104), the subjection of the judge to the law and to the law only (art.101) and the status of the judiciary as an independent power. The fundamental principles concerning the appointment of magistrates of higher jurisdictions are also provided in the Constitution, though detailed provisions are to be found in ordinary acts.

direct participation of citizens in the administration of justice, which is restricted to particular proceedings related to criminal justice.<sup>72</sup>

The judiciary is a unitary organization, whose set-up, historically, has been influenced by French judicial organization. Its pyramidal structure is hierarchically organized and falls within the sphere of the Public Administration, though a high degree of independence is granted pursuant to the constitutional framework rules already mentioned. Functional and organizational independence is related to the performance of strictly professional tasks, whilst the hierarchical dimensions of the judicial status come into play in connection with career evaluation, role assignments and the disciplinary and/or liability rules to be applied. It has been clearly acknowledged that “*this type of model creates an almost inevitable strain between the autonomy judges must necessarily be granted to perform their judicial functions and the hierarchical control over their performance.*”<sup>73</sup> The latent threat of institutional clashes between the Ministry of Justice and the body of governance of the judiciary (*Consiglio Superiore della Magistratura*) is not only an abstract implication: conflicts arise with a certain regularity; a conflict may also arise between the branch of executive power and a single magistrate in dealing with the exercise of criminal action in ordinary cases.<sup>74</sup> In several decisions the Constitutional Court has pointed out the importance of procedural models of cooperation, already present in the constitutional provisions and thoroughly specified in sector-specific legislation; with a view to offering guidelines to prevent and solve the conflicts of power between the

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<sup>72</sup> For a general description of the role played by lay judges in criminal proceedings, see WATKIN, T.G., (1997) *supra* fn. 12, at p.128-137.

<sup>73</sup> See GUARNIERI, C. , PEDERZOLI, P. (2001) *supra* fn.64, at p.50.

<sup>74</sup> Not every single magistrate is entitled to raise the conflict of attribution in the Constitutional Court: in the case in point the conflict was raised by a *pubblico ministero*. In the Italian system of Criminal procedural Law a public prosecutor (*pubblico ministero*) is entrusted with the investigation about crimes and the prosecution of the responsible. This magistrate cannot select crimes to be investigated; he is bound by the duty to investigate and prosecute all the crimes that are notified to him either by private individuals or by the Police. For this reason the impartiality and independence of public prosecutors are sensitive issues in the organization of judiciary. See for instance Constitutional Court, decision n.420/1995 and decision n.497/2000, in which the Governing body of the judiciary raised the problem of the constitutionality of the provisions that did not grant the magistrate the right to receive professional defence in the course of disciplinary proceedings. See also Constitutional Court, decision n. 270/2002, annotated by LOY, F. in *Giustizia Civile*, 11 (2002):2719-2723; GIACOBBE, G., “*Autonomia della magistratura, indipendenza del giudice, poteri del ministro di grazia e giustizia*”, in *Giustizia civile*, 5 (1999):233-237.

judiciary and the Ministry of Justice, the Court ruled that both branches of independent powers are bound by a duty of loyal cooperation.<sup>75</sup> To sum up, the Italian model is that of a bureaucratic judiciary, as opposed to the Common law model of professional judiciaries. As is also apparent from this brief account of possible confrontations between the executive power and the judiciary, guarantees of independence in this model tend to be weak, therefore the control function to be performed by the Constitutional Court turns out to be crucial in preserving standards of legitimacy and transparency in the action of both the judiciary and the executive, whether in their mutual relationships or in relation to the protection of individual rights. The dynamics of these relationships are also reflected in the recent amendments of Law n.195/1958 concerning the disciplinary section of the *Consiglio Superiore della Magistratura*.<sup>76</sup>

For this reason, the draft proposal put forward by the Government with a view to amending the Statute, which regulates the set-up of the judiciary, gave rise to a highly confrontational debate in which the tension between the goals and risks of both bureaucratic and professional models became evident.<sup>77</sup> Moreover, the constitutional design that would emerge

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<sup>75</sup> See Constitutional Court, decision n.379/1992. The decision concerned the refusal of the Minister of Justice to proceed to the approval of the designation of a magistrate to a directive assignment. The governing body of the Judiciary raised the conflict of attribution among powers and asked the Court to take a deliberation on the legitimacy of the Minister's refusal. The key point of the decision is the focus on a procedural cooperation model for shaping the relationship between the Ministry of Justice and the judiciary. See also Constitutional Court, decision n.380/2003.

<sup>76</sup> The reform is contained in Law n.44/2002, which reduced the number of members sitting in *Consiglio Superiore della Magistratura* and changed the composition of the disciplinary section.

<sup>77</sup> See Draft Law n. 1296-B/bis, approved by the Italian Senate on the 21<sup>st</sup> of January 2004. At art 1 of the draft proposal the scope of the reform is provided as follows: "Art. 1. (*Contenuto della delega*) 1. Il Governo è delegato ad adottare, entro un anno dalla data di entrata in vigore della presente legge, con l'osservanza dei principi e dei criteri direttivi di cui all'articolo 2, commi 1, 2, 3, 4, 5, 6, 7 e 8, uno o più decreti legislativi diretti a:

a) modificare la disciplina per l'accesso in magistratura, nonché la disciplina della progressione economica e delle funzioni dei magistrati, e individuare le competenze dei dirigenti amministrativi degli uffici giudiziari;

b) istituire la Scuola superiore della magistratura, razionalizzare la normativa in tema di tirocinio e formazione degli uditori giudiziari, nonché in tema di aggiornamento professionale e formazione dei magistrati;

c) disciplinare la composizione, le competenze e la durata in carica dei

from the systematic implementation of Draft Law n.2544-D<sup>78</sup> and Draft Law n.1296- B/bis is likely to strengthen both the legislative and the control powers of the Executive, resulting in a weakening of parliamentary and judiciary prerogatives.

We have described the raise of the “third giant,” its commitment to the implementation of public policies and, consequently, the confrontation with the other institutional powers. These phenomena are likely to act not only upon the efficiency of the judiciary’s organization *per se*, but also upon the efficiency of the judiciary’s responses to the individual/collective demands for justice. Furthermore, individuals and the economic actors have progressively extended the range of their expectations from the judiciary: along with fair and just decisions, private parties now demand a reasonable length for the proceedings, flexibility in the procedures, a display of adequate instruments to ensure the enforcement of the judgments, and a reduction of the unpredictability of the results. Hence, it is likely that non-institutional subjects, or rather subjects other than the judiciary, will take part in the administration of justice, since this represents not only the possibility of providing fair solutions for conflicts from a juridical standpoint, but also an acceptable degree of adjustment to changing societal needs.

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*consigli giudiziari, nonché istituire il Consiglio direttivo della Corte di cassazione;*

*d) riorganizzare l’ufficio del pubblico ministero;*

*e) modificare l’organico della Corte di cassazione e la disciplina relativa ai magistrati applicati presso la medesima;*

*f) individuare le fattispecie tipiche di illecito disciplinare dei magistrati, le relative sanzioni e la procedura per la loro applicazione, nonché modificare la disciplina in tema di incompatibilità, dispensa dal servizio e trasferimento d’ufficio;*

*g) prevedere forme di pubblicità degli incarichi extragiudiziari conferiti ai magistrati di ogni ordine e grado.”*

For an earlier assessment of the difficulties that might arise from the change of status of judges and public prosecutors in the context of Criminal proceedings, see, in a comparative perspective, AMODIO, E., “*The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy*”, in *American Journal of Comparative Law* 52 (2004) :489-500

<sup>78</sup> See *supra* fn. 52. The reform touches upon the whole structure of representative institutions: it changes the composition, structure and functions of both the Parliament and the Senate; the role and powers of the President of the Republic and the Prime Minister. More than 60 constitutional lawyers have expressed concerns about the future of the constitutional design and democratic guarantees in connection with the weakening of the separation of powers. Comments and critiques are available at [www.associazionedeicostituzionalisti.it](http://www.associazionedeicostituzionalisti.it) and at [www.astrid-online.it](http://www.astrid-online.it).

Private bodies and individuals play a minor role in the administration of justice, as earlier noted. Two core areas come into play in this regard: a) the role of lawyers in the administration of justice; b) the tools offered to the parties as an alternative means of resolving disputes. Both areas are related to law finding as they represent two of the connecting points between institutional and non-institutional lawmaking; in fact, they tie in with the process of rule production by both institutions and private actors, that is, the phenomena of the so-called *formazione negoziale del diritto*.

Lawyers are pivotal actors in the so-called “national litigation market.”<sup>79</sup> Social sciences have brought to the surface the relevance of their role in the machinery of justice and in the dynamics of law: from a quantitative standpoint “*lawyers monitored decisions of the Court. On the basis of that monitoring they made thousands of individual decisions about when and under what circumstances to sue.*”<sup>80</sup> From a qualitative standpoint, a mutual influence between Courts and lawyers must be highlighted as well as an active cooperation in balancing the concurring phenomena of both the so-called “path dependence” of the judiciary and the adjustment of legal rules to changing regulatory needs.<sup>81</sup> In fact, it may be observed that lawyers perform a role in law shaping, in their capacity of quasi-institutional actors in the administration of justice. Hence, it is necessary to spell out the nature of the interests pursued by lawyers when selecting the cases and the arguments to be brought to Court, since this is the most prominent way in which lawyers contribute to the law shaping of the system. Furthermore, the virtuous relationship between lawyers in their capacity as advisors, the realm of legal

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<sup>79</sup> See RUBIN, P. “*Why is the Common Law efficient?*”, in *Journal of legal studies*, 6 (1977), 1:51-63.

<sup>80</sup> See SHAPIRO, M. , STONE SWEET, A. *On Law, Politics, and Judicialization*, Oxford, Oxford University Press, 2002, at p.96.

<sup>81</sup> See SHAPIRO, M., STONE SWEET, A. (2002) *supra* fn.80, at p.98. The path dependence of the judiciary is defined by STONE SWEET as follows: “*Legal institutions are path dependent to the extent that how litigation and judicial rule-making proceeds, in any given area of the law at any given point in time, is fundamentally conditioned by how earlier legal disputes in that area of law have been sequenced and resolved*”. See STONE SWEET, A. “*Path Dependence, Precedent and Judicial Power*”, in SHAPIRO, M. , STONE SWEET, A., (2002) *supra* fn.80, at p.113. On this issue I assume that path dependence and the adjustment of the law to the emerging regulatory needs are complementary phenomena; in doing so, I exclude a radical opposition between the two. This view is supported by the consideration of the cooperative relationship between institutional and quasi-institutional actors in law shaping.

research and judges contributes to law shaping, in that it fosters innovative practices, which may subsequently be systematised by the doctrinal formant and definitively accepted by courts and/or restated in statutory legislation.

### III.1.2 The role of lawyers

First of all, lawyers are a necessary constituent of the system, because when having recourse to the Court in order to obtain the enforcement of their rights, citizens must have a technical defense; since all individuals are subject to this obligation, the State, pursuant to art.24 of the Italian Constitution, provides for the payment of a lawyer for those who cannot afford his service.<sup>82</sup> Therefore, lawyers are the hinges connecting the administration of Justice to the citizens: they act as mediators between the public interest, in its broader meaning, and the factual interests brought by the parties to the attention of the Courts. This particular quality of the activity of lawyers may be indicative of the duality of interests underpinning their function; it is also reflected in the duality of legal sources that regulate the legal profession, that is, state regulation and self-regulation provided and enforced by the National Bar Association. Moreover, this system of mixed substantive regulation coupled with an independent enforcement specifies their role in terms of quasi-institutional actors taking part in the law-shaping activity.

The public layer of the lawyers' activities, or at least some of its implications, are currently underrated, due to both the quality of State regulation concerning the legal profession and the outcome of the interaction between the state regulation and the self regulatory instruments provided by the Bar Association.<sup>83</sup> The discipline of the legal profession consists of several statutes which are relevant to the set-up of the Judiciary.<sup>84</sup> This legal

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<sup>82</sup> THE OBLIGATION TO APPEAR IN COURT ASSISTED BY A PROFESSIONAL LAWYER IS SET AT ART. 82 CODE OF CIVIL PROCEDURE. THE REAL POSSIBILITY OF BEING ASSISTED BY PROFESSIONAL LAWYERS IS GRANTED DIRECTLY BY THE STATE TO CITIZENS WHOSE ANNUAL INCOME IS PROVED TO BE LOWER THAN EURO 9.296,22 AND IS REGULATED BY ART.74-141 ("PATROCINIO A SPESE DELLO STATO") OF T.U. N.115/2002 REGARDING LEGISLATIVE PROVISIONS AND REGULATIONS CONCERNING THE COSTS OF THE ADMINISTRATION OF JUSTICE.

<sup>83</sup> See D'ANGELO, A. "La deontologia dell'avvocato" in ZATTI, P. "Le fonti di autodisciplina. Tutela del consumatore, del risparmiatore, dell'utente", Padua, Cedam, 1996, pp.12-161

<sup>84</sup> The basic discipline is to be found in *Regio Decreto Legislativo*, n.1578, 22<sup>nd</sup> of November 1933 and subsequent amendments (henceforth RDL n.1578/1933); important modifications and updating are contained in D.Lgs. n.96, 2<sup>nd</sup> of February 2001 which, at art. 4 and 5, also provides for the applicability of this legal regime to

framework contains provisions which emphasize the relevance of the lawyers' commitment to the public interest. Lawyers and practitioner lawyers must swear a formal oath after their registration at the Bar: thus they undertake to comply with the duties relating to the legal profession and to the tasks that the law assigns to them "in the interest of Justice."<sup>85</sup> Furthermore, they are subject to restrictions concerning their place of residence and their personal behaviour.<sup>86</sup> Both the Bar examination and lawyers' activities are subject to the control of the Ministry of Justice, pursuant to art.36 and 15 RDL n. 1578/1933; lastly, the table of fees to be charged for legal services is subject to the approval of the Ministry of Justice.<sup>87</sup> Despite these provisions, members of the Bar retain a wide range of independence, since they establish a code of conduct that provides for the basic rules to be applied to lawyers in the exercise of their dual activity of technical defendants and legal advisors. The public interest layer of the legal profession is, however, expressed in both sources of provisions by appealing to vague, indefinite and prudential concepts, such as "loyalty" or "honor."<sup>88</sup> Thus, the specification of the scope of the provisions must be found in disciplinary case law: but, as previously mentioned, the system of disciplinary sanctions in the legal profession is

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lawyers who have obtained an equivalent professional qualification in a EU member State; D.P.R. n.115, 30<sup>th</sup> of May 2005.

<sup>85</sup> See art.8, 3<sup>rd</sup> par. and art.12, RDL n.1578/1933.

<sup>86</sup> See art. 10, 12, 1<sup>st</sup> par., art.17, 1<sup>st</sup> par. N.3, RDL n.1578/1933 as well as the limits contained in the Code of Conduct enacted by the National Bar association in 1997, *Codice di deontologia professionale*.

<sup>87</sup> See art. 57, 2<sup>nd</sup> par. RDL n.1578/1933. Every two years the National Bar Association drafts a new table of tariffs and presents it to the Ministry of Justice for approval.

<sup>88</sup> The examples of the use of prudential concepts are several. In the Lawyers' Code of Conduct (1997) for instance, see art.5 that runs as follows: "*Doveri di probità, dignità e decoro. – L'avvocato deve ispirare la propria condotta all'osservanza dei doveri di probità, dignità e decoro.*" The provision binds the lawyer to act in his capacity conforming to the duties of probity, dignity and propriety. In the State legislation, see art. 12 R.D.L. 1578/1933: "*Gli avvocati debbono adempiere al loro ministero con dignità e con decoro, come si conviene all'altezza della funzione che sono chiamati ad esercitare nell'amministrazione della giustizia (co. 1°); - "... <<Giuro di adempiere i miei doveri professionali con lealtà, onore e diligenza per i fini della giustizia e per gli interessi superiori della Nazione>> (co. 3°);* similar expressions are contained in art. 12, 14 and 38 R.D.L. 1578/1933, as well as in the Criminal Code, at art.88 and 105, 4<sup>th</sup> par. The Code of Conduct has been "enacted" in 1997. It has been amended in 2002. The full text is published in *Foro Italiano.*, 2003, I, c.244. It is also available at [http://www.consiglionazionaleforense.it/visualizzazioni/vedi\\_elenco.php?areanumber=10](http://www.consiglionazionaleforense.it/visualizzazioni/vedi_elenco.php?areanumber=10).

almost entirely administered by the territorial Councils of the Bar Association jointly with the National Bar Association, and the form of publicity given to the disciplinary cases is limited.<sup>89</sup> Consequently, the attitude of the Courts towards the upgrading of the function of lawyers is ambiguous.<sup>90</sup>

On the contrary, the contents of the private interest layer in the legal profession are well defined by the contractual obligations that are undertaken by the lawyer in performing advisory tasks and the duties of technical defense.<sup>91</sup> In this regard, the obligation to follow the client's indications about the course of action to be taken within the proceedings or the obligation to take on an ill-chosen lawsuit are but two paradigmatic examples of the client-oriented behaviour that the lawyer is obliged to keep.<sup>92</sup> Lawyers are not bound to discourage clients from bringing patently ill-chosen lawsuits, nor can they refuse to provide legal aid in that sense; nevertheless the duty of care imposes on them the obligation to advise the clients about the juridical definition of their position and to give them all relevant information concerning alternative means of dispute resolution or on the possible juridical implications of the clients' intentions.<sup>93</sup>

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<sup>89</sup> See art. 37-48 RDL n. 1578/1933. The scarce availability of detailed case law and reports of disciplinary cases is indeed a problem which led to the enactment of the Code of Conduct, which also contains some provisions concerning the principled behaviour to be kept by the lawyer in his relationships with colleagues, clients, judges and alike. As the *Corte di Cassazione* repeatedly stated, these provisions must be interpreted as mere examples, thus implying that behaviours not comprised in the Code might be considered as disciplinary infractions: on this point see *Corte di Cassazione, Sez. Un.* Decision n.8225/2002.

<sup>90</sup> The acknowledgement of the nature of the function enacted by lawyers is vaguely underpinned in the order given by Constitutional Court, ord. n. 359/1999, issued in a conflict of attributions between powers raised by a lawyer. In the same decision, the Court does not take a clear stand on the problem, thus leaving unsolved two major issues: a) a clear definition of the scope and the nature of the lawyer's function within the system of Justice administration and his legitimisation to raise the conflict in Court. The order of the Court is commented by RESCIGNO, F. and CELOTTO, A. in *Giurisprudenza Italiana*, 2000, at pp.1570-1576.

<sup>91</sup> See D'ANGELO, A. (1996) *supra* fn.83, at p.147-151. According to the author the lawyers' behaviour is oriented towards the fulfilment of the clients' interest.

<sup>92</sup> See also BARCA, A. "La responsabilità contrattuale dell'avvocato nell'espletamento dell'incarico ricevuto", in *Nuova Giurisprudenza Civile Commentata* (2001) II, p.483-505.

<sup>93</sup> The problem that may possibly arise from the obligation to pursue the client's interest is that of independence. In point see D'ANGELO, A. (1996) *supra* fn.83, at p. 151-155.

Hence, the question is how this duality influences the law shaping of the legal system. I argue that by performing both technical defense in judicial proceedings (litigation) and advisory tasks, lawyers foster (or hinder) virtuous developments in the legal system; they select claims to be brought to courts, they guarantee the right of judicial enforcement of rights and obligations.<sup>94</sup>

An example of this kind of law-shaping function exercised by lawyers may be seen in the selection of the claims to be brought to the Courts. As noted above, lawyers must provide the legal service required by their clients, duly disclosing all the relevant information about the legal framework and the clients' position at law; having provided this full information, they may suggest that the client take a particular course of action, but ultimately they must respect their clients' determinations and consequently assist them in the legal pursuit of their objectives. Hence, lawyers may influence their clients' resolution to bring a lawsuit by placing emphasis on the weakness (or the strength) of the clients' positions at law; they may also suggest that the client should make use of means of alternative dispute resolution offered either by substantive law or by procedural law. In the former case, the lawyers will favour the instruments offered by a specific area of law in order to ensure a direct fulfillment of individual rights. A vast array of examples is to be found in Italian codified contract law, which enables a debtor or a third party to assign real estate revenue to a creditor in security of a debt.<sup>95</sup> Other similar institutions that aim at the self-enforcement of the party's rights are provided in the case of the breach of a sale contract, due to the buyer's fault, in which the seller has the right to sell the goods by means of an auction.<sup>96</sup> In the latter case, by selecting the solution which is the most appropriate for the client, lawyers will promote alternative instruments of dispute resolution, such as arbitration or mediation centres.<sup>97</sup>

By and large, lawyers also work as mediators between the realm of legal research and the realm of the judiciary. From this standpoint, by theoretically framing and arguing their pleas, they foster (or undermine) the interpretations and systematisations of the law proposed by doctrine; the opposite dynamic can also occur, since lawyers put forward the legal grounds

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<sup>94</sup> On this specific point see D'ANGELO, A. (1996) *supra* fn.83, at p.147.

<sup>95</sup> This peculiar type of contract is called "*anticresi*" and is regulated at art.1960-1964 Italian Civil Code.

<sup>96</sup> See art. 1515 and 1516, art.1686 and 1687, Italian Civil Code. See also art. 1500-1509 Italian Civil Code which constitute the legal basis for the contract of "*sale and lease back*".

<sup>97</sup> Mediation Centres have been set up in Chambers of Commerce, pursuant to Law n. 580/1993.

to trade practices and determine the scope of the judicial response to the case in hand, potentially stimulating a new systematisation of the law and promoting the occurrence of *revirement* in High Court case law.

A picture of the extent to which this virtuous triadic alliance might be beneficial to law shaping is offered by a recent development in the field of floating charges.<sup>98</sup> The traditional systematisation of securities implied that the autonomy of the parties was prevented from constituting a floating charge in the form of a pledge (“*pegno rotativo*”); however, the legal formalization of trade practices, especially in the sectors of banking and international commerce, had already been offering both doctrine and the courts a constant application of this contractual scheme as a security in a wide range of financial and commercial transactions; in the 1990s, the validity of these legal formalizations became accepted doctrine.<sup>99</sup> The repeated occurrence of claims, regularly dismissed by the courts,<sup>100</sup> underscored the fact that legal practice had been reluctant to conform to the strict interpretation offered by doctrine and by Courts at that time. Finally, the High Court has reached a position in which it acknowledges, though via the mediations of the above-mentioned doctrine, the practice of “*pegno rotativo*,”<sup>101</sup> shortly afterwards the legislator expressly provided a norm which contemplates this type of security.<sup>102</sup>

### III.2.1 Judge-made law

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<sup>98</sup> According to art. 2784 of the Italian Civil Code, securities consisting of cash collaterals or movable goods are attached to the goods, so that the pledged collateral becomes the object of the security offered against a debt. See also art. 2742 and 2743 Italian Civil Code (hence “ICC”); art. 2795 ICC; art. 2802 and 2803 ICC; art.2815 and 2816 ICC; art.2825, 2<sup>nd</sup> par. ICC.

<sup>99</sup> See GABRIELLI, E. *Il pegno anomalo*, Padua, Giuffrè, 1990.

<sup>100</sup> The decisions are widely reported and commented on: see for instance *Tribunale di Roma* (Lower Court of Rome), 21<sup>st</sup> of July 1993, but also *Tribunale di Torino* (Lower Court of Turin), 1<sup>st</sup> of June 1991 and 22<sup>nd</sup> of July 1992.

<sup>101</sup> See *Corte di Cassazione*, decision 28<sup>th</sup> of May 2005, n.5264. The first comments on the decision of the *Corte di Cassazione* underscore the fact that the High Court caved in on this type of floating charge under the pressure of the doctrinal formant. See AZZARO, A.M. “*Il pegno ‘rotativo’ arriva in Cassazione: ovvero ‘come la dottrina diventa giurisprudenza’*”, in *Banca Borsa e Titoli di Credito*, 5 (1998): 1; MAIMER, F. “*Pegno rotativo: la dottrina ispira la Cassazione. Prime osservazioni*”, in *Giustizia Civile*, 9 (1998): 2159. See also RESCIGNO, M. “*Le garanzie ‘rotative’ convenzionali: fattispecie e problemi di disciplina*”, in *Banca, Borsa e Titoli di credito*, 1 (2001) :1.

<sup>102</sup> See also art. 34, 2<sup>nd</sup> par., D.Lgs 24<sup>th</sup> of June 1998, n.213 ( so-called “Decree on the Euro”).

As regards law-making in a 'strong sense' as previously defined, I have already underscored the dynamics of the judicial review of legislation as well as the influence exerted by the Constitutional Court in providing the legal framework necessary to grant the enforcement of fundamental rights: that is, the role played by the Constitutional Court in making the constitutional project real. As regards law shaping, the Italian legal system does not treat case law as a formal source of law. Thus, decisions and opinions issued by the judiciary in its own capacity will constitute, on the one hand, *the* substantive rule to be applied in the case in question; on the other hand, judges will hold an informal, though effectual, power to shape the law concerning the subject matter being considered. If the decisions are made by ordinary courts, that is, lower courts and courts of appeal dealing both with civil and criminal matters, they will only represent *trends* of approach; if the decisions are taken by higher jurisdictions, they will have a flexible binding force, mainly by means of a mild implementation of the *stare decisis* principle.<sup>103</sup> Hence, although not counted among the sources of Italian law, case law and judges' opinions must be included among the formants making up or giving the current shape to general rules, either pre-existing, or to be found through the systematic or analogical interpretation of legal principles. The careful consideration of case law, then, turns out to be crucial for the purposes of law finding.<sup>104</sup>

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<sup>103</sup> As for the principle in question, there is an increasing awareness of the path dependence to be traced in Italian case law; the phenomenon is multi-faceted and involves both elements of legal culture and of ideology, referring, with this latter term, to the confines marked (by legislator but also by academics and judges) for judicial interpretation within the legal system. Positive legal constraints and judicial standards of civil liability for the judge are also part of the framework that shapes path dependence in Italian case law. The investigation of the (supposed) presence/absence of the *stare decisis* principle in the Italian legal system is beyond the scope of this paper. For further references on this issue see VISINTINI, G. *La giurisprudenza per massime ed il valore del precedente con particolare riguardo alla responsabilità civile*, Padua, Cedam, 1988; GALGANO, F. "L'efficacia vincolante del precedente di Cassazione", in *Contratto e Impresa*, 1999, 889-904.; MAZZAMUTO, S. "Certeza e prevedibilità: nuove frontiere della nomofilachia e tentativi di enforcement del precedente", in *Politica del diritto*, 2 (2003):157-176.

<sup>104</sup> See also ALPA, G., MONATERI, P.G., GUARNIERI, A. *Le fonti del diritto italiano. Le fonti non scritte* Turin., Utet, 1999. The awareness of the relevance of case law for law-finding purposes has given way to a relatively new *genre* of legal literature, i.e. that of the commentaries on case law. As regards contract law, see for instance DOGLIOTTI, M., FIGONE, A. *Giurisprudenza del contratto* Milan., Giuffrè, 2000.

As a consequence of this and despite the traditional tale about codified systems neglecting the role of the judiciary, it is now a shared assumption among academics and practitioners that even in a Civil Law (entrambi minuscoli o entrambi maiuscoli) system the judiciary's contribution is crucial both to law shaping and to law making. Indeed, its counterpoint in common law legal environments is represented by the piercing of the veil of "the artificial differentiation between the binding authority of the cases and the merely persuasive authority of the other literature."<sup>105</sup>

The relationship between the judges and the law in a codified system bears certain peculiarities, among which must be numbered the interaction between codified rules and statutory law. What has been noted in the analysis of the new codification of Dutch private law can be applied to other codified systems in general:

the general part of private law is aere perennius, more durable than bronze. The legislature is merely concerned with branches of the law that are sensitive to changing developments and attitudes in society...[...]As statutory law ages, the role of the courts becomes more substantial. Since the general part of the Code is rarely amended, it is that area of private law where the court's influence is greatest.<sup>106</sup>

The aforementioned current of investigation has underscored two levels at which the influence of the judges on law-making is exercised: a. declaring what law is relevant to the case in hand; b. setting a rule which might be considered valid beyond the case in hand.<sup>107</sup> However, taking for granted these conclusions, it is necessary to focus attention on the practical modes in which the judges' contribution to law shaping is realized.

The first mode to be considered is that of giving a solution to the case in hand, provided that a rule for the case is already present: in doing so, the judge interprets the law often fostering legal change via systematic interpretation. The contribution of the judges to legal change is undisputed, for instance, in the field of family law, which has been adapted by the Courts to a changed social context; both the Court of Cassation and the

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<sup>105</sup> See BIRKS, P., (1997) *supra* fn. 18, at p.114.

<sup>106</sup> See HARTKAMP, A. "Interplay Between Judges, Legislators and Academics. The case of the New Civil Code of the Netherlands.", in MARKESINIS, B., (1997) *supra* fn.18, p.91-112, at p.91

<sup>107</sup> See GORLA, G. (1981) *supra* fn. 67, at p.273.

Constitutional Court have played a role in this process. The institution of the legitimate family, as set up in art. 29 of the Italian Constitution and regulated by art.79-219 of the Italian Civil Code, still retains its prominence in comparison with other forms of personal relationship acknowledged by private law. Major developments have been achieved in the extension of the applicability of means of protection – already provided for married couples – to couples cohabiting *more uxorio*. The Constitutional Court, after recognizing the juridical relevance of the personal relationship between unmarried partners, has stated that art.6 of the Law n.392/1978 on housing must also be applied to unmarried partners. The rule provided the husband/wife with the right to replace the deceased husband/wife as party to the lease contract. In the same decision the court also stated that when cohabitation had ceased, but there were still children, the rules on separation must be applied (the partner who cohabits with children is granted *ex lege* the right to keep the house).<sup>108</sup> The High Court followed suit and in several decisions granted protection to the children born from unmarried couples, recasting the means of protection provided by the Civil Code and stating their applicability to cohabitants *more uxorio*.<sup>109</sup>

A second mode of law shaping may be traced in the reception of theories and a new systematisation expressly advanced by doctrine. These developments of the legal system, though achieved through case law, are supported and recommended by a lively juridical scholarship which maintains a constant dialogue with the judges. An example of this beneficial interaction between formants is well represented by the history of the availability of an action under art.2043 of the Italian Civil code for recovering damages in the case of a creditor whose contractual rights had been impaired on account of a wrongful act by a third party. Until 1971, art. 2043 of the Italian Civil Code was interpreted by judges as contemplating only the case of wrongful acts which may have caused an infringement of absolute rights, thus leaving out of the scope of the provision those cases of wrongful acts which may have caused infringement of contractual rights. The *Corte di Cassazione* finally came to accept the systematisation suggested by doctrine, hence granting compensation for damages suffered by a creditor and caused by a third party.<sup>110</sup>

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<sup>108</sup> See Constitutional Court, decision n.404/1988.

<sup>109</sup> See, for instance, *Corte di Cassazione*, decision n.376/1999; decision n. 10797/1998; decision n.10538/1996.

<sup>110</sup> The case which gave way to the pivotal *revirement* is well known: Corte di Cassazione, 26<sup>th</sup> of January 1971, n.174 (the “Meroni case”). A summary of the case is offered in BUSSANI, M., POZZO, B., VENCHIARUTTI, “*Tort Law*”, in MATTEI, U., LENA, J.(2002) *supra* fn.7, pp.217-246, at p.236-238.

A third mode of law shaping performed by judges can be traced in the gap-filling activity carried out in deciding cases regarding incomplete contracts. Often neglected by Italian legal literature, the gap-filling activity of the judge represents a crucial intersection between State regulation and private actors' regulation.<sup>111</sup> In the last paragraph of this section I will briefly examine relevant features of the gap-filling activity of the judge and I will provide an example of the latter in the area of contract law.

### III.2.3. Law shaping: the gap-filling activity of the judge

In exploring the balances reached in the paradigm of the separation of powers through the allocation of law-making functions, the gap -filling activity of the judge must not be underrated. The possibility (or the desirability) of a judicial intervention in the appraisal and in the definition of the content of contractual clauses involves a formalization of the institutional scope of judicial activity. This relationship has been built in terms of radical opposition by formalist theories of contract law.<sup>112</sup> The model of institutional opposition between State and private parties is transferred to the level of contractual rules; cost-wise, the best regulator for the contract is always the parties themselves. State legislation (default rules) and Court adjudications are costly and less efficient. On the contrary, a relation of complementarities between State regulation and the regulation put in place by private actors has been advocated by those who try to reach a balance in the mixed system of institutional/ non-institutional cooperation.<sup>113</sup> Two aspects of the problem are taken into consideration: the costs of laying down a (contractual) rule and the definition of the borderlines between the law-making power of institutional and that of non-institutional actors. Hence, the cost-benefit analysis not being relevant to my present purposes, the reference to the gap-filling activity of the judges is presented here in order to shed light on that grey area of complementarities which judges, though under the false flag of interpretation,

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The same doctrine is at the basis of the possibility of granting compensation for economic losses. The scholar who has forecast this legal change is F.D. BUSNELLI, in *La lesione del credito da parte di terzi*, Milan Giuffrè, 1964.

<sup>111</sup> See BELLANTUONO, G. *I contratti incompleti nel diritto e nell'economia*, Padua Cedam, 2000.

<sup>112</sup> See SCHWARTZ, A., "Relational Contracts in the Courts: An analysis of Incomplete Agreements and Judicial Strategies", in *Journal of Legal Studies*, 21 (1992), 2: 271-318.

<sup>113</sup> As regards Italian Contract law, see BELLANTUONO, G. "Contratti incompleti e norme sociali", in *Rivista Critica del Diritto Privato*, 2001, p261-294, at p.275, and further references contained therein.

enter in order to regulate authoritatively the *dominium* of private parties, that is, the contract.

In their gap-filling activity, judges are *formally* bound by the law: in this regard art. 101 of the Italian Constitution, providing that judges are bound “only by the law”, plays a pivotal role: in line with the fundamental idea of the division of powers, the judiciary should not be subjected to any constraint other than the law itself. Rules governing interpretation are also to be found in the law, and, in particular, in the Civil Code itself.<sup>114</sup> Legal constraints on the gap-filling activity of judges may also differ according to which area of law is taken into account, as stated in art. 14 of the Preliminary Dispositions to the Civil Code. In civil matters, rules on interpretation are provided at art. 12 of the Preliminary Dispositions, where legal techniques available for the judges are also contemplated. Relevant provisions are contained in art. 1175, 1322, 1323, 1324, whilst the specific rules on the interpretation of contracts are set out in art. 1362-1371. Among these provisions art. 1366 (good faith) deserves special attention. This has provided the legal base for the recognition of further duties of cooperation between the parties.

It may seem that in a codified system of private law, the room for manoeuvre left to the judges is reduced and, indeed, legal constraints do delimit the scope of the gap filling activity. Furthermore, these restraints work in different ways with respect to civil or commercial contracts, depending on the evolution of general principles governing the specific subject matters. However, several provisions expressly attributing gap-filling power to the judges may be found in the system. The discipline of warranties in sale contracts offers some examples; on this point, European regulations place emphasis on the protection of the weaker party in a transaction (already present in the system, see art. 1341 c.c.), thus providing a new interpretative framework for art. 1512 of the Italian Civil Code: in this latter case, for instance, the objective purport of the provision has been enhanced by the Courts.<sup>115</sup> In other cases the *Corte di Cassazione* has acknowledged an implicit obligation resting on the seller, the purpose of which is to guarantee the regular functionality (“*buon funzionamento*”) of the item for

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<sup>114</sup> Art. 23, 24, 25 and 28, as well as 102, 111 and 113 are also important, since they provide the institutional framework for the exercise of judiciary power, especially by determining legal sanctions for the abuse of powers or for judges’ liability (see also L.n.117, 13<sup>th</sup> of April 1988, in particular art. 2,3. This statute cleared the opposite interpretations provided by two judgements of *Corte di Cassazione* on the subject: Cass. Sez. Un. 6<sup>th</sup> of November 1975 and Cass. Sez. Un. 24<sup>th</sup> of March 1982 n.1879).

<sup>115</sup> See *Corte di Cassazione*, decision n.22661/1999 and decision n.8153/2000.

sale.<sup>116</sup> No such implicit obligation has been acknowledged in sales between private parties; thus the protection provided by art.1512 I. c.c will be applicable to sales between private parties only if expressly contained in the contract.<sup>117</sup>

Nevertheless, these constraints are balanced by the power of the judge to select the facts to be taken into account in order to decide the case in hand.<sup>118</sup> Though not explicitly spelled out, but only covered by “thick ” layers, such as the legal techniques of interpretation or positive law constraints, the gap filling powers of judges can be deployed to pierce the veil of contractual autonomy. The clause giving way to these powers might be seen in art. 116 of the Italian Code of Civil Procedure, as mentioned above; the only limit to this power is the necessary correspondence between *petitum* and *iudicatum* established by art.112 of the Italian Code of Civil Procedure.

The question of whether or not a judge may substantially modify the content of the contract is rarely addressed *per se* by the Courts, but in recent times the *Corte di Cassazione* has sought to issue several decisions in which the gap-filling powers of the judge are discussed in the light of the possible balances between the exercise of private autonomy and the authoritative control exercised by the judiciary.<sup>119</sup>

#### **IV. From the ‘rules’ to the general picture.**

In the previous sections I have provided an analytical framework for the processes underpinning the contribution of institutional and quasi-institutional actors to both law making and law shaping. At this stage it is thus

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<sup>116</sup> See *Corte di Cassazione*, decision n.325771983, interpreting the part of the provision which establishes that the particular kind of warranty must be agreed upon by the parties, unless usages provide that the warranty is to be acknowledged implicitly.

<sup>117</sup> See ALPA, G. “*Autonomia privata e ‘garanzie’ commerciali*”, in *Contratto e Impresa Europa*, 2001, pp.455-496.

<sup>118</sup> See art.116 Code of Civil Procedure and art.2729 Civil Code. See also *Corte di Cassazione*, decision n.4333/1983.

<sup>119</sup> See *Corte di Cassazione*, decision n.10511/1999; decision n.14172/2000 and recently decision n.18128/2005 . All the above-mentioned decisions concerned the interpretation of art. 1384 of the Italian Civil Code, which runs as follows: “**Riduzione della penale.** La penale può essere diminuita equamente dal giudice, se l’obbligazione principale è stata eseguita in parte ovvero se l’ammontare della penale è manifestamente eccessivo, avuto sempre riguardo all’interesse che il creditore aveva all’adempimento “.

necessary to verify, in a positive dimension, whether the assumption of a substantive discontinuity between the constitutional model and the legal system in action is proven or not. The answers provided in this paper will substantiate, in a normative perspective, some concluding remarks on the effects that the allocation of law-making functions produces on the paradigm of the separation of powers.

As regards the first issue, for each class of actors the outlines of significant “implicit constitutional change” have been underscored, thus substantiating the initial assumption.<sup>120</sup>

At the outset of the analysis, I discussed the relationship between the constitutional text and other pieces of legislation: the enactment of the Constitution itself and the enforcement of the values enshrined in it have radically changed the contents of the legal system. The *main* actor in this process has been the Constitutional Court, but parts have also been played by the Judiciary through adjudication and by the application of ‘horizontal effect’ doctrine. The analysis has also revealed the importance of the institution of the referendum in the transformation of the legal system itself. The dynamics of the use of this institution appear to be those of truly direct democracy rather than those of the checks and balances pattern, as laid down in the constitutional text. In this case the Constitutional Court’s role turns out to be crucial in mediating between the demands of change coming from civil society and the institutional response. Setting aside the latest constitutional reform, whose destiny hangs under the threat of a referendum, the shift from monism to dualism and beyond undoubtedly provides evidence for the alleged discontinuity. The Government has progressively eroded parliamentary legislative prerogatives; furthermore, the process of implementation of the constitutional reform granting legislative power to the regions and the other local representative bodies has given rise to a quasi-permanent conflict of attribution between the executive power, the State legislator and, to a large extent, the regional legislator. In this framework I have underscored how the role of the Constitutional Court is not only that of an *arbiter of legality* who pursues the implementation of the given constitutional design.

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<sup>120</sup> For the concept of “implicit constitutional change” in a Law & Economics’ perspective see the model of institutional interaction presented by VOIGT, S. “*Implicit Constitutional Change – Changing the Meaning of the Constitution Without Changing the Text of the Document*”, in *European Journal of Law & Economics*, 7 (1999):197-224. However, it must be noted that the idea of a *de facto* constitution has been widely discussed and accepted in Italian Constitutional theory.

The Court indeed in its capacity of a hierarchically superior interpreter continuously shapes the institutional design, functioning as a mediator in the competition for the allocation of legislative functions between the executive and the legislative power, whether residing in Parliament or in local representative bodies. This interpretation is in line with the learned current of constitutional theory according to which the legal system can be seen as a complex set of rules deriving from normative facts and acts that are consistent with the abstract models provided by the norms on legislative production; this set of rules is coherently unified by the interpretative activity of institutional actors and by the action of quasi-institutional actors. The discontinuities between the abstract model and the rules that govern in practice are but one characteristic of the law.<sup>121</sup> Furthermore, the Constitutional Court's action also has substantive effects on the contents of the legal system, both re-modeling current legislation with a view to harmonising it with constitutional values and fostering prospective change in the legal system, thus steering the policy-making process as well as taking an active part in it.

The dynamics underscored in the law-making process appear to be consistent with those traced for the law-shaping process. On this issue, ordinary courts have gradually gained increasing importance in defining the limits and the contents of the legal issues under their jurisdiction. In performing this function of law shaping, they also traced a line of demarcation for private autonomy, as noted earlier in particular in the field of the adjudication of incomplete contracts. The influence exerted by a peculiar type of quasi-institutional actor, the lawyers, on law shaping has also proved to be substantial, despite the limited acknowledgement obtained by formal institutional design.

The analysis of the basic features of law-finding patterns in the Italian legal system allows me now to make some observations on the effect of the allocation of legislative functions on the separation of powers. The allocation of legislative functions to bodies deriving their legitimacy from the fact that they have been elected by the people is related to the idea that policy objectives and, in particular, redistributive policies, are pursued in a fair way only by democratic representative powers (the majoritarian model). However, the dynamics illustrated in this paper provides relevant examples of a deviation from the strict majoritarian paradigm that is reputed to govern the Italian legal system. While the text of the Constitution and the formal theory of the sources of law assume the majoritarian model of democracy as the

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<sup>121</sup> See PIZZORUSSO, A., FERRERI, S. , *supra* fn. 26, at p.46-47.

dominating pattern for law finding, the above-mentioned deviations show how in practice more “Madisonian” balances are constantly negotiated in practice.<sup>122</sup> As regards the action of the institutional and quasi-institutional actors as analysed in this paper, a tendency to correct the failures of the majoritarian model appears clearly from the role gained by the Constitutional Court and by the judiciary in general; on the other hand, a substantive influence is advocated and exerted both by civil society, via direct democracy instruments and/or active participation in the task of system building. The role of lawyers in the administration of justice helps to weaken (?) the idea of the Judiciary as a third giant able to dodge any kind of wide-ranging democratic control; furthermore, it constitutes an important example of cooperation between actors in the law-shaping process.

By way of conclusion, the paradigm of the separation of powers turns out to be more fragmented than the level of black letter rules allows it to be perceived. This fragmentation is not necessarily a negative development; on the contrary, it seems to me that both in relation to institutional design and political theory and in relation to the evolution of regulation theory, the shifts and adjustments highlighted in the allocations of legislative function demonstrate the endeavour to achieve a better coordination and more efficient results in law making. From the former viewpoint and bearing in mind the lesson taught by liberal thought, both the social structures designed to fulfil the requirements of legislation and the tasks of public order need to be conceived as changing under varying circumstances.<sup>123</sup> In line with the observation of the father of classical economy, the paths in law finding as analysed in this paper appear to follow the model of “*balanced government*.”

Moreover, the outlines of such a negotiated institutional balance appear to constitute the positive ground on which, in a normative dimension, the sharp opposition between the logic of law-making discourse and the logic of regulation discourse might be blunted. In regulation theory, the reasons for opting out of the majoritarian model and a consequent option in favour of allocating regulatory powers to non-majoritarian institutions have been described, in a nutshell, in terms of efficiency, credibility and legitimacy

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<sup>122</sup> See LIJPHART, A. “*Majority Rule in Theory and Practice: the Tenacity of a Flawed Paradigm*”, in *International Social Science Journal*, 129 (1991):483-493.

For a description of the majoritarian model as opposed to a non majoritarian (madisonian) model, see DAHL, R.A. *A preface to Democratic theory*, Chicago, The University of Chicago Press, 1956.

<sup>123</sup> See SMITH, A. *Lectures on Jurisprudence*, in *The Glasgow edition o the works and correspondence of Adam Smith, Vol.1-6*, Oxford, Clarendon Press, New York, OUP, 1976-1983, vol.5.

goals.<sup>124</sup> The polar opposition between efficiency and redistribution as alternative roots capable of strengthening the regulatory powers of non-state actors is nevertheless contested as incapable of explaining the idiosyncratic characteristics of each and every regulatory domain.<sup>125</sup> I am not suggesting here that the latter binomial does (or ought to) constitute an ever-valid criterion in assigning portions of legislative powers instead of the pattern of the separation of powers, displayed in constitutions. However, on the one hand, the analysis of the way in which legislative functions are allocated and exerted in practice does show the inadequacy of the traditional pattern if we are to grasp the multiform relationships between law making, institutional design and the legal system. On the other hand, the fragmented dynamics that govern the complementary processes of law making and law shaping offer examples of interaction between institutional actors and between institutional and quasi-institutional actors that make the real functioning of the pattern closer to the paths and the logic of regulation.

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<sup>124</sup> In regulation theory, see MAJONE, G. *Lo Stato Regolatore*, Bologna, Il Mulino, , 2000, at p. 167-173.

<sup>125</sup> On this issue as a first reference, see the picture provided by KAHN, A.E. *The economics of Regulation: Principles and Institutions. Vol.1 Economic principles*, NY-London- Sidney –Toronto, John Wiley & Sons. Inc., 1970, at p.12-14. A discussion of the unitary theories of regulation and a vast array of bibliographical reference is provided by STEWART, R.B. “*Regulation in a Liberal State: the Role of Non-Commodity Values*”, in *Yale Law Journal*, 92 (1982-1983): 1537-1590.