ISSN: 2281-5147

Opinio Juris in Comparatione

Studies in Comparative and National Law

Op. J. Vol. I, n. I/2013

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Suggested citation: Giovanni Comandé and Luca Nocco, *Proportional Liability as an Application of the Precautionary Principle. Comparative Analysis of the Italian Experience, Op. J.*, Vol. I, n.1/2013, Paper n. 1, pp. 2 - 40, http://www.opiniojurisincomparatione.org, online publication October 2013.

PROPORTIONAL LIABILITY AS AN APPLICATION OF THE PRECAUTIONARY PRINCIPLE. COMPARATIVE ANALYSIS OF THE ITALIAN EXPERIENCE

by

Giovanni Comandé and Luca Nocco*

Abstract:

"All-or-nothing" rule is still the most used system to allocate damages in tort law. According to this principle, a judge must establish the minimum threshold beyond which causation is established and below which, on the contrary, a right to compensation may not exist. The article argues that proportional liability is a suitable option to substitute the "all-or-nothing" approach, especially in cases of (causal/scientific) uncertainty. The aim is to have a more flexible instrument in pursuing the traditional goals of tort law, i.e. compensation an deterrence, by means of a progressive precautionary approach according to which liability should be proportionally attributed in compliance with developments in scientific knowledge and evidence concerning general causation.

Keywords: Proportional liability; tort law, scientific uncertainty, causation, precautionary principle, "all-or-nothing".

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Introduction

In this paper, following and developing reflections we have already expressed in another article[1], we claim that there is already a host of proportional liability rules in place in the Italian legal system as a result of contrasting policies accumulated overtime. In our article we also claim that, to date, proportional liability is a suitable option to substitute the "all-or-nothing" approach - especially in cases of (causal/scientific) uncertainty. However, the move towards a more proportional liability oriented approach should consider dangers to the protection of fundamental rights that it might entail and, accordingly, it should provide for procedural safeguards such as the alternate use of joint or several liability along with presumptions and reversal of the burden of proof. Part I elaborates on the notions we employ exposing background information and the role played by differences in criminal and civil procedure, while Part II, in dealing with the issues surrounding proportional liability, elaborates on the state of actual solutions to some theoretical cases - which have been conceived in another publication[2] - and on the concerned policies. Finally, Part III summarizes the reasons in favour of a reasonable proportional liability apportionment in cases of scientific uncertainty in light of the relevance of the protected interests at stake.

[1] See G. Comandé and L. Nocco, *Proportional Liability in Uncertain Settings: Is it Precautionary? Italian Insights and Comparative Policy Considerations*, in I. Gilead, M.D. Green, B.A. Koch (eds.), *Proportional Liability: Analytical and Comparative Perspectives*, De Gruyter, Berlin-Boston, 2013,199-226.

[2] We refer to the above mentioned I. Gilead, M.D. Green, B.A. Koch (eds.), *Proportional Liability: Analytical and Comparative Perspectives*, cit. We used the taxonomy which has been elaborated and exposed there since it seems particularly useful to fully understand several aspects of proportional liability.

Part I. 1. In Search of a Definition for Proportional Liability: Some Legal and Policy Background

Apart from really rare exceptions[3], Italian legal literature has not deepened the theory of proportional liability.

Lately, some authors have begun to consider the problems related to the allocation of the harmful effects resulting from a tort, offering a host of different opinions[4]. Generally, these authors share the view that it is necessary to proportion the liability to the causal efficiency of the tortfeasor's negligent conduct. Yet, not only have they not defined in any way proportional liability as such but they have not even mentioned the said expression let alone make reference to the routine arguments generally made in justifying the adoption of this form of liability[5].

A similar gap may be found in case law that, above all in medical liability, has applied the theory of the "loss of a chance" in pursuing aims similar to those of proportional liability.

Having said that, with the following qualifications, we think it is possible to generally define proportional liability as a kind of liability imposed upon a defendant, who by her[6] tortious conduct created a risk of harm to the plaintiff, for only a portion of the risk-related loss that the former suffered or may suffer in the future.

Furthermore, the concept of proportional liability might be generally divided into three subcategories, each of which will be further distinguished later, related to instances where:

i) it is uncertain whether the defendant's tortious conduct was a *causa sine qua non* of the plaintiff's loss;

ii) the tortfeasor contributed to the loss jointly with others and it is not clear to what extent each individual contributed to the damage;

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[3] G. Comandé, *L'assicurazione e la responsabilità civile come strumenti e veicoli del principio di precauzione,* in Id. (ed.), *Gli strumenti della precauzione: nuovi rischi, assicurazione e responsabilità,* Giuffrè, Milan, 2006, 66 ff.; L. Nocco, *Causalità: dalla probabilità logica (nuovamente) alla probabilità statistica: la Cassazione civile fa retromarcia,* in *Danno e responsabilità,* 2006, 1238 ff.; M.-E. Arbour, *A proposito della nebulosa. Principio di precauzione-responsabilità civile,* in *Liber amicorum per Francesco Donato Busnelli. Il diritto civile tra principi e regole,* Giuffrè, Milan, 2008, 513 ff.; L. Nocco, *Il "sincretismo causale" e la politica del diritto: spunti dalla responsabilità sanitaria,* Giappichelli, Turin, 2010, 247 ff.

[4] B. Tassone, *La ripartizione di responsabilità nell'illecito civile. Analisi giuseconomica e comparata,* E.S.I., Naples, 2007; U. Violante, *La responsabilità parziaria,* E.S.I., Naples, 2004; A. Gnani, *Commento sub art. 2055,* in *Commentario al codice civile Schlesinger-Busnelli,* Giuffrè, Milan, 2005; M. Feola, *Il danno da perdita di chances,* E.S.I., Naples, 2004, 121 ff.; F. Parisi, V. Fon, *Causalità concorrente,* in *Danno e responsabilità,* 2006, 701 ff.; R.E. Cerchia, *Uno per tutti, tutti per uno. Itinerari della responsabilità solidale nel diritto comparato,* Giuffrè, Milan, 2009.

[5] At least not in the terms which are explained in European Group On Tort Law, *Principles of European Tort Law: Text and Commentary*, Springer, Wien-New York, 2005.

[6] Hereinafter we use the feminine as a neutral way to refer to both male and female individuals.

iii) it is uncertain whether the risk created by the tortfeasor will actually materialize into a given future loss or not.

The above descriptive categorization of proportional liability can identify the cases in which to proportion the risks among plaintiffs and defendants seems opportune, taking into account that this operation cannot be met through the traditional approach of the tort system based on the "all-or-nothing" rule. Yet, the above description does not provide a "definition" of proportional liability nor does it suggest the standard of proof it requires (aspects which we will analyze in the following paragraphs).

Actually, often the courts use comparative fault in using "*de facto*" a "*quasi*" proportional liability rule in an "all-or-nothing disguise" (see below). Indeed, often courts bypass the all-or-nothing rule by using/manipulating other areas of law or the application of one or more rules of tort liability. For instance, this happens by deciding that causation has been established (*i.e.* the standard of proof is considered satisfied, though factually with poor evidence[7]) but damages are reduced "forcing" either the relevance of contributory fault or the use of discretionary powers in setting the actual amount of damages awarded.

The techniques that have been previously described easily apply to all cases where there might be room for the application of proportional liability. This practice of adjusting liability by "playing" with the different elements of tort liability clearly reflects the fact, as we will see, that proportional liability is interrelated with the different elements of tort liability (negligence, causation, and damages) and with other tort related rules such as joint and several liability. The definition of proportional liability should therefore take all these elements into account[8].

It should also be noted that there is a difference between those cases in which only the specific causation is uncertain (*i.e.* it is uncertain whether the harm is attributable to a specific defendant, though under general scientific knowledge it can be attributable to a certain class of defendants) and those cases in which scientific uncertainty is also general (see below, para. 4).

In the first class of cases (according to which the general causation has been established but the specific one has not) courts are more easily apt (and perhaps willing in several instances, such as

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[7] Basically this operation is performed manipulating extra or metalegal rules or standards such as "common sense", reasonableness, *res ipsa loquitur*, "*massime di esperienza*" (*Erfahrungssatz*) in evaluating the relative value of a means of proof. See M. Taruffo, *Senso comune, esperienza e scienza nel ragionamento del giudice*, in *Rivista trimestrale di diritto e procedura civile*, 2001, 665 ff.; D.E. Van Zandt, *An Alternative Theory of Practical Reason in Judicial Decision, 65 Tulane Law Rev.*, 1991, 777, 792 ff.

[8] In a sense the operation of proportional liability seems to operate stressing the relevance of the particular facts to manipulate the elements of the liability rule in ways similar to what is proposed under the so-called post-modern jurisprudence with reference to peculiarities of individuals and groups (see for general reference, G. Minda, *Postmodern Legal Movements. Law and Jurisprudence at the Century's End*, N.Y.U. Press, New York-London, 1995).

medical malpractice) to play with different elements of a civil action[9] so as to reach proportional liability effects in practice. In the second type of cases (characterised by uncertain general causality and uncertain specific causation) we argue that a proportional liability rule should be accompanied by a progressive precautionary approach[10] according to which liability is proportionally attributed in compliance with developments in scientific knowledge and evidence concerning general causation.

2. The Role of the Burden of Proof

It has been previously argued that proportional liability is usually called for when it is impossible to establish, according to the required burden of proof, that the defendant caused the harm, or indeed which specific part of the harm was caused by the tortfeasor, or whether future harm will be caused to the victim by the tortfeasor's conduct.

Therefore, it appears indispensable to analyze the Italian regime of the allocation of the burden of the proof, as well as the most important case law trends on this issue, since it shows how the case law has faced the scientific uncertainties thus far affronted.

Art. 2697 of the Italian Civil Code (hereinafter "c.c.") states that "*The person who wants to assert her rights in a trial must prove the facts which constitute the basis of her action*"[11].

Through this rule, the legislator places the burden of being unable to prove her assertion[12] (contrarily to what, as we will demonstrate below, case law has decided with reference to civil medical liability) on the plaintiff.

The flexibility of such a rule is so clear that an authoritative Italian author called it a "*rule in blank*" and even objected to whether it might be considered a legal rule at all[13].

Over the years, such flexibility has led to quite different probative standards, in line with the objection that a probative rule "*has a merely contingent value, depending on the structure and the function of each legal action*"[14].

The passage from the burden of the proof based on the unwritten rule of certainty (request to prove facts beyond any doubt) to that based on "the preponderance of evidence" (a judgment on

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[9] We specify here civil action because the way judges operate does not differ under a contract law regime and a tort one. Indeed, in Italian law medical malpractice has moved from tort to contract, playing around evidence rules, without much of a change in so far as the proportional liability analysis we perform here is concerned.

[10] G. Comandé, *L'assicurazione e la responsabilità civile come strumenti e veicoli del principio di precauzione,* cit. fn. 3, 66 ff.

[11] Our translation.

[12] See G.A. Micheli, *L'onere della prova,* Cedam, Padua, 1966, 6 and S. Patti, *Commento sub art. 2697 c.c.,* in *Commentario al codice civile Scialoja-Branca,* Zanichelli, Rome, 1987, 1 ff.

[13] See R. Sacco, *La presunzione di buona fede,* in *Rivista di diritto civile,* 1959, I, respectively 1 and 2, fn. 2.

[14] See G.A. Micheli, *L'onere della prova,* cit. fn. 12, 4.

plausibility)[15] has been taking place since the social and economic transformations rendering Italy an industrialized country.

As is well-known, industrialization brings more risks for people, caused by new economic activities, somehow dangerous for human health but socially useful (and consequently permitted)[16]. Moreover, emerging ("new") types of damages (or instances in which damages occur) are often characterized by a difficulty to cope with the burden of proof due to scientific or evidential uncertainties. The difficulties in proving the facts on which the claim is based are fundamental, for example, in damages caused by products: if a user should prove a producer's fault, pursuant to the general principle of negligent tort liability (Arts. 2043 c.c. and 2697 c.c.), in most cases the victim would not receive any compensation at all[17].

Another example concerning difficulties in proving one's claim is the case in which, for instance, causation or fault for a specific damage cannot be fully traced to a given individual where several potential defendants can be identified.

In addition, the expansion of the typology of compensable damages (*e.g.* expansion of non-economic damages and health-related damages), has contributed to the significant change to the contents of the burden of proof required to establish liability. In this regard, it has forced a shift from certainty (beyond any doubt) to probability (preponderance of evidence) setting different standards in relation to the minimum proof required to win in a trial.

It is interesting to observe that, according to part of traditional scholarship[18], the rule of certainty was so obvious and universally accepted that it was not even necessary to express it. Obviously, the everyday legal practice at that time only dealt with cases of liability where the existence or non-existence of fault and causation was evident. This measures the distance between those days and today's understanding of statistical evidence and appreciation.

2.1 Borrowing from the Example of Medical Related Accidents

Against this background, we assume that it is possible to look at medical malpractice as a testing ground of the instruments used by case law to solve the uncertainties due to lack of scientific knowledge.

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[15] See G.A. Micheli, *L'onere della prova,* cit. fn. 12, XXIII, expressing himself against the rule of verisimilitude.
[16] See for an overview on the impact of new technologies on tort law, F. Di Ciommo, *Evoluzione tecnologica e regole di responsabilità civile,* E.S.I., Naples, 2003, 113 ff.
[17] On the point, among others, see G. Benacchio, *La responsabilità del produttore,* in G. Benacchio (ed.), *Diritto privato della Comunità Europea*, Cedam, Padua, 2004, 377 f.
[18] See for instance G.A. Micheli, *L'onere della prova,* cit. fn. 12.

In this field, the debate was (and still is) the most vigorous and it concerns mainly the assessment of causation and, to some extent, fault. Both the issue of causation and the area of medical related accidents attracted much attention from legal scholarship since their historical complexity is further complicated by new technologies and scientific developments.

In Italy, some recent decisions – which will be discussed below – have defined the question of causation through an inversion of well-established rules for appreciating proofs[19].

In the last decades, in order to ease the burden of proof for individual causation, particularly in the field of medical malpractice, Italian criminal and civil decisions favoured an approach referring to a simple statistical probability standard[20]. Nevertheless, the probability standard has been gradually accepted and increasingly lower levels of probability were sufficient to establish causation. However, at least in theory, the rule remained preponderance of the evidence. This process, of course, opened the path to a variety of opinions in case law[21], which eventually led to the establishment of a simpler rule.

In short, this rule might be summarized as follows: in medical liability, particularly concerning the proof of causation, the principle regarding the certainty about the effects of a conduct can be substituted by the principle of the probability of its effects. In other words, causation was supposed to exist even when the medical conduct, if timely and correct, would have had only serious and appreciable possibilities of success[22].

This way, "*de facto*", both civil and criminal Italian case law accepted the so-called theory of "more probable than not" as a criterion to evaluate the proof offered by the parties.

The decision which brought this issue to its momentum within the limits of this trend, was Cass. 17th January 1992, no. 371[23], in which 30% of probability was thought to be sufficient in ascertaining that the alleged doctor's tortious conduct was the cause of damages occurred. We must bear in mind

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[19] See for an outline L. Nocco, *Il "sincretismo causale" e la politica del diritto: spunti dalla responsabilità sanitaria,* cit. fn. 3, 127 ff.

[20] See, recently, B. Tassone, *La ripartizione di responsabilità nell'illecito civile. Analisi giuseconomica e comparata,* cit. fn. 4, 237 ff.

[21] See *Corte di Cassazione* (Italian Supreme Court: hereinafter: Cass.) 21st April 1977, no. 1476, in *Giustizia civile, Massimario,* 1977, 634, Cass. 13th May 1982, no. 3013, in *Foro italiano, Massimario,* 1982, Cass. 13th May 1992, in *Giustizia penale,* 1992, II, 550; Cass. 18th October 1990, in *Cassazione penale,* 1992, 2102; Cass. 13th June 1990, in *Giustizia penale,* 1991, II, 157.

[22] See, Cass. 12th May 1983, no. 4320, in *Rivista italiana di medicina legale,* 1984, 871 and Cass. 5th June 1990, no. 8148, in A. Fiori, E. Bottone, E. D'Alessandro, *Quarant'anni di giurisprudenza della Cassazione nella responsabilità medica,* Giuffrè, Milan, 2000, 656.

[23] The so-called "*Silvestri case*", in *Foro italiano,* 1993, I., 2331 and in *Responsabilità civile e previdenza,* 1992, 361, commented on by G. Giannini, *La questione del nesso causale, la Suprema Corte e la strana regola del ciò che accade nel minore numero di casi,* and at page 552 commented on by G. Ponzanelli, *Tanto rumore per nulla: a proposito di gazzette e di responsabilità medica*

that it was a criminal trial. Thus, so to say, the "less probable than not" rule to convict a person[24] was accepted.

The application of a statistical probability does not contradict the adoption of the model of "scientific causation" – *i.e.* the theory of causation assessment based only on scientific laws or on common sense, provided that it does not contradict science[25] –, but in fact it is essential to it. Indeed, all scientific laws have a probability base. Therefore, to demand certainty so as to establish causation would be in contrast with the essence of the model of scientific causation, causing a clear contradiction within it[26].

The above conclusion leads to exclude that a counterfactual reasoning needs to be carried out based (only) on universal scientific laws. Furthermore, it would not preclude the enforceability of rules addressed to prevent torts (or crimes) explainable, solely or mainly, through a statistical probability test[27].

Italian case law applied the probability principle because limiting medical liability to cases, in which causation may be assessed with certainty, would result in denying medical liability in most cases[28]. Indeed, if absolute certainty were necessary, no doctor would be condemned even in the case of, for example, death following an appendectomy even though such interventions are considered one of the safest in medicine[29]. Therefore, special probative conditions to the plaintiff's advantages are rationally grounded.

The problem, therefore, is in establishing a threshold of probability that will successfully provide for the fulfilment of the requirement of the "*condicio sine qua non*" (but-for causation) test. In other words, is a 51% of probability fair? On the other hand, is a lower percentage sufficient to assess causation?

On this point, Italian case law, both criminal and civil, has always hesitated, alternating its attitude leading to decisions in which the required percentage of probability was over three quarters[30] in some case, whereas other[31] cases required a high probability of success to be adequate proof (i.e. preponderance of evidence), disregarding mathematical percentage altogether. In other occasions,

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[24] Note that this decision was not so clear in motivating this part of this point. Indeed, it was interpreted differently by part of the scholarship as being in line with the principle of "more probable than not": see G. Ponzanelli, *Tanto rumore per nulla: a proposito di gazzette e di responsabilità medica*, cit. fn. 23, 552 ff.
[25] See F. Stella, *Leggi scientifiche e spiegazione causale nel diritto penale*, 2nd ed., Giuffrè, Milan, 2000.
[26] See F. Stella, *Leggi scientifiche e spiegazione causale nel diritto penale*, cit. fn. 25, 281 ff.
[27] See F. Stella, *Leggi scientifiche e spiegazione causale nel diritto penale*, cit. fn. 25, 32.
[28] See already G. Cattaneo, *La responsabilità del professionista*, Giuffrè, Milan, 1958, 325.
[29] See *ibidem.*
[30] See Cass. 2nd April 1987, in *Cassazione penale*, 1989, 72.
[31] Cass. 11th November 1994, in *Cassazione Penale, Massimario Annotato*, 1995, fasc. 8.

causation was considered practically incidental and therefore solved through a mere juxtaposition with negligence[32] i.e. there has been negligent conduct… therefore she has caused the damage.

At the turn of the last century, some decisions of the "*Corte di Cassazione*", without repudiating the model of scientific causation, began to require more convincing conditions to establish causation[33]; as a consequence, a conflict among different divisions of the Supreme Court occurred.

At first, the Criminal Division of the Italian Supreme Court imposed that the causation assessment should be based upon the principle of a probability close to certainty[34]. This rule forced judges to limit criminal convictions only to cases where causation had been certainly proven. However, the instrument used to verify the existence of causation was, and still is, "abstract" statistical probability (i.e. the statistical probability a consequence could ensue based on the given facts) not individual/specific probability that the defendant's actual conduct has caused the harm.

Following this period of uncertainty and conflict among different divisions of the Supreme Court, the "*Corte di Cassazione*", in a different (and more authoritative) composition of its criminal division (the so-called "*Sezioni Unite*")[35], established a higher evidential standard. This evidential standard was based on the principle according to which evidence should "beyond any reasonable doubt" lead to an acquittal whenever there is no certainty of the medical malpractice and of the causal link between the conduct and the damage[36]. Importantly, this decision was rendered by the criminal division representing, as we will see an important evolution in the Italian legal system.

Following this "*revirement*" in criminal case law, the mentioned rule of evidence to establish causation was extended to the civil divisions by the decision of the *Corte di Cassazione* dated 4th March 2004, no. 4400[37]. In short, this judgment gives a clear answer to the causation issue in the sense that causation itself must be established in accordance with Arts. 40 and 41 of the criminal code. In principle, this statement should have resulted in the abandonment of the criterion of "*more probable than not*". However, this did not occur. In reality, this decision has been applied in various ways, among

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[32] See R. Blaiotta, *La causalità nella responsabilità professionale tra teoria e prassi,* Giuffrè, Milan, 2004, 176 f.

[33] For example, Cass. 1st September 1998, no. 10929, in *Rivista italiana di medicina legale,* 2000, 271, commented on by V. Fineschi, *Responsabilità medica per omissione: malintesi e dubbi in tema di nesso di causalità materiale.*

[34] See Cass. 28th September 2000, no. 1688, in *Rivista italiana di medicina legale,* 2001, 805, commented on by A. Fiori and G. La Monaca, *Una svolta della Cassazione penale: il nesso di causalità materiale nelle condotte mediche omissive deve essere accertato con probabilità vicina alla certezza.*

[35] Cassazione penale, Sezioni Unite, 11th September 2002, no. 30328, in *Danno e responsabilità*, 2003, 195, the so-called "*Franzese case*", commented on by S. Cacace, *L'omissione del medico e il rispetto della presunzione di innocenza nell'accertamento del nesso causale.*

[36] See recently M. Barni, *Come si esorcizza il ragionevole dubbio: prove di restaurazione?,* in *Rivista italiana di medicina legale,* 2007, 1412.

[37] In *Danno e responsabilità,* 2005, 45, commented on by M. Feola, *Il danno da perdita di chances di sopravvivenza o di guarigione è accolto in Cassazione,* and L. Nocco, *La "probabilità logica" del nesso causale approda in sede civile.*

which it has been said that the civil division of the "*Corte di Cassazione*" meant, with it, to return to a lower index of probability compared with the decision of the criminal division[38].

However, we think the civil division of the "*Corte di Cassazione*" (in that moment) did not display any contrast with the criminal division. Actually, in our opinion, the adoption of a high probability standard – which would have reduced the recoverability of damages in civil law matters – forced the civil division of the Italian supreme judicial body to adopt the "loss of a chance of survival or recovery" criterion, in order not to over-reduce compensation.

In short, the civil division of the Italian Supreme Court accepted the recoverability of the damages deriving from the loss of chance of survival, considering the chance of survival as an interest to be protected as such[39].

Accordingly, damages have to be awarded in proportion to the loss of a chance of survival (or recovery) that a doctor had "caused" to the patient through his malpractice. Loss of chance operates in a very similar way to proportional liability, even though, as we will see subsequently, in a non-convincing and probably theoretically and technically incorrect way.

Some recent decisions of the civil divisions of the "*Corte di Cassazione*"[40], on the contrary, initiated a process of deviation from the principles previously outlined in relation to the assessment of causation and loss of a chance. Particularly, Cass. 19th May 2006, no. 11755 closed the gap between the understanding of causation in criminal and civil matters, claiming that the assessment of causation in the mentioned decision of 11th September 2002, no. 30328 (where the principle of beyond any reasonable doubt is stipulated), explored a different area of law, *i.e.* criminal law, and is not applicable to civil cases.

Following the decision of 2006, the Italian Supreme Court, in the judgment of 16th October 2007, no. 21619[41], confirmed the existence of a clear distinction in the assessment of causation between civil and criminal proceedings.

In Italy, as the Supreme Court reflected, the principle of presumption of innocence, established by Art. 27 of the Constitution, refers only to criminal law. On the contrary, civil liability does not provide for a similar principle, and the possibility of strict liability rules is provided for[42].

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[38] M. Viti, *Responsabilità medica: tra perdita di chances di sopravvivenza e nesso di causalità,* in *Corriere giuridico,* 2004, 1026. Likewise also M. Rossetti, *Allargati ancora i confini della responsabilità del medico,* in *Diritto & Giustizia,* 2004, 14, 35 f. and, more recently, B. Tassone, *La ripartizione di responsabilità nell'illecito civile,* cit., 248.

[39] See Cass. 4th March 2004, no. 4400, cit. fn. 37.

[40] Cass. 18th April 2005, no. 7997, in *Corriere giuridico,* 2006, 257, commented on by F. Rolfi, *Il nesso di causalità nell'illecito civile: la cassazione alla ricerca di un modello unitario* and Cass. 19th May 2006, no. 11755, in *Danno e responsabilità,* 2006, 1238 ff., commented on by L. Nocco, *Causalità: dalla probabilità logica (nuovamente) alla probabilità statistica: la Cassazione civile fa retromarcia.*

[41] In *Corriere giuridico,* 2008, 35, commented on by M. Bona, *Causalità civile: il decalogo della Cassazione a due "dimensioni di analisi"* and in *Danno e responsabilità,* 2008, 43, commented on by R. Pucella, *Causalità civile e probabilità: spunti per una riflessione.*

In any case, the very important outcome of the 2006 decision is the final prevalence of the "more probable than not" standard of proof (preponderance of evidence), which is clearly stated in the decision of the civil division of the *Corte di Cassazione*[43].

To complete our description, we must recall that similar rules are applied in the field of attorney's liability as well[44]. In other fields, case law has not investigated yet the rule of judgment to be adopted in case concerning uncertainty, at least according to the depth illustrated above. As a rule, however, the principle of "more probable than not" is increasingly applied. Indeed, according to authoritative legal scholarship, this is the probative rule applicable in Italy[45].

3. Reasons to Introduce a Rule of Proportional Liability and Policy Related Implications

Having described the rules regarding the burden of the proof which are applicable in Italian civil lawsuits, in our mind it is evident – as we will try to show – why, according to us, the "all-or-nothing" rule, which is still usually applied by case law (except rare exceptions[46]) cannot pursue the deterrence objective in every case where facts are assessed on the ground of merely probabilistic criteria[47].

That is true, firstly in a case where the threshold of the more probable than not standard is not reached and, yet, there is a significant percentage, say,40-45%, of probability. Here, there is a clear under-deterrence effect, since the alleged conducts have contributed to the damage with a certain degree of verisimilitude.

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[42] Moreover, civil law is uninterested in the way damages are charged, *i.e.* by means of strict or fault-based liability, since it is a question of mere wealth redistribution. See F. Stella, *Giustizia e modernità*, 3rd ed. Giuffrè, Milan, 2003, 29 ff.

[43] See, recently, in the same sense, M. Taruffo, *La prova del nesso causale*, in *Rivista critica del diritto privato*, 2006, 101 ff., now in C. De Maglie, S. Seminara (eds.), *Scienza e causalità*, Cedam, Padua, 2006. It is important to stress that, after that decision, the civil division of the Italian Supreme Court affirmed also the inversion of the burden of the proof of medical causation (see Cass. Sez. Un., 11th January 2008, no. 577, in *Nuova giur. civ. comm.*, 2008, I, 612, commented on by R. De Matteis, *La responsabilità della struttura sanitaria per danno da emotrasfusione*).

[44] See for an overview L. Nocco, *Itinerari della giurisprudenza. La responsabilità civile dell'avvocato,* in *Danno e responsabilità*, 2009, 302 ff.

[45] See M. Taruffo, *La prova dei fatti giuridici*, Giuffrè, Milan, 1992, 272 ff. and, more recently, Id., *La regola del più probabile che no come regola probatoria e di giudizio del processo civile*, in V. Garofoli (ed.), *L'unità del sapere giuridico tra diritto penale e processo*, Giuffrè, Milan, 2005, 56 ff. and F. Stella, *A proposito di talune sentenze civili in tema di causalità*, in *Rivista trimestrale di diritto e procedura civile*, 2005, 1159 ff. But, for a different opinion, see S. Patti, *Commento sub art. 2697 c.c.*, cit., 164 ff. See also S. Patti, *Spunti di teoria generale sull'onere della prova (anche in relazione al diritto tributario),* in *Obbligazioni e contratti*, 2009, 679 ff.

[46] See, firstly the above-mentioned case law regarding the recoverability of the loss of a chance of recovery or survivorship. See also the damage to the professional competence of the worker due to the imposition of disqualifying duties (on this point, please refer to the following pages).

[47] Actually, according to B.A. Koch, *The "European Group on Tort Law" and Its "Principles of European Tort Law", 53 Am. J. Comp. L.*, 189, 193 (2005), "*(f)actual causation alone is, of course, insufficient (…) in order to determine whether and to what extent liability can be established under the circumstances of the case*". See also L. Nocco, *Il "sincretismo causale" e la politica del diritto: spunti dalla responsabilità sanitaria,* cit. fn. 3, 247 ff. and 309 ff.

These policy considerations hold true also in the opposite cases where the "more probable than not" threshold in the standard of proof is reached. However, in such cases, the risk is over-deterrence, since the transfer of wealth from the tortfeasor to her victim is not fully justified. Indeed, it is neither certain, nor it can be said probable, that the defendant has caused the alleged harm. On the contrary, there might be evidence that the damage has a different cause (either or both natural and human).

The distortionary effect in tort law is evident and discussed in scholarship[48].

Moreover, the compensatory scope of tort law would result, in its turn, prejudiced, since often the plaintiff may not provide the proof of her own right, even on a probability base, under the circumstances previously described[49].

Moreover, under the operation of a rule of preponderance of evidence, the parties will not be properly motivated to promote the optimal level of knowledge of the trial facts by providing further proof, since more probable than not is the threshold which can either grant compensation or deny it[50].

Of course, the adoption of proportional liability has a clear impact on the reallocation of costs as well. This problem has been discussed in scholarship either expressly[51] or by tackling the effects of "graduating" liability from the angles of specific elements of liability or by investigating the effects of joint or several liability[52].

As for case law, an analogous problem has been faced concerning causation in medical tort law. Yet, its solution has not been the explicit use of proportional liability, but rather the "lost chance of recovery and survival theory"[53] which actually forces the system to switch from an "all-or-nothing" rule to an "all-or-proportional" rule.

The adoption of a theory which apportions civil liability in relation to the degree of proof that each party has been able to offer during the trial, does not bear unilateral advantages in favour of only one of

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[48] As P. Trimarchi, *Causalità e danno*, Giuffrè, Milan, 1967, 54, writes, though not with reference to proportional liability, if deterrence is absent, the transfer of wealth from a tortfeasor to a victim is not fully justified. More recently, see also R.E. Cerchia, *Uno per tutti, tutti per uno. Itinerari della responsabilità solidale nel diritto comparato*, cit. fn. 4, 47, 81 ff. and 198 ff., for an overview for the distortions which might be caused by the application of joint and several liability and for the hypotheses of reform which are carried out on this matter in several countries.

[49] See Comandé, *L'assicurazione e la responsabilità civile come strumenti e veicoli del principio di precauzione*, cit. fn. 3, 72, and M. Capecchi, *Nesso di causalità e perdita di chances: dalle Sezioni unite penali alle Sezioni unite civili*, in *Nuova giurisprudenza civile commentata*, 2008, II, 162.

[50] D. Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, *97 Harv. L. Rev.*, 909 (1984).

[51] See G. Comandé, *L'assicurazione e la responsabilità civile come strumenti e veicoli del principio di precauzione*, cit. fn. 3, 66 ff.

[52] See B. Tassone, *La ripartizione di responsabilità nell'illecito civile. Analisi giuseconomica e comparata*, cit. fn. 4; U. Violante, *La responsabilità parziaria*, cit. fn. 4; A. Gnani, *Commento sub art. 2055*, cit. fn. 4; M. Feola, *Il danno da perdita di chances*, cit. fn. 4, 121 ff.; F. Parisi, V. Fon, *Causalità concorrente*, cit. fn. 4, 701 ff.; R.E. Cerchia, *Uno per tutti, tutti per uno. Itinerari della responsabilità solidale nel diritto comparato*, cit. fn. 4, 213 ff.; A. Gnani, *L'art. 2055 c.c. e il suo tempo*, in *Danno e responsabilità*, 2001, 1037 ff.; U. Violante, *Responsabilità solidale e responsabilità parziaria*, in *Danno e responsabilità*, 2001, 460 ff; Id., *Concorso di colpa e allocazione della responsabilità*, in *Rivista critica di diritto privato*, 2004, 483 ff.

[53] See Cass. no. 4400/2004, cit. *supra* fn 37.

the two interested parties (*e.g.*, in the field of medical malpractice, doctors and patients, but this consideration might be generalised to all the cases where proportional liability applies). On the contrary, we think that it provides a fair sharing of (medical or otherwise) risks, and it is especially appropriate when the allocation of uncertain risks both at the general (scientific) and at the individual (procedural) level is at stake.

Of course we are aware that the theory of proportional liability can be considered, as was the loss of a chance, as a form of "*discounted liability*"[54]. However, adopting the "all-or-nothing" theory, which is still formally applied in Italy, except in fields where the "loss of a chance" is used[55], the tortfeasor quite often is condemned to pay all or nothing (and, *vice versa*, the victim recovers all of or no damages) on the ground of absolutely unforeseeable and difficult to evaluate circumstances.

In cases where the probabilities are substantially the same (fifty-fifty per cent), in adopting the "all-or-nothing" theory the judge will have the power to allocate damages, so to say, "as she pleases"[56].

Technically, the judge will be using meta-legal concepts (policy considerations often hidden in interpretative reconstructions) or will "weigh" the proof so as to reach the pursued allocation of costs while the actual criteria of allocation might remain unveiled.

In addition, due to the incertitude of the grounds for the judgment and often for the legal impossibility to criticize the factual evaluation on appeal, it might be significantly difficult, in appeal cases, to reverse the judgment.

Furthermore, in the presence of uncertain risks, as occurs typically in the application of proportional liability, the idea to proportion liability to the percentage of proof is fully consistent with the objectives of civil liability and tort law i.e. compensation and deterrence.

As has been argued before, such consistency is not present in the application of the "all-or-nothing" rule.

In our view, proportional liability can offer an evolutionary legal rule, flexible enough to reflect in law the advancements of scientific knowledge and to manage uncertainty.

Thus, in conclusion, the re-allocative effects of proportional liability are coherent and consistent with its premises. Nevertheless, as will be discussed below[57], we propose to limit –provisionally at least– proportional liability only to cases where uncertainty arises due to the lack of scientific knowledge

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[54] See J. Healy, *Medical Negligence: Common Law Perspectives,* Sweet & Maxwell, London, 1999, 221.

[55] See firstly the above-mentioned case law regarding the recoverability of the loss of a chance of recovery or survivorship in the field of medical law. See also the area of damage to the professional competence of the worker due to the imposition of disqualifying duties and the damage caused by public or private selections, illegally performed, which have been recovered in Italy by means of the loss of a chance. See for instance M. Feola, *Il danno da perdita di chances,* cit. fn. 4, *passim*.

[56] See L. Nocco, *Rilevanza delle concause naturali e responsabilità proporzionale: un discutibile revirement della Cassazione,* in *Danno e responsabilità,* 2012, 149 ff.

[57] See *infra,* Part III.

thereby excluding cases where incertitude is caused by a defective allegation or lack of proof of facts by the plaintiff.

Moreover, it must be stressed that the dissimilar relevance of interests at stake (*e.g.* fundamental rights and the right to health above all) have triggered different judicial attitudes with regard to the manipulation of the elements of liability required in granting compensation, and this might (and perhaps should) be the case for proportional liability as well.

The application of proportional liability, so to say, allows one to avoid the gap between judicial statements and real life which is at time difficult to circumvent according to the traditional "all-or-nothing" regime. In fact, we should bear in mind that in most cases of personal injuries, a web of causation exists, *i.e.* a plurality of etiological factors involved in the causation of the event[58]. This can occur, for example, in cases concerning occupational diseases[59], and in all contexts subject to so-called "systemic causality"[60].

In such cases, the difficulty does not consist only in the assessment of causation, but the real problem is that damage is not caused only by one factor and allocating the loss is above all a matter of policy played by legal rules. In such cases, not accidentally, it has been argued that the etiologic reconstruction must search for the "*prominent etiologic contribution*"[61]. Essentially, this admits that there is not only one cause of the event, and the selection of the prominent one is a policy decision hidden behind a (technical discretionary) legal rule.

Based on this we are of the opinion, that the adoption of a proportional liability scheme is even more necessary, replacing, in cases of scientific uncertainties, the preponderance of evidence and the all-or-nothing rules.

Part II. In Search of Instances for Proportional Liability

4. The First Category of Proportional Liability (and Tools Aimed at Aiding Similar Objectives): Uncertainty on the Link between the Defendant's Conduct and Harm.

It is necessary again to remember that the expression "proportional liability" and its rationale have not been sufficiently investigated by Italian scholarship and case law. Therefore, in the literature no

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[58] Among criminal lawyers, see L. Cornacchia, *Il concorso di cause colpose indipendenti: spunti problematici (Parte I),* in *Indice penale,* 2001, 645 ff. and *Parte II, ibidem,* 1063 ff.

[59] Cf. A. Fiori, *La causalità nelle malattie professionali (Parte Prima),* in *Rivista italiana di medicina legale,* 2006, 781 ff.

[60] See C. Piergallini, *Danno da prodotto e responsabilità penale. Profili dommatici e politico-criminali,* Giuffrè, Milan, 2004, 140 ff.

[61] This way E. Di Salvo, *Causalità e responsabilità penale. Problematiche attuali e nuove prospettive,* Utet, Turin, 2007, 179 ff.

explicit reference to any sub-categorization regarding this matter can be found. However, following a sub-categorization, recently proposed[62], we will analyze the following five sub-categories:

Sub-category A1 – "Alternative Liability" – Indeterminate Tortfeasor

Sub-category A2 – "Market-Share Liability" – Causally Unrelated Tortfeasors and Victims

Sub-category A3 – "Pollution or Drug Cases" – Indeterminate Victims

Sub-category A4 – "The Hard Case"

Sub-category A5 – "Lost Chances"

4.1. Sub-category A1 – „Alternative Liability" – Indeterminate Tortfeasor

Firstly, we will address cases in which it is uncertain whether the defendant's tortious activity was the "*causa sine qua non*" of any part of the plaintiff's harm.

Sub-category A1 includes cases in which multiple defendants may have been the cause of the harm, but not all of them, perhaps even just one defendant, have actually caused the harm.

Following the sub-categorization suggested, therefore, we should bear in mind that in the cases belonging to sub-category A1, called "alternative liability", contrarily to the ones analysed in the following sub-categories, the damage is borne by an anonymous tortfeasor, even if that tortfeasor belongs to a group who actually behaved tortiously.

4.1.1. Asbestos-related Illnesses

The above-mentioned situation frequently occurs in cases where the harm results in asbestos-related pathologies since it is not always possible to establish the subject responsible for the damage given that workers have provided their services to different employers over the years.

In Italy, the relationship between asbestos exposure and asbestosis led the legislator to provide for specific rules forbidding contact with this substance (Royal Decree (R.D.) 14th June 1909, no. 442, concerning works unhealthy for women and children).

Finally, Act, 27th March 1992, no. 257 totally prohibited the use of asbestos.

If the employee has contracted an asbestos-related disease and, therefore, seeks damages from the employers (assuming that, as is very frequent, s/he was employed by several companies resulting in multiple exposures to asbestos), the but-for theory of causation seems compromised on two counts: not only due to the difficult compatibility with an assessment where the probability threshold tends to

[62] For the analysis of the proposed categorization and examples please refer to I. Gilead, M.D. Green, B.A. Koch (eds.), *Proportional Liability: Analytical and Comparative Perspectives,* cit., fn. 1.

reduce dangerously, even falling below 50% (we could say, paradoxically, "less probable than not"), as in the cases of medical malpractice[63], which will be analysed later, but also due to a problem of damage allocation on a specific agent (pairing one Plaintiff with one Defendant).

These cases, which may be solved only by adopting a wide use of presumptions, show that the but-for theory, applicable to cases of linear causation, is an awkward and troublesome instrument if used in cases where there is the possibility of establishing multiple causation.

The above-mentioned hypothesis shows at least three elements of serious uncertainty.

Firstly, the tortfeasor may not be known (that is, where the worker has been subjected to asbestos exposure by different employers). Secondly, there might be a concurrence of the victim's own negligence: for example, the interaction between cigarette smoking and asbestos exposure can multiply the risk of developing asbestos-correlated pathologies[64]. In this case, it would seem unfair to impose full liability upon the employer, even though that liability can be ascertained[65] (this is of course dependent upon the worker being aware of the dangers related to her conduct). Finally, there may be a natural concurring cause, such as a genetic predisposition.

According to a line of criminal law cases[66], the criminal liability of an employer, who fails to control dusts according to common sense and current technical knowledge, can be established even if the minimum exposure threshold is not established with certainty. Such option, if applied in cases of civil disputes, would be risky for two reasons.

On the one hand, the issue of establishing causation is bypassed because it has not been investigated whether any predisposition of the employee, along with his/her lifestyle, might have had any incidence in the production of the damage, although it is known, as previously stated, that the interaction between cigarette-smoking, for example, and asbestos exposure multiplies the risk of asbestos-related diseases[67]. On the other hand, there might be the risk of reducing the workers' protection in a significant way, as well as of increasing uncertainty, since each judge would be delegated to establish case by case the minimum threshold beyond which causation is established and below which, on the contrary, a right to compensation may not exist.

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[63] Please refer to the case law cited *supra*, fn 23.

[64] See A. Marinaccio, *Esposizione ad amianto ed insorgenza di casi di mesotelioma maligno. Evidenze epidemiologiche e causalità*, in R. Pucella, G. De Santis (eds.), *Il nesso di causalità. Profili giuridici e scientifici*, Cedam, Padua, 2007, 117. See also E. Poddighe, *I "mass torts" nel sistema della responsabilità civile*, Giuffrè, Milan, 2008, 184 ff. for an overview on the interaction among different causes in the tobacco litigation.

[65] See U. Violante, *La responsabilità parziaria*, cit. fn. 4, 68 and, for further reflections on this point, R.E. Cerchia, *Uno per tutti, tutti per uno. Itinerari della responsabilità solidale nel diritto comparato*, cit. fn. 4, 247 ff.

[66] Cass. 30th March 2000, cit. To some extent, the reasoning seems very similar to the "risk theory", which will be analyzed subsequently (par. 4.4) under the expression "*The Hard Case*".

[67] See the scientific literature quoted above, fn 64.

The issues inherent to this sub-category have attracted poor attention from Italian scholars so far. According to authoritative case law[68], one has to prove one's damage in order to be compensated. Of course, presumptions can be used[69] but they do not shift the burden of proof from the plaintiff. Once the damage is proven, its amount might be quantified equitably by the judge[70] .

4.1.2. Hunting Accidents

Another example we can include in this category is the classical hunting accident in which a hunter is injured by an anonymous bullet.

In Italy, according to Art. 12 of Law 11th February 1992, no. 157, hunting is subject to the possession of third-party insurance. Furthermore, Art. 2050, according to which "*anyone who causes damage to another in pursuit of a dangerous activity, by its nature or by the nature of the means employed, must compensate the damage, if she does not demonstrate that all reasonable steps to prevent the damage were taken*"[71] applies to hunting activities.

The Constitutional Court[72], in decision no. 79 of 1992, dealt with the constitutionality of Art. 2050 c.c.. It was questioned in relation to the fact that it did not provide for the presumption of joint liability of all the participants to the dangerous activity in cases where it is impossible to detect which of the participants is actually responsible for the given damage occasioned by the exercise of a dangerous activity (as in hunting).

However, the Constitutional Court rejected the question of constitutionality affirming that it falls within the legislative discretionary power to provide for stronger protection in similar cases. Thus, in these cases, in which the protection of a victim might be substantially reduced, the prospect of using a proportional liability rule would result in fairer solutions. However, the Constitutional court basically left it to the legislator to either eventually enact the principle or to adopt a public law statutory provision.

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[68] See recently Cass., Sezioni Unite, 11th November 2008, nos. 26972, 26973, 26974 and 26975 in *Rivista di Diritto Civile*, 2009, 97 commented on by F.D. Busnelli, *Le Sezioni Unite e il danno non patrimoniale*.
[69] See Arts. 2727 ff. c.c.
[70] See Art. 1226 c.c., applicable to tort liability by means of Art. 2056 c.c.
[71] Our translation.
[72] Corte Costituzionale 4th March 1992, no. 79, in *Foro italiano*, 1992, I, 1348, commented on by G. Ponzanelli, *"Pallino anonimo", ovvero attività pericolosa con responsabile ignoto e problemi di "welfare state"*.

4.1.3. Common Profiles

We mentioned before the case where the victim herself contributed to the damage, for example, smoking contributing to asbestos-correlated pathologies, or indeed the contribution of natural concurring causes, such as a genetic predisposition. Similar examples may be formulated in the hunting accident case.

It seems clear that, when the same victim has contributed to the alleged damage, through one's own culpable conduct, or the damage has been jointly caused by a natural defect, important differences arise that are non-existence otherwise.

In the first case (comparative negligence), we so not see any obstacles in relation to the application of Art. 1227 c.c., pursuant to which "*if the creditor's culpable fact has jointly contributed to cause the damage, the compensation is reduced according to the seriousness of the fault and to the amount of its effects*"[73]. As for the second hypothetical (concurrent natural cause), we should mention that two opposite approaches have been applied by the courts in determining the amount of the compensable damage. One of the opinions favours the use of proportional liability and Art. 1227 c.c.[74] while the majority does not.

The majority opinion[75] rather focuses on an interpretation of Art. 2055 c.c., in the field of joint and several liability, under which the ratio of Art. 2055 c.c. would be "the *victim's interest to be wholly compensated*"[76].

Therefore, Art. 2055 c.c. is not considered as a rule burdening the victim with the damage from adverse fate. Nevertheless, such an argument, according to the minority opinion, does not take into account that the goal of enabling a creditor to enjoy her own right is present also in indivisible obligations, so that the mechanism of joint and several obligations pursues functions that are only moving towards a stronger protection of the victim[77].

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[73] Our translation.

[74] See F.D. Busnelli, *L'obbligazione soggettivamente complessa. Profili sistematici*, Giuffrè, Milan, 1974, 136 ff. and lately, A. Gnani, *Commento sub art. 2055*, cit. fn. 4, 171 ff. and R. Pucella, *La causalità "incerta"*, Giappichelli, Turin, 2007, 151 ff. In the case law, see Cass. 11th August 1982, no. 4544, in *Massimario della giurisprudenza italiana*, 1982, Cass. 25th October 1974, no. 3133, in *Giustizia civile*, 1974, 1489, Cass. 6th December 1951, no. 2732, in *Foro padano*, 1952, I, 1312, Cass. 13th March 1950, no. 657, in *Foro italiano, Massimario*, 1950.

[75] Cass. 9th April 2003, no. 5539, in *Rivista italiana di diritto del lavoro*, 2003, II, 750, Tribunale Casale Monferrato 5th May 2000, in *Nuova giurisprudenza civile commentata*, 2000, I, 70, commented on by F. Alleva, *Questioni in tema di nesso di causalità naturale*, Cass., 5th November 1999, no. 12339, in *Nuova giurisprudenza civile commentata*, 2000, I, 661, commented on by F. Alleva, *L'irrilevanza delle concause naturali ai fini dell'accertamento del nesso di causalità materiale nella responsabilità da fatto illecito*, Cass. 16th February 2001, no. 2335, in *Danno e responsabilità*, 2002, 409, commented on by B. Sieff, *Danno neurologico da parto al neonato: nesso di causalità ed alternative indennitarie no-fault*, Cass. 27th May 1995, no. 5924, in *Massimario della Giurisprudenza Italiana*, 1995.

[76] C. Salvi, voce *Responsabilità extracontrattuale (dir. vig.)*, in *Enciclopedia del diritto*, XXXIX, Giuffrè, Milan, 1988, 1257, P.G. Monateri, *La responsabilità civile*, Utet, Turin, 1998, 189 and, recently, R.E. Cerchia, *Uno per tutti, tutti per uno. Itinerari della responsabilità solidale nel diritto comparato*, cit. fn. 4, 225.

[77] F.D. Busnelli, *L'obbligazione soggettivamente complessa*, cit. fn. 74, 81.

Since events beyond one's own control may have contributed to bring about the harm, the apportionment of the prejudicial effects of a tort is the objective of the Court of Cassation, when, by means of the above-mentioned decision no. 4400 of 2004, it has adopted for the field of medical liability the recoverability of the loss of a chance[78].

Art. 1227 c.c. establishes that it is necessary to also take into account the circumstances that are independent of the tortfeasor's conduct and that have contributed to the damage[79]. To limit the above principle only to human causes would represent a derogation neither grounded on systemic requirements nor opportunity reasons which, on the contrary, would tend to allocate damages differently, if considering, for instance, the frequency of a case and the inconvenience of burdening the tortfeasor with the prejudicial effects of an act carried out not only by her.

Moreover, limiting the above principle only to human causes might result in an inefficient allocation of damages. To follow the usual patterns of irrelevance in relation to natural concurring causes would undermine the preventive function of tort law, since the alleged tortfeasor could not dominate or avoid natural causes and the rule would just have an unjustified redistributive effect … unless such a redistributive effect is the policy goal pursued.

For such reasons, and with the mentioned qualifications, we think that it is quite logical and consistent with Italian rules to apply proportional liability in the above-mentioned cases.

We must also stress, as a further policy consideration, that through the eyes of the plaintiff there is no difference at all between the fact that a possible defendant (acting tortiously) is sharing her potential liability with natural or human non-tortious behaviour. For this reason, it might be consistent to move towards proportional liability in both cases.

To date, an important change in the debate described above was made by a recent Supreme Court decision which overturned its previous consolidated line of cases in stating that "*if the harmful event is caused by a combination of human activity and natural factors (which are not themselves linked to the first by a nexus of causal dependence) the irrelevance of such factors cannot be accepted*"[80].

This new trend, therefore, promised to open a new season in establishing causation, finally acknowledging the need to proportion the amount of damages to the actual causal contribution of the tortfeasor's conduct.

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[78] See also Tribunale Venezia 25th July 2007, in *Danno e responsabilità,* 2008, 43, commented on by R. Pucella, *Causalità civile e probabilità: spunti per una riflessione*.

[79] See U. Violante, *La responsabilità parziaria,* cit. fn. 4, 97 ff.

[80] Cass. 16th January 2009, no. 975, in *Responsabilità civile e previdenza*, 2010, 375, commented on by G. Miotto, *Il "difficile" concorso di cause naturali e cause umane del danno*, in *Corriere giuridico*, 2009, 1653, commented on by M. Bona, *"Più probabile che non" e "concause naturali": se, quando ed in quale misura possono rilevare gli stati patologici pregressi della vittima*, and in *Foro italiano,* 2010, I, 1002, commented on by B. Tassone, *Concorso di condotta illecita e fattore naturale: frazionamento della responsabilità.*

At the same time, it is important to stress that the Court avoided the use of other legal theories, such as the loss of a chance, theories that are openly aimed at achieving a similar goal, but are absolutely less methodologically correct.

However, more recently, and in our opinion in a regrettably way[81], the Supreme Court changed its approach[82], re-establishing, at least theoretically, the previous rule, and expressly rejecting the proportional liability theory.

On the other hand, "*de facto*", the two decisions come to substantially equivalent conclusions, both recognizing the need to take into account the pre-existing conditions of the victim in the quantification of damages[83], which may consequently be defined as a part of Italian "*jus positum*".

4.2. Sub-category A2 – „Market-Share Liability" – Causally Unrelated Tortfeasors and Victims

Sub-category A2 includes cases in which multiple tortfeasors cause harm to multiple plaintiffs, but it is unknown which tortfeasor caused which plaintiffs' harm. The most important and famous hypothesis is "market-share liability"[84], where a wide use of presumptions is normally employed.

Owing to the important analogies shared with the situations described above, belonging to sub-category A1, we find it appropriate to refer to the arguments developed under para. 4.1. However, to the best of our knowledge, there is no Italian case law on this matter.

As has been noted, market-share liability represents a "*radical departure from traditional conceptions of tort law*"[85], and leads to a collectivization of liability, which is what happens in litigation relating to anonymous tortfeasors. To this extent, market-share liability represents a different option to alternative liability.

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[81] Please refer to L. Nocco, *Rilevanza delle concause naturali e responsabilità proporzionale: un discutibile revirement della Cassazione,* cit. fn. 56, 149 ff.

[82] Cass. 21st July 2011, no. 15991, in *Danno e responsabilità,* 2012, 149, commented on by L. Nocco, *Rilevanza delle concause naturali e responsabilità proporzionale: un discutibile revirement della Cassazione;* in *Corriere giuridico,* 2011, 1672, commented on by M. Bona, *La Cassazione rigetta il "modello della causalità proporzionale" con un decalogo impeccabile sulla valutazione degli stati pregressi*; in *Nuova giurisprudenza civile commentata,* 2012, I, 180, commented on by R. Pucella, *Concorso di cause umane e naturali: la via impervia tentata dalla Cassazione*; in *Responsabilità civile*, 2012, 16, commented on by S. Pellegrino, *Incertezza sul nesso di causalità: il dibattito in corso tra i giudici della Cassazione.*

[83] See R. Pucella, *Concorso di cause umane e naturali: la via impervia tentata dalla Cassazione,* cit. fn. 82, 195 and D. Zorzit, *Il problema del concorso di fattori naturali e condotte umane. Il nuovo orientamento della Cassazione,* in *Danno e responsabilità,* 2012, 512 ff.

[84] *Sindell v. Abbott Laboratories (1980) 163 Cal. Rep. 132, 607 P. 2d 924.* For the Italian literature see G. Ponzanelli, *Il caso Brown e il diritto italiano della responsabilità civile del produttore***,** in *Foro italiano,* 1989, IV, 128, F. Parisi, G. Frezza, *La responsabilità stocastica,* in *Responsabilità civile e previdenza,* 1998, 832 and, recently, E. Poddighe, *I "mass torts" nel sistema della responsabilità civile*, cit. fn. 64, 108 ff.

[85] H.L.A. Hart, T. Honoré, *Causation in the law,* 2nd ed., Clarendon Press, Oxford, 1985, 424.

In all these cases, the solution relies on the burden of proof required to attach liability to a given defendant, and, in procedural terms, it is dealt with by pairing one defendant to one plaintiff. Nevertheless, we think it is useful to stress that in cases classified under sub categories A1 and A2, we can delineate a second and even preliminary layer of problems i.e. that concerning the issue of uncertain general causation.

With regard to this issue, it is useful to recall that, as has been stressed by authoritative American scholarship[86], *the term «specific causation», sometimes called «individual causation», refers* "*to the factual issue of which particular events caused or will cause a particular injury in a specific plaintiff. Specific causation is distinguished from «general causation», also called «generic causation», which addresses whether there is any causal relationship at all between types of events and types of injury. Specific causation is whether a specific event caused or will cause a specific injury, while general causation is whether such events can (ever) cause such injuries. Usually, for a plaintiff to win damages in a tort case, the plaintiff must prove both general and specific causation*".

Again when general causation is theoretically established (e.g. pollutant x causes cancer), the increased risk of cancer by the rising presence of pollutant x with by proportional could be dealt liability more easily.

On the contrary, in instances where general causality is unclear, it is more useful to employ a progressive precautionary proportional liability tool capable of exposing and constraining in scientific terms the legal arguments behind the judicial choice to weigh evidence in one way rather than another.

Indeed, it has been argued that the increase of scientific knowledge will change the causal attribution of diseases and, in general, of damages. These outcomes shift the allocation of risks: some of them, which previously were considered as merely potential (on a solid, although not definitive, basis), may be considered as more and more well-established[87] and thus attributed accordingly.

According to our model of progressive (precautionary) proportional liability, one might think to restore the damage proportionally in relation to the probability that there exists a causal link between the conduct and the damage itself. Of course, this proportion might change in relation to scientific knowledge available at any given moment, potentially causing the award of differing amounts of damages even in the same trial.

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[86] V. Walker, *Restoring the Individual Plaintiff to Tort Law by Rejecting "Junk Logic" About Specific Causation, 56 Ala L.R.,* 383 (2004):

[87] G. Comandé, *L'assicurazione e la responsabilità civile come strumenti e veicoli del principio di precauzione,* cit. fn. 3, 72. In the same sense, C.M. Nanna, *Principio di precauzione e lesioni da radiazioni non ionizzanti,* ESI, Naples, 2003, 34. It is clear that increased knowledge might also result in excluding that there is a causal link: let us consider the case of the implantation of silicone breasts which, after the ban imposed by the Food and Drug Administration in 1992, resulted in massive (amounting to millions) settlements and in the bankruptcy of some of manufacturing firms. However, fourteen years after, the F.D.A. excluded the toxicity of such practice (news from the site of the Authority consulted on November 18th, 2006. See www.fda.gov/CDRH/breastimplants).

4.3. Sub-category A3 – „Pollution Or Drug Cases" – Indeterminate Victims

Sub-category A3 includes cases in which pollution, a drug or an equivalent source of risk, increases the number of those suffering from a disease but non-tortious factors are independently responsible and present in the "background" of a number of cases.

We are not aware of cases expressly dealing with this sub-category. However, in a partially different context, regarding the field of environmental damages, we must recall that the abrogated Art. 18 of Law 8th July 1986, no. 349, relating to cases concerning several tortfeasors, provided for a regime of several liability, according to which, notwithstanding the private or public nature of the victim, only the Government would be allowing standing to sue the tortfeasor for environmental damage as such.

The proportional liability was justified due to the "punitive nature", to some extent, of the regime of liability, which was aimed at sanctioning the polluter rather than restoring the environment[88]. In fact, the amount of damages were quantified taking into account the level of negligence, the necessary costs for the restoration and the profit achieved by the transgressor as a result of her behaviour.

Thus, imposing joint and several liability would be in contrast with the deterrent scope of this rule because of the risk of over-deterrence.

On the other hand, case law stressed that recoverable damages were not limited to those suffered by specific victims, but were extended also to all the costs necessary to restore the environment[89].

Coherently with the above-mentioned regime, the majority of scholars working in the field[90] qualified this kind of liability as a form of "private punishment" ("*pena privata*"), which can be defined as a penalty. Yet, technically it is a tort rule.

Today, on the contrary, the principal aim of Art. 306 of Decreto Legislativo (D. Lgs.) 3rd April 2006, no. 152 which substituted Law no. 349/1986 is restoration in kind of the polluted environment. Restoration in kind can be ordered by the Ministry of the Environment. The Ministry can only seek damages, by means of an administrative order (Art. 313 law 152/2006), in cases where the polluter does not fulfil this request. Damages are quantified with reference to the sum needed to cover the necessary interventions aimed at restoring the environment.

Coming back to the specifics of sub-category A3, i.e. where there is an increase in the number of individuals suffering from a disease but it is not possible to ascertain the possible influence of non-

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[88] See recently M. Franzoni, *Il nuovo danno all'ambiente,* in *La responsabilità civile,* 2009, 785 ff. and G. Taddei, *Il rapporto tra bonifica e risarcimento del danno ambientale,* in *Ambiente e sviluppo,* 2009, 417 ff.

[89] See for instance Cass. 6th March 2007, no. 16575, in *Danno e responsabilità,* 2008, 406, commented on by U. Salanitro and L. Giampietro, *Il nuovo regime del danno ambientale:* according to this decision, the content of the damage to the environment does not coincide with the notion of suffered damage but with the notion of provoked damage and the damage is to be restored also whether there are no consequences of the illicit conduct considering that the lesion of the wide interest to the safeguard the environment is sufficient.

[90] See, among many, F.D. Busnelli, *La parabola della responsabilità civile,* in *Rivista critica di diritto privato,* 1988, 667 and P. Trimarchi, *La responsabilità civile per danni all'ambiente: prime riflessioni,* in *Amministrare,* 1987, 195 f.

tortious independent factors, we are of the opinion that, if, proportional liability is applied, several liability may be applied simultaneously instead of joint and several liability (similarly to the "*reviremen*t" by the House of Lords in the Barker case[91]).

As authoritatively argued[92], several liability, not joint and several liability, represents the most adequate solution in cases of merely potential causation because it leaves room to balance everyone's probability of causing the event and individual levels of fault, with the level of probability that the same event might have been caused by alternative tortfeasors. Again this conclusion experiences qualification if a redistribution effect is sought for any reason, including efficient loss spreading or insurance.[93]

In case of tortfeasors' insolvency or non-detection, joint and several liability risks that a tortfeasor is exposed to the obligation to pay full compensation even when, for example, the actual defendant who pays full compensation is the least responsible one among the joint tortfeasors. This can produce distorting effects on the deterrence goal[94]. Hence, the choice among joint and several or several liability in these cases depends on the respective relevance of the compensation and the deterrence goal. When the deterrence impact is minimal it is better to pursue the compensation goal (J&S liability). On the contrary, when the impact on deterrence can be significant it might be preferable to apply several liability along with proportional liability, so as to avoid an operational effect leading to an excessive burden upon the defendant.

Metaphorically, when faced with J&S liability the tortfeasor would face, a sort of double presumptive mechanism. First, there would be a presumption – which is co-essential to establishing potential causation – that the tortfeasor contributed to causing the damage complained of, since it is by definition impossible to prove individual and actual causation[95]. Moreover, the impact of this presumption would increase along with the expansion of the number of possible tortfeasors.

Furthermore, J&S liability, in cases of potential causation, results in the further presumption that the tortfeasor has caused the whole damage.

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[91] *Barker v Corus UK Ltd Murray v British Shipbuilders (Hydrodynamics) Ltd and others Patterson v Smiths Dock Ltd and another [2006] UKHL 20, [2006] 2 AC 572*. However, finally, in the *Compensation Act 2006*, passed on 25th July 2006, dealing specifically with damages due to asbestos exposure, the English Parliament, repudiating the House of Lords, imposed joint and several liability (see A. Samuels, *The Compensation Act 2006: Helpful or Unhelpful for Doctors?*, in *Medico-Legal Journal,* 2006, 74 (171) and N. Bevan, *Case Reports – Negligence*, in *PILS Butterworths Personal Injury Litigation Service,* 2006, 85). The same decision was taken by the Scottish Parliament, even though "*the House of Lords judgment in Barker v Corus is not binding in Scotland, but the courts are likely to find it highly persuasive*" (see T. Dowding, *Asbestos Update, Liability Risk and Insurance, 2006 191 (11) 2).* In the Italian scholarship, see also B. Tassone, *La ripartizione di responsabilità nell'illecito civile*, cit. fn. 4, 265 ff. and 472 ff. and, for the opposite view, A. Gnani, *Commento sub art. 2055*, cit. fn. 4, 309 ff.

[92] F. Bydlinski, *Causation as a Legal Phenomenon,* in L. Tichý (ed.), *Causation in Law,* IFEC, Prague, 2007, 19 f.

[93] G. Comandé, *Risarcimento del Danno alla Persona e Alternative Istituzionali*, Giappichelli, Turin, 1999, *passim*.

[94] C. Gómez Ligüerre, *Joint and several liability in the law of torts (La responsabilità solidale nell'illecito civile),* in *Responsabilità civile e previdenza*, 2009, 240 f.

[95] See F. Stella, *L'allergia alle prove della causalità individuale. Le sentenze sull'amianto successive alla sentenza Franzese (Cass. IV sez. Pen.),* in *Rivista italiana di diritto e procedura penale,* 2004, 413 ff.

If we opt for several liability, in order to allocate the burden of the proof we face different options which diverge in a relevant way.

As argued[96], if the burden to prove the apportionment of individual conducts rests on the victim, her position would result highly weakened by moving from joint and several liability to several liability. This outcome might be not appropriate from a policy perspective because the plaintiff is usually already in a weaker position than that of the defendant.

Furthermore, such an option is not even in line with ordinary evidentiary mechanisms. If we mentally eliminate J&S liability in those cases in which causation is uncertain, it remains with the plaintiff to show the actual apportionment of damages among the potential tortfeasors by firstly delineating them and then suing each of them individually. This would be extremely burdensome for the victim. These inconveniences could be worked out by establishing a rebuttable presumption of joint and several liability on the defendant.

Indeed, whenever a plaintiff proves the constitutive facts of her own "*prima facie*" case, the defendant must demonstrate the facts which change, pay off or hinder her obligation[97].

Nevertheless, in line with the principle of the "closeness of the proof", which is applied by Italian case law[98], such a burden may not always and solely fall on one party, but may be split between the defendant and the plaintiff in relation to the specific facts they have to prove. For example, if facts concern the victim's physical conditions, a plaintiff must produce evidence to prove the condition or, on the other hand, she must rebut the condition. This rule also applies *vice versa* in that if the facts relate to, as an illustration, business activities, the execution of those activities or the duration of the exposure to a toxic substance, proof of which may be mostly controlled by the supposed tortfeasor, the latter shall be charged with the burden of the proof to limit the compensable damage or to exclude its existence.

In short, the burden of limiting the amount of the compensatory obligation is shaped according to its specific content. Of course, it remains understood that a judge can convince herself in light of presented proof, regardless of sources.

We, therefore, propose a sort of "temperate" several liability rule, through the procedural mechanisms according to which a defendant may limit her own obligation during the objections (but not during the action for recourse[99]), aware that, in the absence of proofs, she shall shoulder the whole

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[96] L. Gullifer, *One Cause After Another, 117 L.Q.R. (2001), 403, 405.*

[97] See before mentioned Art. 2697 c.c.

[98] See Cass. 19th May 2004, no. 9471; Cass. 28th May 2004, no. 10297; Cass. 21st June 2004, no. 11488, in *Danno e responsabilità,* 2005, 23, commented on by R. De Matteis, *La responsabilità medica ad una svolta?,* and Cass. 30th October 2001, no. 13533, in *Giustizia civile,* 2002, I, 1934.

[99] On this, see recently R.E. Cerchia, *Uno per tutti, tutti per uno. Itinerari della responsabilità solidale nel diritto comparato,* cit. fn. 4, 239 ff.

weight of a possible adverse verdict. In other terms, it will be on the defendant to show the other tortfeasors' contribution to reduce her liability.

In this way, the risk of the absence of proof potentially rests on the supposed tortfeasor. However, she shall not shoulder the risk of insolvency and/or non-detection of other possible joint contributors to the harmful event, "*thereby spreading the risk of insolvency more fairly among the parties involved than under most existing regimes*"[100].

Moreover, we must also consider that some pathologies, such as mesothelioma, are indivisible: whenever it has been caused, by only one asbestos fibre, independently of its latency or evidence, it does not get worse with continued exposure[101].

We may consider that as another factor illustrating how excessively burdensome the imposition of a joint and several liability in some instances or several liability rule - with the above mentioned procedural qualifications and redistribution concerns - is.

We envisage a situation whereby plaintiffs, in the hypothetical situation we are referring to, must only prove that there is liability (they "suffered" a tort) failing to quantify damages and their attribution to a specific defendant.

At the moment, in Italy, we find it probable that these cases would be treated as cases of joint and several liability, regulated by Art. 2055 c.c. The condition to apply Art. 2055 c.c. is the singularity of the detrimental event[102]. Yet, the singularity of the conduct is not necessary[103], since the requirement of subjectively complex obligations lies in the plurality of subjects with "*eadem res debita*" (the same obligation) and "*eadem causa obligandi*" (the same source of obligation)[104].

On this matter, case-law orientation tends to enlarge the concept of singularity of a detrimental event, in order to extend the application of Art. 2055 c.c.[105]

Therefore, the fact that the prejudice has been caused by more than one act or omission, or the fact that the victim is unable to apportion damages among tortfeasors, are basically irrelevant elements in view of the application of Art. 2055 c.c. In fact, the victim may claim full compensation from any co-tortfeasor who later has recourse to action against the other tortfeasors (Art. 2055, 2nd paragraph c.c.). The amount recoverable in recourse by a defendant depends on the degree of the respective fault and

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[100] See B.A. Koch, *The "European Group on Tort Law" and Its "Principles of European Tort Law"*, cit. fn. 47, 193. See also European Group On Tort Law, *Principles of European Tort Law: Text and Commentary*, cit. fn. 5.
[101] See J. Stapleton, *Two Causal Fictions at the Hearth of U.S. Asbestos Doctrine, 122L.Q.R. (2006) 189-195*.
[102] Recently, A. Gnani, *Commento sub art. 2055,* cit. fn. 4, 127 ff. On this point see also R.E. Cerchia, *Uno per tutti, tutti per uno. Itinerari della responsabilità solidale nel diritto comparato,* cit. fn. 4, 217 ff.
[103] See C. Salvi, voce *Responsabilità extracontrattuale (dir. vig.),* cit. fn. 76, 1254 and P.G. Monateri, *La responsabilità civile,* cit. fn. 76, 189 ff.
[104] See F.D. Busnelli, *L'obbligazione soggettivamente complessa,* cit. fn 74, 55.
[105] See R. Pucella, *La causalità "incerta"*, cit. fn. 74, 189 ff.

on the seriousness of the ensuing consequences. In doubt, negligence is supposed to be apportioned equally.

From the above it follows that in "A3" cases it would be easy to find the conditions for the application of Art. 2055 c.c. to ease the position of the plaintiffs: that is the uniqueness of the event[106].

Following the analysis of Italian law on this issue, we come to the conclusion that it is possible and perhaps useful to apply proportional liability to those cases. However, it should be a context-related proportional liability (according to the kind of damaged interest, for instance: *e.g.* health) which can be accompanied by joint and several liability in view of reducing the plaintiff's administrative and litigation costs and for shifting insolvency risks from Plaintiffs to Defendants.

4.4. Sub-category A4 – „The Hard Case"

Sub-category A4 includes cases in which it is uncertain whether a unique tortfeasor caused harm to a unique victim. On the other hand, it may be said that the defendant increased the risk to the plaintiff to suffer the injury which actually happened but, which might theoretically occur also otherwise.

For instance, a doctor negligently operates a caesarean section and (consequently?) a newborn suffers a severe brain damage. However, it is uncertain whether the damage was an inevitable outcome of her premature birth or was actually due to the negligent treatment.

In this and in similar cases there may be room for the application of liability for increased risk, which has been used by courts[107] and debated in scholarship.

To this extent, we can say that the proportional liability doctrine shares with the loss of a chance rule the objective pursued: namely, to compensate production of evidence difficulties faced by plaintiffs in cases where it is impossible to satisfy the standard of proof, whatever that may be. Obviously, the higher the standard the higher the need to use such doctrines. Therefore, the analogies between the two models that have been applied in similar situations are very important.

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[106] See the case law mentioned in R.E. Cerchia, *Uno per tutti, tutti per uno. Itinerari della responsabilità solidale nel diritto comparato,* cit. fn. 4, 225 ff.

[107] See above all the case law related to medical liability, previous to the "*revirement*" carried out by Italian Supreme Court in 2002 (please refer to paragraph no. 2). See also the case law regarding asbestos-related litigation, for instance Tribunale Barcellona Pozzo di Gotto 15th April 2004, no. 501; 11th November 2004, nos. 1557 and 1558, in *Giurisprudenza italiana,* 2005, 1168, commented on by N. Coggiola, *Il giudice e la statistica: attività lavorative, esposizione all'amianto ed asbestosi (ovvero quando il numero di morti e malati fa la prova nel processo),* and Cass. 30th March 2000, in *Foro italiano,* 2001, II, 278, commented on by R. Guariniello, *Dai tumori professionali ai tumori extraprofessionali da amianto.* For the literature, see N. Coggiola, *Nesso di causalità e colpa nel danno da amianto. Le esperienze italiana e inglese,* in *Rivista di diritto civile,* 2008, 381 ff. and, in a very critical way, F. Stella, *L'allergia alle prove della causalità individuale. Le sentenze sull'amianto successive alla sentenza Franzese (Cass. IV sez. pen.),* cit. fn. 95, 413 ff.

The main distinctions we can draw between the two doctrines remain based on the fact that loss of chance relates to compensating for the reduced probability of survival -for instance- or the increased risk of harm as a loss in itself. Increased risk, on the contrary, would compensate the whole loss actually incurred.

4.5. Sub-category A5 – „Lost Chances"

Analogously to sub-category A4, sub-category A5 also refers to cases in which the defendant cannot satisfy the required standard of proof because, according to current scientific knowledge, it is unascertainable whether a damage has been caused by a defendant or it would have occurred anyway.

Therefore, is it only possible to say that the alleged tortfeasor's negligence reduced the victim's chances not to suffer the harm.

Debate in relation to this topic has focused on medical liability. Nevertheless, judicial decisions rendered in this field usually have an important impact also in other areas, setting a general rule. Thus, we will focus our attention mainly on the case law regarding medical related accidents.

In Italy, after the decision of the Criminal Division of the "*Corte di Cassazione*", establishing a higher evidential standard in the proof of specific material causation[108], the Civil Division of the Supreme Court chose to adopt the theory of the loss of a chance of survival or recovery.

Applying such theory, the damage is quantified by identifying the chance the plaintiff has lost and awarding damages accordingly.

The main problem concerning recoverability under a loss of chance theory is that it permits compensation of a predicted or potential loss [109].

Public competitions for employment contracts, competitive examinations for appointment to public office, and prejudices regarding professional competence based on the imposition of disqualifying duties are the main instances in which case law has granted compensation for loss of a chance[110]. The problems raised by the idea of compensating a loss of chance have led prominent scholars to critically maintain that, in the case of medical services, liability should be found by focusing on the assessment of the default in the obligation and not on the compensable damage. In other terms,

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[108] See *supra*, paragraph no. 2

[109] See L. Bigliazzi Geri-U. Breccia-F.D. Busnelli-U. Natoli, *Diritto civile,* 3, Utet, Turin, 1992, 729; F.D. Busnelli, *Perdita di una "chance" e risarcimento del danno,* in *Foro italiano,* 1965, IV, 50 f. and R. Pucella, *La causalità "incerta",* cit. fn. 74, 89 ff.

[110] See lastly Cass. 23rd January 2009, no. 1715, in *Il lavoro nella giurisprudenza,* 2009, 516, where the loss of the worker's chance to pass a competition, due to the bad faith of the employer, has been awarded. See also Cass. 10th June 2004, no. 11045, in *Gius,* 2004, 3884, where the loss of the chance to progress in one's own career path, due to the imposition of disqualifying duties, has been compensated.

"*there shall not be compensation for the positive chance lost but for the lack of a result due to the non or mis-performance*"[111].

Loss of a chance is a theory oriented to sustain and expand compensation. The limits it faces in this perspective and in the context of medical liability are basically conceptual. Case law has pointed out that, when dealing with the loss of the possibility to win in a competitive examination, courts examine the possible evolution of a future condition. To the contrary, in medical liability cases, *"medical conduct interferes in a causal chain in progress, precluding the possibility of reaching the result of care or survivorship*"[112].

However, it may be said that the loss of a chance and proportional liability "*de facto*" share the same requisites (a lack of knowledge, which renders the ascertainment of the actual case impossible) and objectives (sharing the risk of the above cited lack of knowledge among plaintiffs and defendants).

5. Some First Insights on Proportional Liability and Uncertainty

The issues that some decisions try to solve using the theory of the compensable loss of chance may be tackled more properly by delimiting the scope of compensable consequences[113]. Indeed, this was the path pursued by the "*Corte di Cassazione*" in decision no. 4400/2004 quoted above.

Therefore, even if, as we have stated before, the theories of loss of a chance and of proportional liability pursue similar objectives in the domain of sharing uncertain risks, we think it is preferable to adopt the second theory since it permits a better calibration of the amount of damages[114].

As has been pointed out[115], to claim that the defendant must compensate the entire damage even if causation is proven only on an "approximate" 50,01% probability basis and, *vice versa* to maintain the opposite when the statistics showed lower percentages, essentially relates to a false certainty of law.

Consequently, various reasoning models have been proposed including charging the defendant only with the damage actually caused by her, the loss of a chance rule or the most recent doctrine of proportional liability. Though the methods are essentially dissimilar at an operational level, these solutions emerge from the same assumption i.e. to establish a threshold would involve in any case a quite diverse treatment for basically similar situations[116].

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[111] C. Castronovo, *La nuova responsabilità civile,* 3rd ed., Giuffrè, Milan, 2006, 762 f.
[112] See Tribunale Venezia 25th July 2007, cit. fn. 78.
[113] As Tribunale Venezia 25th July 2007, cit. fn. 78, suggests.
[114] See European Group On Tort Law, *Principles of European Tort Law: Text and Commentary,* cit. fn. 5, L. Nocco, *Il "sincretismo causale" e la politica del diritto: spunti dalla responsabilità sanitaria,* cit. fn. 3, 156 ff. and G. Comandé, *L'assicurazione e la responsabilità civile come strumenti e veicoli del principio di precauzione,* cit. fn. 3, 66 f.
[115] See M. Feola, *Il danno da perdita di chances,* cit. fn. 4, 126 f.
[116] See also M. Capecchi, *Il nesso di causalità. Da elemento della fattispecie "fatto illecito" a criterio di limitazione del risarcimento del danno,* 2nd ed., Cedam, Padua, 2005, 279 and M. Feola, *Il danno da perdita di chances,* cit. fn. 4, 286 ff.

The issue is felt obviously much more in the field of criminal liability. In order to solve the current problems posed, in the field of criminal law, by scientific uncertainty, a prominent Italian criminal law scholar[117] has proposed that those cases characterised by scientific uncertainty (medical malpractice, environmental liability, etc.) should be transferred from criminal to civil courts. The aim is to avoid the possibility of punishing someone in cases of scientific uncertainty via criminal courts seeing as civil "punishment" impacts upon less important values.

Such a perspective would also affect the notion of evidence required and, particularly, of scientific evidence, since it should limit the use of the evidential standard of "beyond any reasonable doubt" (that is, certainty) only to criminal law, and should accept the use of a standard of mere preponderance of evidence, the so-called "more probable than not" rule in establishing causation in civil matters.

This proposal is partially unsatisfactory, since it would hinder the traditional aims of the tort system, above all the goal of deterrence. It would also hinder the compensatory aims of tort, because the plaintiff, if unable to demonstrate that the causal link between defendant's conduct and her harm is more likely than not to exist, will not receive any damages at all.

On the contrary, we stress the fairness of the apportionment of civil liability in relation to the degree of proof that each party will be able to offer during the trial. The proportional liability principle may be capable of allocating damages in proportion to the level of fault of each party (the comparative negligence rule is based on a similar understanding[118]) and to any pre-existing pathological condition of the victim[119]. Moreover, it remains possible to fine-tune a proportional liability rule according to the descriptive taxonomy suggested by way of playing with inversions of the burden of proof when, for instance, interests of utmost relevance are at stake (e.g. health, dignity) switching back to an all-or-nothing rule.

The latter possible solution takes into account the fact that all damages – particularly personal injuries – are caused by a plurality of factors. Thus, the attribution of full liability upon the person, who only contributed to the result, seems unjust and might be inefficient as well in terms of deterrence[120]. This is, as we shall see, the logic behind those cases that grant compensation for the loss of a chance.

"*The principle of liability proportioned to the causal efficiency of the negligent conduct*"[121], which is behind the concept of proportional liability, was explicitly accepted by the previous Italian Criminal Code of 1889

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[117] F. Stella, *Giustizia e modermità*, 3rd ed. Giuffrè, Milan, 2003.
[118] See also R.E. Cerchia, *Uno per tutti, tutti per uno. Itinerari della responsabilità solidale nel diritto comparato,* cit. fn. 4, 186 ff.
[119] See Comandé, *L'assicurazione e la responsabilità civile come strumenti e veicoli del principio di precauzione,* cit. fn. 3, 66 ff. and L. Nocco, *Il "sincretismo causale" e la politica del diritto: spunti dalla responsabilità sanitaria,* cit. fn. 3, 309 ff.
[120] See lastly R.E. Cerchia, *Uno per tutti, tutti per uno. Itinerari della responsabilità solidale nel diritto comparato,* cit. fn. 4, 229 ff.

(the so-called "*Zanardelli code*"), which allowed for the application of a mitigating clause in relation to some clauses. Indeed, a judge had the duty (Arts. 367 and 368 of the old Italian Criminal Code) to diminish the punishment when the event was caused, also in part, by previously existing conditions, unknown to the offender, or by unexpected causes independent of the offender's actions.

Here, our interest is focused only on the historical existence of a principle of reduction of the punishment, a principle closely connected to a critical reassessment of the "dogma" of the full compensation for damages, whose actual scope is today questioned in Italian scholarship[122].

The fact that the above-mentioned mitigating rule was applicable only to criminal law at that time is irrelevant. Indeed, it would be useful, in a future perspective, to reach a higher flexibility of the instruments of tort law.

Currently, in Italy, several rules capable of setting up a general principle of this kind are already in place. For example, we may refer to Art. 79 of Decree of the President of the Republic (D.P.R.) 30th June 1965 no. 1124, which provides that "*the level of permanent reduction of the attitude to work, emerging as a result of an accident, when it may appear aggravated by pre-existing disabilities resulting from events unrelated to employment (....), must be take into account (…) the pre-existing disabilities (...)*"[123]. Note, however, that this is an instance of welfare-state regulation, a public law answer to the issue of apportioning liabilities and costs.

We can also refer to further regulations which, in cases concerning multiple actors, provide that each of them is responsible for the damages they cause[124].

These rules are related to Art. 2055, paragraph 2 of the Civil Code, which disciplines joint and several liability, providing that "*the person who has compensated a victim has recourse against each of the other tortfeasors, to the extent defined by the seriousness of the respective fault and by the gravity of the derived consequences*"[125].

In our view, the above-mentioned rules provide the starting point to discuss the applicability of proportional liability in Italy.

We are aware that, in applying proportionate liability in today's legal setting, there would be "winners" and "losers". However, as previously stressed, proportional liability acknowledges that establishing a threshold for the recovery of damages, as the "all-or-nothing" rule does, would in any case result in quite different treatments of basically similar situations.

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[121] See Busnelli, *Nuove frontiere della responsabilità civile*, in *Jus*, 1976, 53.
[122] See lastly G. Ponzanelli, *La irrilevanza costituzionale del principio di integrale riparazione del danno*, in M. Bussani (ed.), *La responsabilità civile nella giurisprudenza costituzionale*, E.S.I., Naples, 2006, 67 ff. and G. Pedrazzi, *Oltre il risarcimento: il danno aquiliano tra (integrale) riparazione e sanzione*, in P.G. Monateri, A. Somma (eds.), *Patrimonio, persona e nuove tecniche di "governo del diritto". Incentivi, premi, sanzioni*, E.S.I., Naples, 2009, 1045 ff.
[123] Art. 484 Navigation Code; Art. 18 Law 8th July 1986, no. 349 abrogated; Art. 1 Law 14th January 1994, no. 20; Art. 93 Law 6th September 2005, n. 206. On the point, see Pucella, *La causalità "incerta"*, cit, fn. 74, 210 ff.
[124] On the point, see B. Tassone, *La ripartizione di responsabilità nell'illecito civile*, cit. fn. 4, 165 ff. and A. Gnani, *Commento sub art. 2055*, cit. fn. 4, 109 ff.
[125] See Busnelli, *L'obbligazione soggettivamente complessa*, cit. fn. 74, 136 ff. and A. Gnani, *Commento sub art. 2055*, cit. fn. 4, 189 ff.

Indeed, we consider that, in the presence of uncertain risks, as in those cases in which proportional liability may be applied, the apportionment of liability to the percentage of proof is fully consistent with the traditional goals of the tort system.

Furthermore, let us consider that, applying the more probable than not rule, for a plaintiff it is sufficient, in order to win the claim, to prove that her own reconstruction of the facts at trial has a "50% + n" chance of being true.

On the other hand, from a scientific point of view, we do not have instruments to measure such small probabilities. Thus, to compensate the whole alleged damage in such circumstances is totally anti-scientific[126].

This is also the reason why the Criminal Division of the Italian Supreme Court requires, as a condition to establish causation, a probability close to certainty even though it never quantifies this kind of probability (e.g. 98% or similar statistical percentage)[127].

In fact, as has been noted[128], only "*(i)f there is less than a five-percent probability that the data will depart from the null hypothesis, the association between the exposure and the disease is considered statistically significant*".

Nevertheless, we must emphasize that an all-or-nothing rule can still offer several advantages. Among them, it can be claimed that it is less costly to the system and the parties to manage cases under an all-or-nothing rule since it does not require, all the time, a precise calculation of the respective liability because it works under the assessment of a preponderance of evidence[129]. On the contrary, a proportional liability rule might be said to stimulate conflict on the actual percentage and therefore could ensue in greater litigation. In addition, proportional liability might force judges to surrender to scientific experts scattering the flexibility offered by legal and meta-legal concepts such as "*res ipsa loquitur*", common sense, and background knowledge, which have always served as policy mechanisms instead of scientific expertise.

As we have previously noted[130], a recent Supreme Court decision has stated that "*if a harmful event has been caused by a combination of human activity and natural factors (which are not themselves linked to the first by a nexus of causal dependence) the irrelevance of such factors cannot be accepted*"[131].

After this decision, a serious problem that remained to be addressed was the evaluation of the natural causal contribution to the assessment of damages. The Supreme Court is silent on this topic,

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[126] See also R. Pucella, *La causalità "incerta"*, cit. fn. 74, 103 ff.
[127] See R. Blaiotta, *La causalità ed i suoi limiti: il contesto della professione medica*, in *Cassazione penale*, 2002, 198.
[128] D. Conway-Jones, *Factual Causation in Toxic Tort Litigation: A Philosophical View of Proof and Certainty in Uncertain Disciplines, 35 U. Rich. L. R., (2001-2002) 875, 924.*
[129] As recently argued by Cass. 21st July 2011, no. 15991, cit. fn. 82
[130] Please refer to paragraph no. 4.1.3.
[131] Cass. 16th January 2009, no. 975, cit. fn. 80.

hiding behind the power the judge is charged with in quantifying damages discretionarily, according to Art. 1225 c.c.[132].

The problem is that according to such assessment, it would be necessary to engage scientific parameters, but the fact that such parameters are able to make such an accurate quantification is really dubious.

The rejection of the proportional liability theory made by the subsequent case law is not able, in itself, to solve this aspect, since also the new case law trend, as we have pointed out previously, recognizes the need to take into account the pre-existing conditions of the victim in the quantification of damages.

All in all, this is, to some extent, a problem faced by proportional liability itself since, as authoritative medico-legal scholarship noticed[133], technological progress is such as to make clear that the causes of an illness are not unique and one, but several.

6. The Second Category of Proportional Liability: Indeterminate Parts of Harm

The second category of proportional liability which has been proposed[134] includes cases in which it has been established that the tortfeasor caused some harm to the victim, and the question of causal uncertainty concerns the particular harm caused by the defendant and that which has been caused by another causal factor.

Therefore, it is certain that defendants have contributed to cause the damage, but the amount of their respective causal contributions is not certain (since it is impossible to ascertain which tortfeasor actually caused the harm). However, we hypothesize that this ignorance is not due to a lack of scientific knowledge[135].

In our opinion, those cases may surely be connected to the rule contained in Art. 2055 c.c. in the field of joint and several liability. We do not think that proportional liability can be employed in such cases, which, in our opinion, fall within the category of cases where the uncertainty of facts is not due to scientific data, but only to the course of the events. As will be explained subsequently[136], we believe

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[132] This is another reason why Cass. 21st July 2011, no. 15991, cit. fn. 82, rejected the proportional liability rule.
[133] See F. Introna, *Il problema della causalità tra diritto e medicina*, in *Rivista italiana di medicina legale*, 1992, 7 f. See also U. Beck, *La società del rischio*, It. translation, Carocci, Rome, 2000, 81 ff. and 219 ff.
[134] Please refer again to I. Gilead, M.D. Green, B.A. Koch (eds.), *Proportional Liability: Analytical and Comparative Perspectives*, cit. fn. 1.
[135] In the proposed example (please refer to the forthcoming publication mentioned earlier) the plaintiff was harmed by three dogs, belonging to three different owners and it is uncertain which specific part of the injury was caused by which dog.
[136] Please refer to paragraph no. 8.

that proportional liability should be applied only in cases of scientific uncertainty, due to the relevance exercised here by the precautionary principle.

Therefore, we think it is better to apply ordinary rules to these cases. Moreover, the double presumptive mechanism we mentioned earlier, which risks overburdening the defendant who is only partially responsible, does not materialize in these cases[137].

Indeed, the tortfeasor's position does not appear to be excessively burdensome, at least when the group of supposed tortfeasors is not excessively numerous.

Sub-category B2 refers to cases where the other causal factor, whose influence to the damage is certain but cannot be precisely gauged, is a natural cause.

Following the principle of the relevance of natural causal factors on the amount of damages, which has been justified before in light of present and past Italian law, as well as in light of the precautionary principle, and has been adopted by the Italian Supreme Court[138], we think that in those cases a fair reduction of the amount of damages should be applied.

Nevertheless, we must recall that, as we have stressed before[139], the exact evaluation of the natural causal contribution to the assessment of damages still remains to be addressed. This is a problem faced by each kind of proportional liability, *i.e.* by each type of liability not based on an all-or-nothing approach.

7. The Third Category of Proportional Liability: Uncertain Materialization of Risk

The third category in the proposed taxonomy addresses cases in which the causal uncertainty regards the existence and the amount of future damages. In other words, it is uncertain whether a tortious conduct will actually cause any future harm and how severe the potential harm is.

One of the instances in which Italian case law has awarded damages similar to those mentioned in this group, through the notion of loss of a chance, regards cases concerning "light" labelled cigarettes.

The litigation in this field arose from the decision of the Italian antitrust authority, which had considered the description "light" on the packaging of cigarettes as deceptive advertising[140]. Later, some small claims court (*giudici di pace*; or justices of peace) awarded the damage "*suffered by smokers of light*

[137] Please refer to paragraph no. 4.3.
[138] Please refer to paragraph no. 4.1.3.
[139] Please see paragraphs nos. 4 and 5.
[140] See R. Bianchi, *Danno da pubblicità ingannevole e consumatori: in Cassazione un'apertura condizionata*, in *Responsabilità civile e previdenza*, 2008, 605 ff.

cigarettes, which should have less and condensed nicotine, considering that such a caption is deceptive since such cigarettes are not less dangerous to health than normal cigarettes"[141].

It has been thought, in fact, that "*the tobacco-maker company which merchandizes cigarettes with the caption "light" or "extra light", since such words combine a deceptive promotional message which gives rise to a false opinion about their lower harmfulness, is legally responsible towards a smoker who can prove to have bought and smoked such a product again and again and who is entitled to compensation for the damage due to the loss of a chance corresponding to the non-attainment of the aim of a lower health damage, to be settled equitably*"[142].

Actually, in its operative results such a solution has to be coordinated with other decisions to award not the whole amount of the damage, but the damage corresponding to the higher risk to health from smoking "light" cigarettes compared to the lower – or non existing - damage that, on the ground of the deceptive promotional message, could have been produced[143].

In our view, these cases should be, in a highly context-sensitive approach, either considered as actual losses, when the increased risk of materialization of a harm can be ascertained leading to proportional liability, or as cases in which there is no loss at all and compensation should not be offered until an actual loss materializes. Of course, the latter qualification of the case might create time limit problems in cases where a damage emerges only a long period of time. Yet, these losses seem in any event too speculative.

Actually, as scholars have pointed out[144], damages which have been awarded in the above-mentioned cases are not intended to cover the loss of a chance to suffer a lower health damage, but rather cover the non-pecuniary loss which is "*in abstracto*" recoverable according to Art. 2059 c.c. Indeed, in those cases the plaintiff requests recovery of the damage caused by the fear of contracting a disease. Nevertheless, these damages, similarly to the ones awarded in the so-called "Seveso case" by the Court of Cassation[145], need to meet the requirements fixed by the above-mentioned Art. 2059 c.c.

Today, following authoritative intervention on this topic by the Italian Supreme Court[146], which stressed, among several things, the need to prove the existence of the non-pecuniary damage itself, the award of such damages is unlikely.

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[141] Giudice Pace Portici 7th Novembre 2003, in *Giurisprudenza napoletana*, 2004, 79.
[142] Giudice Pace Napoli 1st September 2004, in *Il Giudice di pace*, 2005, 131, commented on by F.M. Andreani, *Sigarette "lights": pubblicità ingannevole e perdita di "chance"*.
[143] Giudice Pace Napoli 28th January 2005, in *Diritto e giustizia*, 2005, 27, 32.
[144] See R. Bianchi, *Danno da pubblicità ingannevole e consumatori: in Cassazione un'apertura condizionata*, cit., 605 ff. and M. Di Marzio, *Il danno da pericolo diventa esistenziale. Ma nel mosaico mancano molti tasselli*, in *Diritto & Giustizia*, 2005, 27, 32 ff.
[145] Cass. Sezioni Unite 21st February 2002, no. 2515, in *Danno e responsabilità*, 2002, 499, commented on by G. Ponzanelli, *Una nuova stagione del danno non patrimoniale? Le Sezioni unite e il caso Seveso*
[146] See Cass., Sezioni Unite, 11th November 2008, nos. 26972, 26973, 26974 and 26975, cit. fn. 68.

Indeed, very recently, following the above-mentioned decisions, the Italian Supreme Court reversed a decision belonging to the line of cases cited above expressly suggesting that harm had not been demonstrated[147].

Another example to be considered here is that concerning the non-admission to or failure of competitive exams due to the bad faith of the employer.

These cases are characterized by the uncertainty of the damage, since the plaintiff is deprived of future possibilities, without any certain possibility that the possibility may arise again in the future. However, in such cases, the loss of a chance of success is awarded by courts[148].

It must be recalled also that uncertain future harms might sometimes be awarded under contractual liability rules. An example of those damages is the prejudice caused to the worker by the imposition of disqualifying duties for which loss of a chance in career progression is awarded because of a violation of Art. 2103 c.c.: "*An employee must be assigned to the functions for which she was recruited or to the functions corresponding to the higher category subsequently acquired or to the functions equivalent to the latest actually performed, without suffering any decrease in payment*" [149].

Theoretically, the compensation of these kinds of damages in Italy would seem to be excluded pursuant to Art. 1225 c.c. which states that "*if a default or a delay does not depend on the debtor's malice, the compensation is limited to the damage expected at the time the obligation arises*"[150]. Nevertheless, the absolutely dominant case law awards damages deriving from the above-mentioned hypothesis.

Art. 1225 c.c. establishes a principle opposite to full damage compensation[151], by limiting the compensation to cover only expected damages in cases where the defendant is negligent.

Such a rule may not be applied to tort liability since it is not provided for in Art. 2056 c.c. which states that the quantification of damages in tort is performed pursuant to Arts. 1223, 1226 and 1227 c.c. It follows that unforeseeable damages can be compensated under the law of torts.

On the other hand, case law has actually reduced the gap between contract and tort liability concerning the delimitation of compensable damages[152]. Case law has been influenced by the current pro-victim policy. Thus, such an evaluation may lead, in particular circumstances, to the inclusion of future and possible damages as compensable ones. In fact, this evaluation is influenced, among other things, by the nature of the relationship (particularly in cases of contractual liability) and by other specific factors[153].

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[147] Cass. Sezioni Unite 15th January 2009, no. 794, in *Foro italiano*, 2009, 3, 1, 717.
[148] M. Feola, *Il danno da perdita di chances,* cit. fn. 4, 51 ff.
[149] Our translation.
[150] Our translation.
[151] A. Gnani, *Sistema di responsabilità e prevedibilità del danno,* Giappichelli, Turin, 2008, 159 ff.
[152] L. Bigliazzi Geri-U. Breccia-F.D. Busnelli-U. Natoli, *Diritto civile*, 3, cit. fn. 109, 781 ff.
[153] A. Gnani, *Sistema di responsabilità e prevedibilità del danno,* cit. fn. 151, 164.

Part III. In Search of a Reasonable Proportional Liability Rule for Uncertain Settings

Once the use of proportional liability is approved, it is necessary to limit its scope. For example, one might argue that it should apply in all cases where there is no evidence on the causal link "beyond any doubt" (and not "beyond any reasonable doubt").

Therefore, proportional liability would become the only standard, since it is not humanely possible to overcome the existence of doubts. However, if we suppose that, in ninety/ninety-five per cent of cases, the conduct may cause the damage for which compensation has been requested, such statistical percentage, as a rule, represents such a high degree of rational probability that it would lead to a verdict of condemnation also in a criminal lawsuit.

We think that in a civil action, under such a percentage of probability, a condemnation for the whole damage may be justified without strictly applying proportional liability[154]. On the contrary, proportional liability should coherently (and paradoxically) lead to a decrease in the amount of compensation to be awarded.

By following such an argument, on the other hand, even one per cent of the suffered damage should be compensated, if a probabilistic percentage of risk is assessed. Yet, this leads to a real "damages lottery", increasing highly the discretionary judicial assessment of causation as well as administrative costs.

In addition, the scientific ability to ascertain the actual probability of a concurring cause (or negligence where appropriate) might be unrealistic, and the actual entire shift to proportional liability might result in a reduction in the protection offered to fundamental rights and a move which is unjustified in light of the current policy course.

The move towards proportional liability grounded solely on the policy consideration mentioned above might be too high a cost for surrendering the flexibility offered by the technical discretionary evaluation of a judge, in given cases.

As we stressed in relation to the recoverability of chances, to be recoverable, the probability that a defendant caused the loss should, at least, be "worth"[155] it.

Thus, in conclusion, we propose to exclude the applicability of proportional liability in extreme cases (for instance, less than ten per cent and over ninety per cent). However, it would be naïve to hide the difficulties involved with setting and justifying limits in a rational way or on efficiency grounds.

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[154] For a similar view, applying the loss of a chance theory, see M. Feola, *Il danno da perdita di chances,* cit. fn. 4, 156 ff.

[155] See M. Bilancetti, *La responsabilità penale e civile del medico,* 6th ed., Cedam, Padua, 2006, 975.

Vice versa, cases in which the probabilities of the risk randomly fluctuate above and below 50% (which might be called, for instance "borderline cases"), are those in which proportional liability promotes efficiency, since compensating the whole damage even though there were «about» 50,01% of probabilities (or vice versa) would produce a strong difference in the treatment of basically similar situations[156]. Yet all the above hold true on the condition that full (and non-costly) information is available to all players.

In addition, we must take into account that proportional liability might theoretically produce regressive effects if the rule is not paired with procedural rules which, for instance, reverse the burden of the proof in cases where the plaintiff (or the defendant) is ill-suited to demonstrate respective roles in causing damage. For example, in medical malpractice, when there is a 49% chance of materialization of the risk of harm, this instance is today considered full evidence of malpractice. The rule of proportional liability can also be construed as a consequence of a rebuttable presumption of full liability (all or nothing rule) on the defendant once the plaintiff has established the fault beyond certain thresholds of causation.

In our opinion, proportional liability, in itself, should not create any risk of increasing administrative costs related to the judiciary process.

The adoption of proportional liability actually includes the possible risk that such kind of "compromise logic", which is behind the reduction of the compensatory amount, rightly induced by the impossibility of charging the tortfeasor's conduct with the whole damage, may lead judges to accept, as sufficient, less convincing evidentiary assessments. In other terms, being aware that, at most, only part of the damage is compensated, judges may tend, more or less unconsciously, to be more permissive in assessing proof.

Furthermore, one more negative consequence may be that the out-of-court settlement of litigations would be made more difficult if chancy and changeable evidentiary assessments were adopted.

On the other hand, today, settlements are discouraged in all "borderline" cases by the fact that small differences in the assessment of probability, which is a little higher or lower than 50 per cent, lead to very different judicial outcomes.

Indeed, if the threshold is a fixed and static one, and there is no way to be sure that we are above or below it, the parties have no incentives to settle. In these terms, on the contrary, proportional liability may favour alternative dispute resolutions. These statements show that the actual argument of administrative costs and incentives to settle depend more on procedural rules than on the substantive rule of proportional liability vs. all-or-nothing as alternative solution concepts.

[156] Please refer also to what has been illustrated supra, paragraph no. 4.5.

Moreover, we think one of the problems which proportional liability might abstractly produce, *i.e.* the incentive to litigation, may be easily prevented by excluding compensation in cases where only a very low percentage may be proven (for example, 5 – 10%) and by restoring an all-or-nothing rule in the reverse case.

Conclusively, proportional liability represents clearly a significant change in the tort system, which we think must not be applied in a far-reaching way even though it is already somehow employed in courtrooms.

Firstly, it should be applied only in cases of scientific uncertainty. Even though it is impossible here to deepen this argument, the rationale behind the application of the proportional liability doctrine is the principle of precaution, as it has been argued[157], since some modern economic activities bear uncertain risks[158].

It does not interest us here to know whether such risks are sufficient to forbid that particular economic activity. On the contrary, it is interesting to reflect on the possible effects, from the angle of tort law, and when such an activity may give rise to damages. Today, applying both ordinary rules, in particular in relation to application of the "more probable than not" standard, and *a fortiori* applying the "beyond any reasonable doubt" standard of proof, it is difficult to suppose that the victim may get compensation in similar cases. Thus, proportional liability offers an answer to the demand for social justice, awarding some damages, but at the same time, limiting compensation to the quantity of proofs the victim can provide at trial and according to socially accepted scientific evidence.

If that is the objective of proportional liability, it may be applied only in "borderline cases" (following the definition which we have previously given) which are characterised by scientific uncertainty, because there we can locate its strong rationale.

Otherwise, it may become an instrument allowing plaintiffs, unable to prove claims fully due to demerits, to successfully get compensation, albeit partial. It may also provide for the opportunity to avoid paying damages caused to a defendant who uses the fact that there is insufficient contrary evidence.

Another rationale for the selective application of proportional liability may lie in the logic of policy. For instance, this may arise in cases concerning work-related harassment. It is well known that usually the victims of work-related harassment are the most "vulnerable" individuals. Due to the victim's

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[157] See on this point G. Comandé, *L'assicurazione e la responsabilità civile come strumenti e veicoli del principio di precauzione,* cit. fn. 3, 66 ff. See also G. Schamps, *The Precautionary Principle versus a General Principle for Compensation of Victims of Dangerous Activities in Belgian Law,* in H. Koziol, B.C. Steininger (eds.), *European Tort Law 2004,* Springer, Wien-New York, 2005, 121 ff. for a "radical" view of application of the precautionary principle in tort liability.

[158] See H.A. Cousy, *Risks and Uncertainties in the Law of Tort,* in H. Koziol, B.C. Steininger (eds.), *European Tort Law 2006,* Springer, Wien-New York, 2008, 2 ff.

frequent mental pre-conditions, often it may be impossible to establish with certainty (or even in a verisimilar way) whether the damage has been caused by the tortfeasor(s) or whether it can be attributed to the victim's characteristics.

Victims' pre-conditions may have an impact in the form of the importance of their harm, compared to the usual effects of that kind of detrimental conduct on "normal" individuals. Nevertheless, it may also happen that such conduct do not cause harmful effects to some individuals, or, to the contrary, the same conduct may cause disastrous results for other people.

In abstract terms, in such cases there may be room for the application of proportional liability, since there is an uncertainty, possibly due to the lack of scientific (for example, psychiatric) data. However, we think that the risk of the possible pre-existing vulnerability and, in general, of uncertainty is to fall exclusively on the tortfeasor[159]. In these cases, it appears clear to us that the subjective element of the tort (malice or recklessness, for instance) plays a role in triggering (or not) proportional liability and it influences the procedural rules to be adopted; for instance, a proportional liability with reversal of the burden of proof.

Thus, if the perimeter for the application of proportional liability should be decided according to the logic of efficient deterrence, it might be said that here there is no room for the application of this form of liability in these cases. Accordingly, the harasser should be liable for the whole damage, even that which has not been caused by her, thus stressing paradoxically the deterrent and punitive effect of liability in tort. The same conclusion might be reached in other similar cases of gross negligence or malice or when interests of utmost relevance are at stake (e.g. health, dignity).

Harassment conducts are basically aimed at damaging the victim, since it is socially expected that the person chosen as a victim is more sensitive and vulnerable: in other terms, a "harassed" person is usually selected exactly because she is more vulnerable.

Such torts are characterized by malice, so we think it is correct to outline their different treatment compared to regular negligence based torts, since the malicious conduct represents a higher negative value than the negligent conduct. The concept is clearly shown in the principle established for contractual liability by Art. 1225 c.c., pursuant to which "*if the default or the delay does not depend on the debtor's malice, the compensation is limited to the damage which might be expected at the time when the obligation arose*"[160].

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[159] Please refer to L. Nocco, *Le concause naturali fra diritto e politica… del diritto,* in *Liber amicorum per Francesco Donato Busnelli. Il diritto civile tra principi e regole,* cit. fn. 3, 635 ff.

[160] On this point, see lastly A. Gnani, *Sistema di responsabilità e prevedibilità del danno,* cit. fn. 151, 35 and 205 ff.

Paper n. 2

WHAT WOULD HAPPEN TO THE ACTUAL MALICE DOCTRINE IN A SEVERELY POLARIZED DEMOCRACY? THE CASE OF TAIWAN

by

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Suggested citation: Jimmy Chia-Shin Hsu, *What Would Happen to the Actual Malice Doctrine in a Severely Polarized Democracy? The Case of Taiwan, Op. J.*, Vol. I, n.1/2013, Paper n. 2, pp. 41 - 89, http://www.opiniojurisincomparatione.org, online publication October 2013.

WHAT WOULD HAPPEN TO THE ACTUAL MALICE DOCTRINE IN A SEVERELY POLARIZED DEMOCRACY? THE CASE OF TAIWAN

by

Jimmy Chia-Shin Hsu*

Abstract:

The American legal doctrine of actual malice in tort of defamation, developed by the U.S. Supreme Court in *New York Times v. Sullivan* and its progeny, is one of the hallmarks of the exceptionally speech-protective First Amendment jurisprudence. Despite the doctrine's uniqueness among western advance democracies, an Asian new democracy, Taiwan, has undertaken an extraordinary experiment in the past decade to transplant the doctrine of actual malice in its laws of defamation. I analyze how the actual malice doctrine underwent extraordinary twists and turns in Taiwan's criminal and tort defamation laws in the past decade. I argue that Taiwan's severe political polarization since 2000 first led to its rise in tort of defamation, and also to its eventual downfall. It was followed then by the divergence of criminal and tort of defamation in terms of fault degree, with criminal defamation leaning consistently toward actual malice and tort of defamation back to negligence. The divergence was a sensible response to the wildly irresponsible culture of exposé in Taiwan's public sphere that developed after 2005. In light of Taiwan's experience, I also argue that actual malice presumes a thick layer of social consensus on what counts as irresponsible speech. When political polarization and political distrust destroys the social consensus, the "reckless disregard of truth and falsity" prong of actual malice collapses along with it, as is the case with Taiwan's criminal libel during the height of political conflict.

Keywords: New York Times v. Sullivan, defamation, libel, actual malice, negligence, gross negligence, fault standards, freedom of speech, reputation, political polarization, comparative law, rumor, the marketplace of ideas, truth, Chen Shui-bian, Kuomintang, Democratic Progressive Party

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INTRODUCTION

The American legal doctrine of actual malice in tort of defamation, developed by the United States Supreme Court in the 1964 case *New York Times v. Sullivan*[1]and its progeny, is one of the hallmarks of the exceptionally speech-protective First Amendment jurisprudence. The doctrine prescribes that in tort of defamation as well as in criminal defamation,[2] when the plaintiff or victim is a government official, the defendant can be found liable only if the defamatory statement is made with "knowledge that it was false or with reckless disregard of whether it was false or not".[3] In a series of cases that followed, the doctrine has been expanded to apply in cases in which the plaintiff is a public figure.[4] The doctrine deviates from counterparts of almost all other advanced democracies, such as Australia,[5] Canada,[6] the United Kingdom,[7] Japan,[8] and Germany.[9] In terms of the extraordinary weight given to free speech, the United States is an outlier not only among advanced western democracies, but perhaps around the globe. Such American exceptionalism attracts scholarly attention and is usually explained by cultural factors such as the American liberal tradition and distrust of government regulation.[10]

That much is well-known. What is little known in comparative law literature is that an Asian new democracy, Taiwan, has undertaken an extraordinary experiment in the past decade to transplant the doctrine of actual malice in its laws of defamation. The Taiwanese experiment is significant, because Taiwan inherits a strong Confucian cultural heritage, in which the liberal political tradition and distrust of government is weak. It means that the cultural explanation employed to make sense of the American divergence with other Western democracies may be of little help to explain the convergence of two

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[1] 376 U.S. 254 (1964).
[2] See Garrison v. Louisiana, 379 U.S. 64 (1964).
[3] 376 U.S. 254, 280 (1964).
[4] See Curtis Publishing Co. v. Butts; Associated Press v. Walker, 388 U.S. 130 (1967).
[5] Leonard Leigh, *Of Free Speech and Individual Reputation: New York Times v. Sullivan in Canada and Australia, in* IMPORTING THE FIRST AMENDMENT 64-5(Ian Loveland ed.,1998).
[6] *Id*. at 57-62.
[7] See IAN LOVELAND, POLITICAL LIBELS: A COMPARATIVE STUDY (1999).
[8] RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE 155-164 (2006).
[9] *Id*. at 104-118.
[10] Frederick Schauer, *The Exceptional First Amendment, in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 45-49 (Michael Ignatieff ed., 2005); RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE (2006).

countries as culturally diverse as Taiwan and the United States. Even as Taiwanese civil courts eventually drifted away from the doctrine, as this article shows, the receptiveness once shown by some Taiwanese courts cannot be satisfactorily explained with cultural factors. My argument is that the venture of the actual malice doctrine in Taiwan is best explained, not by cultural factors, but by dynamic socio-political factors, which used to be hidden in comparative defamation law literature due to the limited number of jurisdictions being compared.

Taiwan's experiment is significant in another respect. Taiwan has a continental civil law system, in which codified legal rules dominate the source of law. However, the reception of the actual malice doctrine has been a purely judicial undertaking. It began with two influential separate opinions of Interpretation No.509 (hereinafter as I.509), a decision delivered in 2000 by Taiwan's Constitutional Court. It was then developed and experimented by Taiwan's lower courts. The timing of the development coincided with the most turbulent era of Taiwan's democratic politics, i.e. the political polarization triggered by Taiwan's historic presidential power turnover in 2000. The decentralized judicial experiment allows a rare degree of flexibility for the courts to interact dynamically with the political environment. Observing how political polarization exerted pressure on the development of Taiwan's laws of defamation provides fresh insights into the deep structure of the actual malice doctrine and its social foundation.

In the wake of I.509, Taiwan's courts have been struggling to stabilize I.509's doctrinal impact. For criminal defamation, which is a misdemeanor not appealable to the Supreme Court, the several branches of Taiwan High Court,[11] after the first few years of trial and error, have been consistently relaxing culpability standards toward actual malice and even beyond it since 2006. In contrast, the civil

[11] Taiwan's governmental system is unitary, rather than federal. The judiciary is no exception. The Constitutional Court is a distinct entity, which has the ultimate authority over constitutional issues. Alongside it, the ordinary court system is organized into three hierarchical levels, namely the Supreme Court, the Taiwan High Court, and the District Court. There is only one Supreme Court, composed of two divisions, the civil and the criminal. The civil division is composed of seven panels, while the criminal contains thirteen. The High Court has five branches located in five metropolitan or regional centers of Taiwan, including Taipei, Taichung, Tainan, Kaohsiung, and Hualien. The District Courts are located at each county or major city. For a brief introduction to the organization of Taiwan's judiciary, please refer to the Judicial Yuan's English Website: http://www.judicial.gov.tw/en/ (last visited 06/11/2012).

division of Taiwanese courts has shown ambivalence toward the issue. Tort of defamation cases can be appealed to the Supreme Court. At first the Civil Panels of the Supreme Court seemed determined to stick to negligence, while allowing some fine-tuning for higher protection of speech in political libel cases. However, after 2004, some panels departed from the previous consensus of negligence and embraced actual malice in certain high-profile political libel cases. The deviation continued until early 2007. Afterwards, actual malice quietly faded into obscurity as almost no Civil Panels have used it again. The general trend among the civil panels of the Supreme Court after 2007 has been to return to negligence in private libel cases, while negligence could be adjusted to something akin to gross negligence in cases involving public interest. Such twists and turns in the Supreme Court Civil Panels can also be witnessed in the general trends of the appellate courts.[12]

The key to understanding the divergence of Taiwan's criminal and tort of defamation is the wavering of the Civil Panels of the Supreme Court. It provides a focal point where in-depth analysis of a manageable number of cases can shed light on the decentralized development at both criminal and civil divisions of lower courts. Analyzing the rise and fall of the actual malice doctrine in the Supreme Court Civil Panels provides insight into the forces that drove both criminal and tort defamation toward radical protection of free speech before late 2006.

Here I argue that the severe political polarization between Taiwan's two major political camps, at both elite and popular levels, tore down the basic political trust between warring partisan camps and social consensus on the code of civility. It became more and more futile to hold liable someone deeply believing in the truth of the defamatory speech, even when such belief would otherwise be judged groundless and the behavior reckless in a normal state of politics. The futility of liability was furthered by the fact that such apparently groundless belief may have been shared by millions of voters.

[12] Jimmy Chia-Shin Hsu, Minxingfeibang Eryuantixi zi Xingcheng yu Fenxi (民刑誹謗二元體系之形成與分析)[Analyzing the Formation of the Dual System of Taiwan's Criminal and Tort of Defamation] 18-20(paper presented at the Second International Conference on Empirical Studies of Judicial Systems, June 6/24-25, 2011, Academia Sinica, Taipei, Taiwan).

It is true that severe political polarization has gradually made it pointless to hold liable someone who believed firmly in groundless rumors and spread it out of deeply-rooted political bias. However, by late 2006, a free-wheeling culture of exposé was taken advantage of by more and more irresponsible and malicious politicians seeking to defame political nemesis.[13] Taiwan's courts were then caught in a dilemma. On the one hand, political polarization had eroded social consensus on what constituted responsible speech and so it grew pointless to discipline someone deeply believing in otherwise unfounded rumors; on the other hand, opportunists began to take advantage of the free-wheeling rumor mongering culture, and these opportunists should be disciplined. The difficulty is that a principled distinction between bias-motivated true believers and opportunists is almost impossible to draw.

The divergence of Taiwan's criminal and tort of defamation after 2006 is a sensible response to the difficult challenge. On the one hand, criminal defamation continued on the course of actual malice, because criminal punishment is symbolically more severe in moral condemnation than tort; the punishment is more consequential; and the silencing effect more severe with the possibility of incarceration. Further, it is more likely to be abused by government prosecutorial function. All these characteristics of criminal defamation demand its restraint in polarized politics. On the other hand, the free-wheeling politics of rumors should be curtailed with moderate but still meaningful tactics. The tort of defamation is more suitable for this function, because Taiwan's tort of defamation is not equipped with punitive damages, which helps avoid complete silencing by excessive damages. Negligence became a sensible effort to restore the collapsing social consensus on responsible political speech.

Interestingly, a closer look at the doctrine's use in some of Taiwan's criminal defamation law cases since 2006 reveal that in some high-profile political cases the doctrine was radicalized to an extent that it surpassed the American actual malice doctrine in its protection of speech. Under the radicalized form

[13] For a full account of the historical process, see Jimmy Chia-Shin Hsu, Free Speech and Democratic Consolidation in a Divided Polity: Taiwan's Politics of Rumors and Laws of Defamation, 2000-2008, 95-116 (August 2009)(unpublished J.S.D. dissertation, The University of Chicago Law School)(On file with Regenstein Library, The University of Chicago).

of the doctrine, only knowing falsification of facts would be criminally punishable. The second prong of the American actual malice doctrine, namely "reckless disregard of truth or falsity", was neutralized by serious erosion of social consensus on what constitutes reasonable speech. Such radicalization of speech protection can be explained by two reasons. First, spreading rumors, however improper in a normal state of democratic politics, may be seen as a way of rebellion against the official authority, the trust of which has been withered away among a substantial portion of the population because of political conflict. Second, the courts may have distanced itself from the political conflict too severe to handle properly by the judicial branch. Over-protection of free speech may serve as a fortress against fear of governmental over-restriction of political speech. This point is especially pertinent in criminal defamation law, because government prosecutors may be politically motivated to suppress opposition speech, the suspicion of which is not unwarranted in a new democracy.

Such an extraordinary development exposes the deep structure of the American version of the doctrine. At least in libel involving national politics, the distinction between "honest yet inaccurate utterance" and "calculated falsehood", which the U.S. Supreme Court held to be the central ideas about what speech is worth protecting and what is not,[14] presumes a deep layer of political consensus and public trust toward the social establishments which defines the boundary of true and false speech. The breakdown of consensus and trust leads to serious blurring of the distinction.[15]

In Part I, I introduce how I.509 was born, followed by an analysis of what it means to Taiwan's laws of defamation. Then I offer a brief account of the political polarization since 2000 that constituted the general political settings, against which the courts developed the laws of defamation in the wake of I.509. In Part II, I report and analyze the rise of actual malice in the Supreme Court Civil Panels. I argue that the rise of the actual malice doctrine in Taiwan's tort of defamation in late 2004 cannot be

[14] Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

[15] For a similar view regarding social consensus needed for how to verify a fact in defamation cases, see Martin Hansen, *Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech*, 62 GEO. WASH. L. REV. 43 (1993).

fully understood without taking into account the rising political conflict between Taiwan's major political parties. Next, I give a brief account of the emergence of a radical culture of exposé in 2005, which is important to help understand the downfall of actual malice in late 2006. In Part III, I observe that the radical culture of exposé resulted in divergence of fault standards in criminal and tort of defamation. Then I analyze how actual malice was radicalized in Taiwan's criminal defamation law during the days when the radical culture of exposé was at its height. I argue that severe political polarization and political conflict eroded the social foundation of actual malice. This article reveals that a successful working of the actual malice doctrine presumes a thick layer of social consensus on what constitutes responsible speech and trust in the official authority to pursue official misdeeds.

I. LIBERALIZATION OF PUBLIC DISCOURSE—I.509 AND ITS MIXED LEGACY

A. The struggle against authoritarian remnants and the birth of I.509

Up until the end of World War II, Taiwan had been colonized by Japan for fifty years since 1895, when the Ching Dynasty of China ceded Taiwan after its defeat in the Sino-Japanese War. After the WWII, Taiwan was taken over by the Chinese government under the rule of Chiang Kai-shek and his party Kuomintang (The Nationalist Party/KMT). In 1949, Chiang Kai-shek lost the civil war to the Chinese Communist Party. Generalissimo Chiang and his government fled to Taiwan and ruled the island with iron fist. The post-1949 KMT authoritarianism was constructed on a quadripartite foundation - an elaborate and centralized party apparatus, a system of extra-constitutional legal arrangements and emergency decrees, a controlled electoral pluralism implemented at the local level, and structural symbiosis between the party and the state. [16] As a quasi-Leninist regime, the KMT party cells reached into all organized social sectors, such as labor unions, youth groups, religious groups,

[16] Yun-Han Chu and Jih-Wen Lin, *Political Development in 20th-Century Taiwan: State-Building, Regime Transformation and the Construction of National Identity*, 165 THE CHINA QUARTERLY 102, 113(2001).

professional associations, business associations, farmers' associations, women's associations, schools and mass media. Detecting and suppressing seditious speech is carried out by this intricate web of party cells and state apparatuses, with draconian censorship and punishment.

Democratization, which was set in motion officially in 1987, unleashed long-suppressed social forces clamoring for political and civil liberties, among which freedom of thought and expression was hailed and advocated with the most passion. President Chen Shui-bian (陳水扁), who held office from 2000 through 2008, was previously incarcerated for eight months for libeling a KMT official in 1986, before the democratization officially began. In 1989, a prominent opposition publisher, Nylon Cheng (鄭南榕), set himself on fire in his office as he awaited an incoming police ransack for his pro-Taiwan-independence magazines. His message was loud and clear----freedom of thought and speech for Taiwan independence.[17] His martyrdom contributed to the acceleration of political liberalization and democratization, and galvanized opposition to KMT's authoritarian rule led mainly by the major opposition party, Democratic Progressive Party (DPP)[18]. In 1992, the Article 100 of the Criminal Code, the source of law for punishing seditious speech as treason, was amended to rid of wordings that incriminated seditious speech. This major reform opened the gateway for exiled prominent Taiwan-independence advocates to return to Taiwan, which reinforced the DPP's political might. Under increasing pressure for political liberalization, the Executive Yuan exercised increasing self-restraint in executing the Publication Act, the legal source of censorship, which eventually was abolished in 1998.

Although the KMT remained in power after the initiation of democratic transition, capabilities of the state and party to control speech had substantially weakened under the waves of democratization.

[17] For Nylon Cheng's biographical note and his influence, please refer to website of Deng Liberty Foundation, which was founded to memorialize Nylon Cheng's contribution to Taiwan's democratization and freedom of speech. http://www.nylon.org.tw/index.php?option=com_content&view=category&id=13&Itemid=46 (last visited, 2012/9/05).

[18] DPP was founded as late as in 1986 in defiance of KMT's ban on political parties. For a succinct historical account of the rise of democratic opposition and the birth of Democratic Progressive Party, See DENNY ROY, TAIWAN: A POLITICAL HISTORY 152-82 (2003).

The swift transition to democracy caused a sudden expansion of room for political speech in the 90s. Not surprisingly the flowering of public discourse led to a surge of high-profile political criminal defamation cases.[19] Many of these cases involved defamation of the KMT government officials or KMT affiliated individuals or institutions. In these cases, the courts were asked to carry out speech-disciplining functions, which were executed by the executive power in the form of censorship before democratization. In the eyes of reformists, most of these cases were continuation of the KMT's authoritarian attempt to suppress political speeches. And the criminal defamation articles in the Criminal Code were seen as outdated authoritarian remnants, in that strict liability was the rule and the defendant had to prove the truth of the statement in order for the criminal act to be justified.[20] Public calls for de-criminalization of libel gradually gathered steam, as more and more high-profile criminal defamation cases threatened the breathing space for criticizing the government and the ruling party. The burgeoning mass media, particularly those unaffiliated with the KMT, were most vocal in the advocacy.

It was amid the increasingly vocal public calls for de-criminalization of defamation that I.509 was born. Two petitions for constitutional review jointly led to the issuance of this Interpretation. The first petition came from a reporter, Lin Yingqiu(林瑩秋), and the chief editor, Huang Hongren(黃鴻仁), of Business Weekly magazine. Both of them were indicted and convicted for libeling the Minister of

[19] For example, Taipei District Court Criminal Decision 82-Zi(自)-699 (1997) involves a former Minister of Transportation as the victim and opposition Legislators as defendants; Taipei District Court Criminal Decision 85-Zi(自)-1098 (1997) involves a high-ranking KMT party official as the private prosecutor and a weekly news magazine as the defendant; Taiwan High Court Criminal Decision 84-Shanyi（上易）-3196(1995) involves a KMT Legislator as the victim and a local newspaper president as the defendant; Taipei District Court Criminal Decision 83-Chunsu(重訴)-1107(1995) involves the Chief of Staff of the President's Office as the victim and an opposition legislator as the defendant.

[20] Article 310 of the Criminal Code of the Republic of China (Taiwan): "Section 1: A person who states or reiterates a fact injuring the reputation of another with an intent to address the pubic, commits the offense of slander and shall be sentenced to imprisonment for not more than one year, short-term imprisonment, or a fine of not more than five hundred yuan. Sec. 2: A person who by circulating a writing or drawing commits an offense specified in the preceding section shall be sentenced to imprisonment for not more than two years, short-term imprisonment, or a fine of not more than one thousand yuan. Sec.3: A person who can prove the truth of the defamatory fact shall not be punished for the offense of defamation unless the fact concerns private life and is of no public concern."

Transportation, Cai Zhaoyang(蔡兆陽). Lin was sentenced to four months and Huang five months in prison.[21] Since libel is a misdemeanor and the sentences were below six months, both convicts could pay monetary fines in exchange for absence from prison.

The report that resulted in their conviction was published in the Business Weekly magazine on October 28, 1996. In the article, Lin Yingqiu reported that one certain deluxe residential tower in Taipei accommodated several ministers. The new Minister of Transportation Cai Zhaoyang, who lived in that tower, expended 2,780,000 TW dollars (about 90,000 US dollars) from a governmental fund to renovate the interiors of his new residence. The amount was deemed excessively large, and the report created a negative image of Cai as leading a luxurious life-style and being unscrupulous with public funds. The report was proved to be wrong in court, based on convincing evidence of official documents provided by Cai with respect to his renovation of residence. The actual expenditure was only one-tenth of the amount reported.

Lin's article was initially based on a legislative report[22] containing Legislator Zhu Huiliang's (朱惠良) questioning of possible misuse of government fund. Legislator Zhu questioned that one unnamed minister expended 2,780,000 TW dollars to renovate his residence. Lin followed the lead and asked Legislator Zhu which minister she referred to. But Zhu refused to identify who it was. Lin continued to interview Zhu's aide. Zhu's aide refused to give any name, either. But Lin was relentless. She offered to call all ministers' names and requested Zhu's aide to passively identify the one in question. When she called the name of Cai Zhaoyang, Zhu's aide laughed loudly and said nothing further. Lin interpreted the laugh as a reference to Cai. To pursue the clue, Lin interviewed a neighboring resident, one Mr. Shaw, in the particular residential tower where Cai lived. Lin asked Mr.

[21] Taiwan High Court Criminal Decision, No.90-Shangengyi（上更易）-533. The following account of the case is extracted from this court decision.

[22] The legislative report is official documentation of the legislative proceedings, published by the Legislature's administrative department.

Shaw whether any minister that he knew of was renovating the residence. Mr. Shaw answered that the minister whom he knew better was not doing any renovation, and that if there was anyone doing renovation, it may have been Mr. Cai. Based on these investigations, Lin concluded that it was Mr. Cai that expended the amount of money first mentioned by Legislator Zhu to renovate his residence.[23]

It is true that Lin's investigative work was unimpressive. She believed the legislative record from the very beginning. All her subsequent works were aimed to prove what she already believed to be true. We do not know very well why she was so credulous of Legislator Zhu's statement that she did not seriously entertain the possibility that perhaps nobody expended the amount of money she suspected at all. One possible reason was Legislator Zhu's unblemished reputation of professionalism and statesmanship. Zhu was esteemed highly enough as a legislator to have later been chosen by the DPP breakaway Xu Xinliang(許信良) as his running mate for president and vice president in 2000.[24] Nonetheless, even though she would have been found negligent in a tortious libel case, if she was tried under the American doctrine of actual malice, she would probably have been found not guilty.

The other petition considered by the Grand Justices came from a case, in which the prominent NGO, Judicial Reform Foundation, was brought to the court upon private prosecution of the defamed.[25] The libel concerned a public report published by the Foundation, in which all judges of the Taipei District Court were ranked based upon a comprehensive survey of more than two thousand practicing attorneys. The ranking was lauded as a path-breaking attempt initiated by the civil society to push for reform of the judicial system, which in the past was unable to filter out incompetent and

[23] Judicial Reform Foundation, Dafaguan Geige Shuofa！(大法官，給個說法！)[The Grand Justices, You Owe Me an Account!] 260-2(Taipei: Business Weekly Publications, 2003).

[24] However, Xu and Zhu were never considered a significant pair of contenders in the race. They ended up with only 0.63 percent of the vote in the presidential election in 2000.

[25] The petitions that led up to I.509 is available on the website of Taiwan's Judicial Yuan. http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=509 (Last visited on Sep.12, 2012).

corrupt judges under the authoritarian clientele system.[26] The private prosecutors are six judges, who ranked the bottom by receiving points under 60. Simply put, the flunked sued the evaluator. This case was actually not difficult to dispose of, even under Taiwan's draconian criminal defamation provision. There was a provision in Article 311 of the Criminal Code that allows privilege for "reasonable comment on matters open to public scrutiny". But Judge Chen Zhixiang(陳志祥), a young reform-minded judge, decided to suspend the case and petition to the Grand Justices. Judge Chen's intention was clear. He held serious doubts about the constitutionality of the criminal defamation provisions, and he wanted to use the seemingly easy case to highlight the necessity of de-criminalizing libel.

Both petitions made constitutionality of criminal defamation the main issue. And their petitions were welcomed and supported by prominent NGOs, such as the Taiwan Association for Human Rights, Judicial Reform Foundation, and Association for Taiwan Journalists.[27] Moreover, support was voiced by the legal profession. Taipei Bar Association made de-criminalization the main theme in their Taipei Bar Journal in February 1998. The Taipei Bar expressed their strong support by publishing as the editorial statement an article written by the eminent law professor, Fa Zhibin, who was a constitutional scholar and a hot candidate for Grand Justice nomination. The article was entitled, "De-criminalization of Libel Is an Imperative".[28] Meanwhile, a handful of reform-minded judges were already defying statutory constraints by citing the American doctrine of "actual malice" to give more room to public discourse.[29]

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[26] Wang Chin-shou (王金壽). Taiwan de Sifaduligaige yu Kuomintang Shicongzhuyi de Bengkui (臺灣的司法獨立改革與國民黨侍從主義的崩潰)[Judicial Independence Reform and the Breakdown of the Kuomintang Clientelism in Taiwan], 10(1) TAIWAN POLITICAL SCIENCE REVIEW 103-162 (2006).

[27] Judicial Reform Foundation, *supra* note 23, at 262.

[28] Fa Zhibin(法治斌), Feibangzui chuzuihua shizaibixing (誹謗罪除罪化勢在必行)[Decriminalization of Defamation Is an Imperative], 1998 TAIPEI BAR JOURNAL 2-3 (1998).

[29] For example, Taipei District Court Criminal Decision, No.87-Zi(自)-528(1998), 87-Yi(易)-2411(1999), 86-Zi(自)-826(1999); Kaohsiung District Court Criminal Decision, No.86-Zi(自)-436(1998) ; Taitung District Court Criminal Decision, No.88-Yi(易)-242 (2000). Regarding English citation format of Taiwan's court decisions, particularly the lower courts, there is no particular format that commands consensus. I avoid the Bluebook style, because it is inconvenient and out of touch with current common practice of Taiwanese lawyers. The basic idea of the Bluebook is to ask authors to refer to bound editions of the court decisions in the jurisdiction of Taiwan. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 404-6 (19th ed., 2010). However, not all lower court decisions are bound

Nearly two years after accepting the petitions, the Constitutional Court issued I.509 on July 7, 2000.[30] The Court indicated that freedom of expression is a basic right of fundamental importance. Then The Court articulated that based on Article 11 of the Constitution, which prescribes "The people shall have freedom of speech, teaching, writing and publication," the state shall accord freedom of speech "the maximum degree of protection", so that it furthers individual self-realization, communication of ideas, truth-seeking and checking of political and social activities. The clarity and strong language of this opening would later prove to be influential on some of the lower courts' rationale, which gave more weight to free speech when balancing it against the right to reputation.

This grandiloquent opening is then followed by a cautious qualification. The Court rejected the claim that decriminalization is mandated by the Constitution. The Court explained that despite the fundamental importance of freedom of speech, it is subject to necessary restrictions in accordance with Article 23 of the Constitution, which allows restriction of basic rights by law only for the purposes of "preventing infringement upon the freedom of other persons, averting imminent crisis, maintaining social order or advancing public welfare."[31] Under heavy influence of German constitutional jurisprudence, the Court conventionally uses the principle of proportionality in balancing the basic rights and the restrictive clauses. However, in this case, the Court recognized that the issue was not

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into volumes. Moreover, as the Judicial Yuan has developed a public internet database covering all court decisions after 1998, which is easily accessible through its website, now it is common practice for Taiwanese lawyers to directly search court decisions through the database. It is now rare for Taiwanese lawyers to make reference through bound volumes. The problem with making reference through the web edition of court decisions, however, is that the decisions are not paginated by the Judicial Yuan. Problems therefore would arise when reference has to be made to a particular sentence out of a long decision. There is no clear solution to this problem. Nevertheless, it does not create serious difficulty in practice, because the web edition makes it quite easy to search the referenced sentence through the search function of the web browser. My format of citation of Taiwan's court decisions is aimed to make it easy for interested readers to search the Judicial Yuan's database. My format contains all the information needed to retrieve the decision through the database. The website (in Chinese) of the database is: http://jirs.judicial.gov.tw/Index.htm (Last visited April 11, 2013)

[30] English versions of all Taiwan Constitutional Court Interpretations can be obtained at the website: http://www.judicial.gov.tw/constitutionalcourt/EN/p03.asp (last visited, May 23, 2012) In this article, where the official English translation is unsatisfactory, I use my own translation.

[31] The full text of the Constitution of the Republic of China (Taiwan) is available in English from the Judicial Yuan's website. http://www.judicial.gov.tw/constitutionalcourt/EN/p07_2.asp?lawno=36 (Last visited on Sep.12, 2012).

really about restricting basic right in the name of public interests. The issue involves a conflict between two basic rights, namely the right to speak freely and the right to reputation. To balance the two rights, the Court engaged in *ad hoc* balancing. The Court stated that criminal defamation is a necessary measure to protect individual right to reputation, privacy or other public interests. However, the reasons for this judgment are not entirely clear. The Court reasoned that to determine whether decriminalization is constitutionally mandated, it is necessary to consider factors such as civic culture of law-abidingness, respect for other people's rights, functions of tort damages, the degree of professionalism of media practitioners and the efficacy of journalistic professional sanctions. After enumeration of the factors, The Court came directly to the conclusion that, "given the current situations regarding the above factors, it is not necessarily the case that criminal defamation is unconstitutional."[32] Interestingly, the Court continued to reason that if infringement of reputation can only be remedied by monetary compensation, it follows that those who are wealthy can buy their right to libel, and it cannot be the intention of the Constitution to let this happen. This reason makes sense, because under Taiwan's tort system there is no punitive damages with respect to tort of defamation.

The Court declined the petitions' invitation to find criminal defamation as in itself unconstitutional, but the Court balanced its decision by giving the criminal defamation provisions a new interpretation. There are two significant holdings. The first concerns who bears the burden of proof to prove that the defamatory statement is true. The first sentence of Paragraph 3, Article 310 of the Criminal Code provides that "A person who can prove the truth of the defamatory fact shall not be punished for the offense of defamation unless the fact concerns private life and is of no public concern."[33] Before the Interpretation, this provision was interpreted as imposing the burden of proof solely on the defendant. The Court reallocated the burden and articulated that "the provision does not exempt the court from

[32] The official English translation of I.509 is available on the following webpage. http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=509 (Last visited on Sep.12, 2012).

[33] The English translation of the Criminal Code of Republic of China (Taiwan) is available through the Laws & Regulations Database of the Republic of China created by the Ministry of Justice of Taiwan. http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=C0000001(Last visited on Sep.12, 2012).

its duty of discovering the truth." Second, the Court held that, "the defendant shall be found not guilty, when he/she produces sufficient evidence to show that he/she has substantial reasons to believe that the statement was true at the time of dissemination."[34]

The phrase "substantial reasons to believe that the statement was true" has become the definitive holding of the Interpretation.[35] It relieved the defendant from the oftentimes unbearable burden of proving the statement in question to be true. However, this phrase is vague with respect to the degree of fault required of the defendant. Without further specification, it is not clear whether it is tantamount to gross negligence, negligence, or the American doctrine of "actual malice", defined as "knowledge of falsity or reckless disregard of truth or falsity".[36] The vagueness was very likely deliberate. In two significant and much-cited concurring opinions of this Interpretation, Justice Su Jyun-Hsiung (**蘇俊雄**)and Justice Wu Geng (**吳庚**) both advocated, apart from the majority opinion, doctrines highly similar to the "actual malice" doctrine, even though they did not use the phrase "actual malice" to label their opinions.[37] In his concurring opinion, Justice Su wrote, "as long as the defendant did not fabricate the false statement, or the defendant uttered the false statement without gross negligence or recklessness, the defendant is relieved from criminal punishment."[38] Justice Wu's key phrase was, "knowledge of falsity or significant recklessness with respect to the truth or falsity".[39] One may then

[34] I.509, *supra* note 32.

[35] Whether this holding was inspired by any foreign law is unknown, since the Court did not provide citations or make any reference. However, it does roughly echo its Japanese counterpart. In1986, the Japanese Supreme Court ruled in *Hoppo Journal Co. v. Japan* that in criminal defamation cases, "even if the truth is not proved, when there is good reason for the perpetrator of the act to have mistakenly believed that the article was true, the foregoing act should be construed to be not malicious or negligent." See KROTOSZYNSKI, *supra* note 8, at 156-8 (for discussion), 264 n.154 (for translation of the holding).

[36] New York Times v. Sullivan, 376 U.S. 254, 280 (1964).

[37] One of Taiwan's leading free speech scholars, late Professor Fa Zhibin, published an article immediately after I.509 was issued. In it, he pointed out the similarity between the two Justices' opinions and the American actual malice doctrine. See Fa Zhibin(**法治斌**), Baozhang Yanlunziyou di Chilaizhengyi: Ping Sifayuan Dafaguan Shizi di 509 Hao Jieshi (**保障言論自由的遲來正義：評司法院大法官釋字第509號解釋**)[Delayed Justice for Free Speech: Reviewing Interpretation No.509], 65 THE TAIWAN LAW REVIEW 152 (2000).

[38] Justice Su's concurring opinion is available in Chinese (no official English translation available) in the attachment contained at the same webpage of the English translation of I.509. *I.509, supra* note 32.

[39] Justice Wu's concurring opinion is also available in Chinese (no official English translation available) in the attachment contained at the same webpage of the English translation of I.509. *I.509, supra* note 32.

legitimately wonder: why did not the two concurring opinions prevail? From the whole reasoning of the Interpretation, it is probable that the Court were suspicious of the social effects of such highly speech-protective approach to defamation. From the grounds upon which the Court refused to decriminalize libel, it is detectable that the Court held serious doubts about the maturity of the journalistic profession and other truth-seeking social institutions. It is then not unreasonable to infer that the same doubts were in play, when the Court were considering whether to adopt a doctrine as speech-protective as the "actual malice". Yet the Court did not want to rule out the potentiality of adopting such a doctrine. Therefore, it is very likely that the Court deliberately left the question for the lower courts to solve in a case-by-case manner.

In the wake of the significant Interpretation, two difficulties arose. The first is the meaning of the doctrine "substantial reasons to believe that the statement was true". The second is whether and to what extent the Interpretation can be applied to tort of defamation, given that I.509 was addressing constitutionality of criminal defamation alone. Leaving aside all doctrinal technicalities of Taiwanese tort and criminal defamation law, these two questions can be rephrased into one simple question: what is the degree of fault required of the defendant with respect to false or unverifiable defamatory statement, in tort and in criminal defamation? [40]

B. A Brief Account of Taiwan's Political Polarization After 2000

To understand how Taiwan's courts responded to I.509 in the following decade, it is necessary to come to grips with Taiwan's major political development after 2000. In 2000, the same year I.509 was

[40] Taiwan's legal academia in the aftermath of I.509 was preoccupied with sorting out whether I.509 applies to tort cases and how. The discussion became increasingly unfruitful and was mired in doctrinal technicalities. I published an article for domestic audience in 2006 to clarify the conceptual mess, which turned out to be widely cited. See Jimmy Chia-Shin Hsu (許家馨), Shizi 509 Hao Jieshi Yingfoa Shiyung yu Minshi Anjian (釋字第509號解釋應否適用於民事案件？)[Should Interpretation No.509 Be Applied in Tort Cases?] 132 THE TAIWAN LAW REVIEW 102 (2006).

delivered, the then opposition Democratic Progressive Party (DPP) candidate Chen Shui-bian (陳水扁) won the presidential election. This electoral victory is a historic watershed of Taiwan's political development.[41] After half a century in power on Taiwan, and after eight decades of continuous rule at the peak of political control, the Kuomintang (KMT) lost power in a free and fair presidential election. It closed the epoch of one-party dominance and set forward a period of party realignment and political-economic power rearrangement.[42]

Yet all great promises come with great dangers. Awaiting the historic executive power turnover was a Legislative Yuan still dominated by a KMT majority. On the eve of the presidential inauguration in May 2000, the KMT retained 115 seats, making up 52% of a Legislative Yuan of 221 seats. Chen Shui-bian's DPP had only 65 seats (29.9 %). The rest was claimed by James Soong's (宋楚瑜) People First Party (PFP) (17 seats/ 7.7%), New Party (10 seats/4.5%), and independents (13 seats/5.9 %).[43] For many, Chen's victory was not a power alternation like that in any other normal functioning democracy. Since the DPP has inscribed Taiwan's *de jure* independence in its platform,[44] its takeover of executive power was a devastating blow to a Chinese statehood long embraced by the KMT, which sought ultimate re-unification with China. The upsetting of what the country stood for caused grave unrest and cognitive dissonance among firm KMT supporters.[45]

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[41] Larry Diamond, *Anatomy of an Electoral Earthquake: How the KMT Lost and the DPP Won the 2000 Presidential Election*, In TAIWAN'S PRESIDENTIAL POLITICS: DEMOCRATIZATION AND CROSS-STRAIT RELATIONS IN THE TWENTY-FIRST CENTURY 48-87 (Muthiah Alagappa ed., 2001).

[42] Yun-han Chu, *Democratic Consolidation in the Post-KMT Era: The Challenge*, In TAIWAN'S PRESIDENTIAL POLITICS: DEMOCRATIZATION AND CROSS-STRAIT RELATIONS IN THE TWENTY-FIRST CENTURY 88 (Muthiah Alagappa ed., 2001).

[43] *Id*, at 106.

[44] For the DPP platform regarding Taiwan sovereignty, see the DPP English website: http://dpptaiwan.blogspot.tw/2011/03/establishment-of-sovereign-and.html (Last visited on Sep.12, 2012).

[45] The deep frustration of KMT supporters was most vividly seen at their fierce demonstration in front of the KMT headquarter from the night the election result was announced on March 18, 2000 until the President Lee Teng-Hui resigned his KMT chairmanship a week later on March 24, 2000. As Denny Roy aptly observed, the KMT rank-and-file supports, who were mainly Mainlanders, "were expressing their frustration over the Taiwanization of politics and the loss of the KMT's old agenda, a reversal of countless previous occasions when Taiwanese gathered in the streets to protest Mainlander control of the island's destiny." Denny Roy, *supra* note 18, at 230-1.

Not surprisingly, the DPP government met with antagonistic opposition. To make matters worse, in September 2000 President Chen called for a sudden halt of the ongoing construction of the fourth nuclear power plant. This decision infuriated the opposition and further caused the KMT and its splinter party People First Party (PFP) to mend their past rivalry and form an even more formidable opposition alliance. In March 2003, one year away from the 2004 presidential election, the leaders of the two major opposition parties, Lien Chan of the KMT and James Soong of the PFP, announced their joint ticket to run for the president and the vice president. Having mended past rivalry through forming the opposition alliance, Lien and Soong made the best possible bid, since their votes together in 2000 would have defeated Chen Shui-bian by 21 percent of the total votes. Indeed, when Lien and Soong announced their joint bid, they enjoyed a comfortable lead in opinions polls of at least 10 percent over the incumbent Chen and Lu. It is explicable not only by the last election result, but by Taiwan's economic recession. For the first three years of the DPP government, the Taiwanese economy suffered from the worst recession since the 1974 energy crisis. Unemployment rose rapidly from 2.92 percent to over 5 percent, foreign direct investment fell, and average economic growth was a paltry 2 percent.[46] Naturally, Lien and Soong were not hesitant to capitalize on the economic downturn for campaign purpose. Their comfortable lead lasted for six months, however, before it declined gradually.

As a counter campaign strategy, the DPP chose Taiwanese national identity and Taiwan's claim to sovereignty against China as the major campaign themes. This strategy concretized in the DPP's bids for a national referendum bill and the first-ever national advisory referendum to be held on the same day of the election. The referendum would be on questions regarding how Taiwan should respond to China's military threats. This strategy worked. The DPP successfully avoided its weak performance in the economy and set an alternative tone of the remaining campaign. On October 30, 2003, the DPP

[46] Tun-jen Cheng and Da-chi Liao, *Testing the Immune System of a Newly Born Democracy: the 2004 Presidential Election in Taiwan,* 2(1) TAIWAN JOURNAL OF DEMOCRACY 81, 83-4 (2006).

held a huge rally in Kaohsiung, a major city in southern Taiwan and the DPP's stronghold, to support the referendum. Chen's popularity surged, gradually closing his lag behind Lien and Soong. On February 28, 2004, the DPP held a successful island-wide mass rally. Millions of supporters made a human chain around Taiwan, symbolizing their determination to guard Taiwan against China. Ten days before the election, some polls showed that Chen already gained a minor lead, while others showed Lien kept a slight upper hand. Overall, the polls showed that in the last stage of campaign, the race was extremely tight.

On March 19, 2004, one day before the election, while standing in a jeep cruising a southern Taiwan city as a final campaign effort, President Chen and Vice President Lu were shot. Both were injured but not fatally wounded. The election went undeterred, but a "National Security Protocol" was activated to raise the level of military alertness. The next evening, the election result came out. Chen and Lu won by a razor-thin margin of 0.22 percent of the vote.[47] To the surprise of many, at the KMT headquarter facing thousands of frustrated supporters, Lien Chan refused to acknowledge defeat and charged that the election was "unfair". The frustrated crowds were aroused by his provocative speech. The pan blue camp questioned whether the shooting incident was staged by Chen himself in order to gain sympathy votes. To them, the shooting occurred at a timing too opportune; the crime scene of the shooting seemed to have been compromised; the activation of the "National Security Protocol" unfairly grounded too many military personnel—presumably more pan-Blue than pan-Green in their partisan preference—from the ballot booths; the unusually high number of invalid ballots signals possible fraudulent votes.

Closely fought elections intensify partisan polarization.[48] The polarization syndrome in Taiwan's

[47] President Chen and Vice President Lu won 50.11%, and opposition contenders Lien Chan and James Soong won 49.89% out of the total of almost thirteen million votes (12,914,422 votes). The election result details are shown at the website of Taiwan's Central Election Committee. http://db.cec.gov.tw/vote3.asp?pass1=A2004A0000000000aaa (Last visited, 2012/9/05).

[48] Laurence Whitehead, *The Challenge of Closely Fought Elections*, 18(2) JOURNAL OF DEMOCRACY 18-22 (2007).

2004 presidential election reached unprecedented intensity, not only because of dubious incidents such as the shooting on March 19, but because it took place against a backdrop already under great stress. In the 90s Taiwan's political and social cleavage structure was cut across by both socioeconomic issues and national identity conflicts. As Tse-min Lin and Yun-han Chu forcefully demonstrated, by 2003 the national identity or "blue v. green" conflict, which features blue(KMT and PFP) as pro-Unification with China and green (DPP and TSU/Taiwan Solidarity Union) as pro-Taiwan independence, has belittled all other issues and acquired dominant salience.[49] Before the election, radically negative campaigning conducted by the contending camps and media critics fueled the already serious mutual distrust to such a degree that on the part of the blue camp there was already a "foundation of deeply negative emotion, discontent, and the conviction that Chen was willing to go to any lengths to get what he wanted."[50] Lien and Soong's rejection of the election results and their charge of unfairness in the election touched off an outbreak of protests and riots that shook Taiwan's fragile democracy.

Immediately after Lien and Soong announced their refusal to admit defeat and their determination to pursue legal course to invalidate the election, crowds began to gather in front of the prosecutorial offices in several major cities calling for immediate recount of votes. Despite Lien and Soong's professed intention to take the legal course, street demonstrations, which may have been spontaneous at first but were later encouraged by pan-blue leadership, became part of their strategy in the following negotiation. In Kaohsiung, with hundreds of pan-blue supporters around, a campaign truck with the PFP legislator Qiu Yi shrieking into a megaphone atop it rammed the iron gate of the prosecutorial office. In Taipei, a crowd of several thousands gathered first outside the KMT headquarters, and then the Presidential Palace.

[49] Tse-min Lin and Yun-han Chu, *The Structure of Taiwan's Political Cleavages Toward the 2004 Presidential Election: A Spatial Analysis*, 4(2) TAIWAN JOURNAL OF DEMOCRACY 133-154 (2008).

[50] OLWEN BEDFORD AND HWANG KWANG-KUO, TAIWANESE IDENTITY AND DEMOCRACY: THE SOCIAL PSYCHOLOGY OF TAIWAN'S 2004 ELECTIONS 125 (2006).

Crisis situations often give rise to rampant rumors, since official news sources are often unable to catch up with the exploding public demands for information.[51] In such a divided society as Taiwan, at a time approaching the end of an overwhelmingly negative campaign, the information flow and dialogue between the two highly mobilized segments of society came to a near-complete halt.[52] As a result, rumors about the shooting burst out along the "blue vs. green" division immediately after the shooting happened in the afternoon on March 19. Pan-blue radio station hosts intimated or outright stated that Chen had staged the shooting to win sympathy votes. The most noted remark in this vein was made by Sisy Chen, a famous pro-pan-blue publicist and popular talk show host. Through electronic news media, she publicly accused Chen of faking his wounds. She also accused that the national security system was involved in the staging, based on a call she claimed to have received from an anonymous nurse working in the hospital where President Chen and Vice President Lu were rushed to. In contrast, underground pro pan-green radio stations, which were concentrated in southern Taiwan, speculated that the pan blues had cooperated with the Chinese to shoot Chen and Lu.

The election result only aggravated the already-rampant rumor mongering. Evidence offered by administration officials and investigators did nothing to assuage pan-blue suspicions, which were publicly expressed in partisan talk shows, op-ed, print and electronic news analysis. For example, the Criminal Investigation Bureau proved through DNA evidence that the blood on the bullets belonged to Chen and Lu. Physicians gave detailed descriptions to the media of Chen's 11cm wound and 14 stitches and the vice president's knee wound. Though both logically would have disproved the rumors that Chen faked his wounds, the rumors did not subside. The opposition's distrust ran so deep and rumors were so rampant, that President Chen decided to invite the heads of the five Yuans (branches of government) to his office and have them personally witness the wound on his abdomen, a humiliating

[51] TAMOTSU SHIBUTANI, IMPROVISED NEWS: A SOCIOLOGICAL STUDY OF RUMOR 37(1965).

[52] Tun-jen Cheng and Da-chi Liao, *Testing the Immune System of a Newly Born Democracy: the 2004 Presidential Election in Taiwan,* 2(1) TAIWAN JOURNAL OF DEMOCRACY 81, 87(2006).

act for a head of state.[53]

The blue camp's rejection of the presidential election result eventually would have to be resolved by the courts. And by the spring of 2005, all election litigations came to an end in the DPP government's favor, as the Supreme Court overruled the blue camp's final appeals. Though the blue camp was intensely disaffected by the ruling, the ruling stood to test, because it was based on a fair and swift comprehensive recount of the ballots.[54]

In the summer of 2005, even though the DPP administration appeared gradually off the hook from the election controversies, it soon got mired in a snowballing of corruption scandals. What touched off the chain reaction was the dramatic revelation by opposition legislators and the news media, of the Deputy Secretary-General of the President's Office Chen Zhenan's (**陳哲男**) possible involvement in briberies. Chen Zhenan's scandals sent a shock wave throughout the society. Although rumors of high level corruption in the Chen administration were occasionally discussed in pro-pan-blue talk shows and already rampant among pan-blue supporters, to the rest of the society the DPP maintained a relatively clean image, earned throughout the years as an active opposition party combating the corruption of the authoritarian KMT. Chen Zhenan's scandals decisively shattered the image, because his close relations with the president suggested likelihood that the DPP government's corruption could be more prevalent and even systematic than expected.

Not before long more striking scandals were revealed. In early May 2006, President Chen's son-in-law, Zhao Jien-ming (**趙建銘**) and Zhao's father were exposed by opposition legislators to have

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[53] Li Haochung(**李濠仲**), Wuyuanyuanchang Chashu Bianliangdupi Lochiangshang(**五院院長茶敘扁亮肚皮露槍傷**)[Teatime with Heads of Five Yuans Chen Shui-bian exposed abdomen revealed wound], United Evening News, March 24, 2004, at 3.

[54] See Weitseng Chen and Jimmy Chia-Shin Hsu, *Horizontal Accountability and the Rule of Law: The Judicial Yuan and the Control Yuan*, In DEMOCRATIC CONSOLIDATION IN TAIWAN (Larry Diamond, Yunhan Chu and Eric C.H. Yu ed., forthcoming).

involved in insider-trading of securities. The prosecutorial office swiftly began investigation. Within weeks the prosecutors judged that evidence for Zhao's insider trading was sufficiently robust that they requested detention of Zhao, and the court granted the detention.[55] The detention of Zhao was a blow to President Chen serious enough to motivate the opposition parties to begin mobilization for an initiative of recalling the president.

Along with Zhao's insider trading, another scandal even more devastating to President Chen was gathering steam. The First Lady Wu Shu-chen (**吳淑珍**)was first exposed by an anonymous informant to have used millions-of-dollars worth of vouchers issued by a famous department store to purchase luxury jewels. Opposition legislators implicated that the vouchers were obtained in exchange for her interference in the department store's ownership change.[56] In June, it was exposed that the First Lady used receipts collected from multiple sources to embezzle the "state affairs fund", which was a special fund for the president's discretionary use. Prosecutors began a comprehensive investigation of President Chen's appropriation of the state affairs fund. [57] Meanwhile, more and more rumors circulated about how the First Lady allegedly interfered in merger and acquisition deals of major financial institutions through which controlling shares of state-owned banks or enterprises fell one by one into the hands of business tycoons, by whom the first family was offered extremely expensive jewelry and watches as gifts for their son's wedding. All these exposures of scandals led to mobilization of blue camp supporters and resulted in huge demonstration in front of the Presidential Palace, known as the Red Shirt Army movement. The demonstration demanded President Chen to step down. The demand eventually remained unanswered, mainly because President Chen was still able to gather

[55] Su Weirong(**蘇位榮**), Zaojienming Sutejian Shouya(**趙建銘蘇德建收押**) [Zao Jien-ming and Su Te-jian Detained], Economic Daily News, May 26, 2006, at A4.

[56] Dong Jiebai(**董介白**), Sogoliquanan Guenshueqiu Beijian Jinqi Qing Wushuzhen Shuomin (Sogo**禮券案滾雪球 北檢近期請吳淑珍說明**) [SOGO Vouchers Case Snowballing Taipei Prosecutors Soon to Request Explanation from the First Lady], United Evening News, April 14, 2006, at 4.

[57] Wang Shengli and Wang Fuqi(**王聖藜、黃福其**), Guowujiyaofei Gaojianshu Fenanzhencha(**國務機要費 高檢署分案偵查**) [State Affairs Fund, High Prosecutorial Office Begins Investigation], United Daily, July 21, 2006, at A1.

support from firm pan-green supporters, who did not really buy into the corruption accusation.[58]

All the political strife in President Chen's final days in office was concluded with the 2008 presidential and legislative elections. The KMT won landslide victories in both the presidential and legislative elections in 2008, putting an end to the sharp clashes between the executive and the legislative branches of government. Even though the politics remains highly polarized, the political struggle between the KMT and DPP would be much less consequential.

To the shock and dismay of his supporters, after President Chen Shui-bian stepped down, it was gradually revealed that he and particularly his wife Wu Shu-chen were involved in taking illegitimate political donations and bribes. On December 12 of 2008, former President Chen Shui-bian was indicted on multiple corruption charges.[59] These charges include embezzlement of special presidential funds, money laundering, and briberies in major governmental construction and land development projects. According to the indictment, the amount of money engrossed by Chen and his wife totaled more than US$ 30 million. In addition to Chen, the dozen indicted included his wife, former close aides, family friends, and retired government officials.

II. THE RISE AND FALL OF THE ACTUAL MALICE DOCTRINE IN THE SUPREME COURT CIVIL PANELS

A. Political Polarization and the Adoption of Actual Malice

In the immediate aftermath of I.509, during the first three years, the Supreme Court Civil Panels were given chances only to decide on cases involving private citizens. In Decision No.90-TaiShan-646, which

[58] For a succinct account of Taiwan's political development, see Yunhan Chu, *Taiwan in 2006: A Year of Political Turmoil*, 48 ASIAN SURVEY 44-51 (2007).

[59] Wang Shengli and Dong Jiebai(王聖藜、董介白), Biansidaanzhenjie Bianqisu Zuiyanzixing (扁四大案偵結 扁起訴 最嚴之刑) [Investigation of Chen's Four Cases Concluded, Chen Indicted, The Prosecutor Plead for the Most Severe Punishment], United Evening News, Dec.12, 2008, at A1.

involves disputes between private citizens arising out of breach of contract, the Second Civil Panel of the Supreme Court set the basic tone of the fault standards in tort of defamation cases. It stated that, in accord with the general structure of tort in Taiwan's Civil Code, negligence shall be the fault standard in defamation cases. The implication is clear. No matter how I.509 shall be interpreted, this decision decided to fend tort of defamation from I.509's influence. The seven Civil Panels of the Supreme Court gathered in June 2003 and passed a resolution to make Decision No.90-TaiShan-646 an official "precedent'.[60] By turning a decision into a precedent, the several Supreme Court Civil Panels achieved coordination on issues that may cause division, and its binding force upon the lower courts is significant.

However, the problem with the precedent is that it grew out of a period in which no significant political cases entered into the Supreme Court. The standard adopted in the precedent was not tested by cases of significantly high public concern. Not long after adoption of the precedent, the Third Civil Panel had to decide on the most politically significant tort of defamation case to enter the Supreme Court since I.509. The plaintiff was the then Vice President Annette Lu (呂秀蓮) and the defendant was a prominent news magazine *the Journalist.* The Journalist published an article accusing Lu of being the source of a scandalous gossip about President Chen Shui-bian's extra-marital affairs. The Journalist

[60] Standing in the civil law tradition, Taiwan's legal system does not recognize the existence of the doctrine of *stare decisis.* It means that judicial decisions are not officially binding on the lower courts. MARY ANN GLENDON, PAOLO G. CAROZZA AND COLIN B. PICKER, COMPARATIVE LEGAL TRADITIONS 245 (2007). The sources of law contain only the constitution, statutes, regulations, and customs. JOHN HENRY MERRYMAN AND ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 20-6 (2007). However, in practice, in order to resolve contradictions among their multiple panels or among lower courts, Taiwan's Supreme Court and Supreme Administrative Court developed a practice to reach consensus upon controversial legal issues. The two Supreme Courts would first select representative case decisions from their own archives by five judges and then have these decisions discussed by the conferences of the several panels. When the conferences resolve that certain decisions shall be deemed as "precedents", the President of the Supreme Court or the Supreme Administrative Court would report the "precedents" to the Judicial Yuan and publicize them. The "precedents" have tremendous *de facto* binding force on the lower courts. Contradiction with the "precedents" by the lower court decisions could constitute reasons for appeal to the Supreme Court, and could result in remand. It should be noted that the "precedent" as passed by the conferences does not encompass the whole text of the original decision. Rather, it is the key holding that is made into the "precedent". As the key holding appears almost always in abstract sentences stripped of case facts, the "precedent" functions much more like legal rules than like distinguishable precedents in the common-law sense.

based the report upon testimony from a prominent news columnist, Yang Zhao(楊照), who then served as one of the editors of *the Journalist*. The editorial board in several meetings questioned Yang but Yang insists on the truth of the fact that Vice President Lu did personally tell him over the cell phone about the scandal. Based upon their trust of Yang's integrity, the other editors eventually decided to print the report, even though the reporters' investigation in other directions produced little evidence to corroborate Yang's assertion. This case received enormous attention both from the press and the legal profession. Most of the press hoped, in professional alliance with the Journalist, to see direct influence of I.509 on the tort of defamation, to the effect that fault standard would be further relaxed from negligence.

On April 29, 2004, the Third Civil Panel delivered a meticulously written decision. It decided to stay on the course set up by the precedent, namely that the fault standard shall be negligence. It explicitly distinguished tort of defamation from I.509, which was only implicated in the Precedent No.90-Taishan(台上)-646. However, the decision was innovative in that it recognized the constitutional concern of press freedom involved in the case. To meet constitutional concern, the Third Panel reasoned that the duty of care involved in negligence should be "more or less lessened".[61] But what does "more or less lessened" mean? The Third Panel reasoned that "as long as the press report was preceded by reasonable investigation, and the investigation produced so much evidence that gives the reporter enough reason to believe in the truth of the statement", then tort liability shall not be imposed. Under this test, the Third Panel judged the defamatory statement was untrue and that the Journalist did not fulfill its duty to conduct reasonable investigation, hence ruling for the plaintiff. The significance of Decision 93-Taishan(台上)-851 (*Annette Lu v. the Journalist*)[62] rests with its meticulous attempt to square

[61] Taiwan High Court Civil Decision 93-Shanyi(上易)-851 (2004).

[62] It is the convention of Taiwan's legal profession to refer to a case by its case number. However, to foreign readers, reference by case number could cause serious confusion. Instead, in this article, where necessary, I refer to a certain decision by the names of the plaintiff and the defendant.

the Precedent's determination of negligence as the proper fault standard with constitutional concern for speech or press freedom.

However, whether *Annette Lu v. the Journalist* has succeeded in reconciling constitutional values and reputation interests in politically charged cases remained to be seen. Five months after the Third Civil Panel delivered the decision, the Fourth Panel delivered Decision 93-Taishan-1979 that flatly contradicted with the Precedent 90-Taishan-646 and *Lu v. the Journalist*. The plaintiff Chang Chunhong was a prominent DPP politician, and the defendant Li Ao was a famous author strongly affiliated with the Blue Camp. In a solo TV talk show Li Ao accused Chang for conspiring with President Chen Shui-bian to shut down the TV channel on which he hosted the talk show and for heartlessly abandoning his wife. Chang sued for tort of libel. Surprisingly, in this case the Fourth Civil Panel deviated from the course determined by the Precedent. Nor did the Panel consider the fine-tuning attempted by the Third Panel in *Lu v. the Journalist* workable. It not only embraced I.509 but went beyond it. While I.509 did not adopt the actual malice doctrine, the Third Panel explicitly took the doctrine in and abandoned negligence. As a result, the Third Panel ruled in the defendant's favor. Decision 93-Taishan(台上)-1797, *Chang Chunhong*（張俊宏） *v. Li Ao*(李敖), was significant, because it was not just one anomaly. In the ensuing two years, the Fourth Panel delivered a series of decisions that stayed on the deviant course initiated by Decision 93-Taishan(台上)-1797. Until early 2007, no other Civil Panels delivered significant decisions dealing with the fault standard regarding falsity. In other words, the actual malice doctrine was the dominant fault standards from late 2004 until early 2007.

Why did the Fourth Panel consider the meticulously written *Annette Lu v. the Journalist*,[63] which used fine-tuned, relaxed negligence, inappropriate in dealing with the publication involved in *Chang Chunhong*

[63] Taiwan High Court Civil Decision 93-Shanyi(上易)-851 (2004).

v. Li Ao,[64] to the extent that actual malice had to be adopted? The departure of the Fourth Panel craved for explanation because it was a breakaway from previous consensus among the several Panels embodied in the Precedent. And such departure was rare. Even though the parallel Civil Panels were equal in their status, normally they honor the Precedent because it was resolved by the joint Panels meeting. In order to understand the Fourth Panel's extraordinary departure, a comparison between the defamatory speeches in the two cases is necessary.

Does the speech in *Chang Chunhongv. Li Ao*, though negligent, deserve more protection than that in *Lu v. the Journalist*? First, in terms of the plaintiff status, the public concern cannot be higher in *Annette Lu v. the Journalist*, in that it involved the Vice President using immoral gossip to defame the President. Of course the public concern in *Chang Chunhong v. Li Ao* is high as well. But as prominent as Chang Chunhong was, being one of the founding members of DPP, when the defamatory speech was made, Chang Chunhong did not hold any government or party post. He was the president of a private telecommunications company. At most, he was a public figure in the political realm. Second, the defendant in the Lu case was the Journalist, one of the most prominent news weekly magazines in Taiwan. In contrast, the defendant in the Chang case was a writer-turned TV talk show host. Li Ao was not a member of the press. The show was never meant to live up to any journalistic professionalism. It was Li Ao's personal stage to express his political viewpoints. Third, the defamatory speech in Lu case underwent serious discussion in the editorial meetings. The ethics of relying overwhelmingly on Yang Zhao's testimony was taken seriously in the discussion. In contrast, Li Ao's speech was his own suspicion based on fragmented, impressionistic evidence, without anyone else checking the verity of the fact and questioning his reasoning and ethics.

By every criterion, it was the speech in *Lu v. the Journalist* that deserves more protection, not the speech in *Chang Chunhong v. Li Ao*. It hence sharpens the question—despite all its unworthiness, why did the

[64] Taiwan High Court Civil Decision 93-Shanyi(上易)-1979(2004).

Fourth Panel nevertheless consider the speech in *Chang v. Li* as needing more protection, to the extent that it made the extraordinary decision to depart from the course laid down by the Precedent 90-Taishan-646 and *Lu v. the Journalist*? The Fourth Panel's decision will remain a mystery, so long as we keep a blind eye toward the partisan nature of the cases. By partisan nature, I mean the only distinction between the two cases that has any promise to lead to any meaningful explanation, is that *Chang Chunhong v. Li Ao* is a case in which the match between the plaintiff and defendant can be contextualized in the broader political environment as a struggle between members of the Green Camp and the Blue Camp, since Chang Chunhong was a prominent DPP politician and the defendant Li Ao was a famous blue-camp protagonist. More importantly, Li Ao's speech directed not only at Chang Chunhong, but at President Chen Shui-bian as well. He accused Chang in collaboration with President Chen of attempting to shut down the TV channel that carried his show. It makes it even more likely that under some context, the case would be cast in strong light of the blue-green partisan struggle. In contrast, *Lu v. the Journalist* cannot be so contextualized. Vice President Lu belongs to the Green camp for sure. *The Journalist* by that time had a reputation for journalistic professionalism. Even in a world of media which reflects the political spectrum, *the Journalist* could hardly be characterized as in the camp of "blue" media. During the 90s, it had built a reputation of daring to challenge the long-ruling KMT government. Therefore, *Lu v. the Journalist* could easily be characterized as being a case involving simply the tension between the autonomous press and a high-ranking government official.

There has been no evidence showing systematic partisan bias in the Supreme Court of Taiwan.[65] As investigation of the series of decisions that followed will show, the Civil Panels did not consistently rule for one particular political camp. Lack of evidence for systematic bias does not rule out attitudinal

[65] So far there has not been any empirical analysis of partisan or ideological inclinations on Taiwan's regular courts. What has been studied is Taiwan's Constitutional Court. In a series of empirical research Nuno Garupa and his colleagues has found no strong indication of any relationship between judicial ideal points and presidential appointments, which means no strong indication could be found by the Justices' political allegiance and their decision patterns. See Nuno Garoupa, Veronica Grembi & Shirley Ching-ing Lin, *Explaining Constitutional Review in New Democracies: The Case of Taiwan*, 20 PAC. RIM L. & POL'Y J. 1 (2011); Lucia Dalla Pellegrina, Nuno Garupa & Shirley Ching-ping Lin, *Judicial Ideal Points in New Democracies: The Case of Taiwan*, 7 NAT'L TAIWAN U. L. REV.123 (2012).

explanation, as attitudinal approach to judicial behavior could address judges' ideological background, instead of narrow partisan loyalty. But the relevance of the attitudinal approach is undercut by the fact that the major ideological divide in Taiwan's society, namely pro-Taiwan-independence or pro-China-unification involves no necessary inclination toward more protection of reputation or speech. Moreover, attitudinal approach is methodologically difficult to develop in Taiwan's context, as no data is available regarding ideological dispositions of Taiwan's judges. Taiwan's judicial system is a bureaucratic system not unlike that of civil service. And judgeship as a civil service career is admitted by state examination blind to ideology. Moreover, after democratization, the judges were strictly forbidden from partisan affiliation.

To understand how the wider context of partisan-struggle could have influenced the Fourth Panel, it was necessary to pinpoint the exact date of the decision. The Fourth Panel delivered *Chang Chunhong v. Li Ao* on September 29, 2004. Anyone who is sensitive to Taiwan's political development could not have missed the significance of the date. The decision took place in the ongoing turbulence of Taiwan's 2004 Post-Presidential election controversies. The whole country was split into two warring factions. The KMT and PFP candidates refused to acknowledge of the election result. Electoral litigations were on their way into Taiwan High Court Electoral tribunals. Rumors were still rampant that DPP rigged the election by staging the assassination on March 19 2004, the night before the election.

Did the political turmoil create political pressure on the Supreme Court? Did the Supreme Court fear reprisals from either the blue-dominated Legislature or the DPP government? Or did the Supreme Court worry about the potential lambast from the vociferous partisan press? If this was the case, and if the Fourth Panel wished to find a safer haven for adjudication, a better strategy would be to stick to the course already laid down by the several Civil Panels together, namely the Precedent. This way the Fourth Panel could have claimed that the legal standard was predetermined, and that it was only impartially applying the rule. Nonetheless, the Fourth Panel did not take this route. Perhaps by the time

the Fourth Panel was preparing for the decision, the political environment had changed to such an extent that it was not safe even for the Supreme Court as a whole to shoulder the political pressure. The approach developed by the Precedent and *Lu v. the Journalist* might not have been able to provide a legal standard robust enough to justify the result and to shield the Supreme Court from the political pressure. So perhaps the Fourth Panel decided to take a sharp turn in order to create a shield robust enough to shelter the Supreme Court as a whole. And the shield was the "actual malice" doctrine.

This line of strategic explanation was built on the premise that the main strategic goal of the Fourth Panel was to avoid political pressure. However, it is not obvious that political pressure in these political libel cases, however prominent the litigants were, was great enough to have fundamentally defined the incentive structures of the Supreme Court Civil Panels. For one thing, by the time the Fourth Panel was preparing for the decision, the single definitive battleground of both political camps was the electoral litigations which could change the election result. And the litigation was still ongoing in the Taiwan High Court.[66] It was very unlikely that either camp would risk its legitimacy before the eyes of the court on a case not directly relevant with the election. For another, both the plaintiff and defendant in the case were not central figures of the political stage at that time.

There is no good reason to surmise that it was out of "purely strategic" concern, in the sense of avoiding political pressure, that the Fourth Panel took such pains to alter the predetermined course. A more viable direction of explanation is that the critical political environment did not so much create critical political pressure as cast the nature of political libel cases in a new light, hence changing the way the Court balance the constitutional speech protection and reputational interest. The central idea of "negligence" as a fault standard rests with the concept of "reasonable man"—what would a reasonable man do in like circumstances? This idea is premised on a relatively stable social or professional

[66] For a succinct account of the election disputes, see Chen and Hsu, *supra* note 54, at 14-16.

consensus on the proper bounds of social conduct. However, the severe political polarization had greatly undermined the social consensus, to the extent that the Court might have deemed the foundation eroded for any standard more demanding on the publisher than actual malice. Implicit in holding the libel defendant liable for negligence is the premise that anyone's good reputation should be presumed unblemished in the public sphere. However, the serious distrust between the two warring political camps has rendered the social consensus regarding reasonable prior investigation in ruin. When almost half of the electorate was already seriously questioning the integrity of the President and the political camp to which the plaintiff belonged, the necessity of reputational protection was substantially weakened. The defendant, however negligent in normal state of affairs, appeared to have stood in line with millions of other opposition supporters in their firm belief in corruption and depravity of the DPP government. There was little point assessing liability on such firm believers of particular political truth. Under such dire political circumstances, "actual malice" seemed the only proper base for tort liability.

Dominant as actual malice was from late 2004 through 2006, quite unexpectedly, actual malice's dominance came to an abrupt end in January 2007, when the Fourth Panel unexpectedly changed course in Decision No.96-Taishan(台上)-35, *Yiu Ching* (尤清)*v. Wang Chienhsuan* (王建煊). The plaintiff was Yiu Ching, a founding member of DPP and former DPP Taipei County magistrate. The defendant was Wang Chienhsuan, a New Party (blue camp) candidate for the Taipei County magistracy. The speech was a campaign leaflet made during the 2001 county magistracy election campaign, in which Wang attacked Yiu for corruption. What was problematic about Wang's campaign speech was that it was based upon an outdated corruption allegation, which was a case already dropped by the Taipei District Prosecutor's office as unfounded. The fact that the case was dropped by the Taipei District Prosecutor's office was reported by one of the major newspapers. In view of the recklessness of Wang, it was not a very hard case for the plaintiff even if the fault standard was actual malice.

However, the appellate court ruled for the defendant for reasons quite unjustifiably in favor of the defendant, such as that "the speech was based on a previous report not directly made by the defendant, and the speech was already out there", and that "there was a question mark, leaving the speech uncertain about the allegation".[67]

The Fourth Panel quite correctly reversed the appellate court's decision. Surprisingly, while it could have maintained actual malice and still reversed the decision, it chose to back away from "actual malice" and returned to negligence. There was no reason given for its surprising decision. And the Fourth Panel reasoned in the decision as if it had been the Precedent that had been ruling all along.

Why did the Fourth Panel back away from the course it started? In retrospect, there might be doctrinal reasons given for the eventual fall of actual malice doctrine. The leading authority on Taiwan's Civil Code, former Grand Justice Wang Tze-chien (王澤鑑)published an important article in December 2006 questioning the transplantation of actual malice into Taiwan's tort of defamation. He saw no good reason for undermining the "negligence" framework that was stipulated in Taiwan's Civil Code.[68] Indeed the debate could have been framed as a purely doctrinal argument. However, the doctrinal debate could not hide what was actually an important matter of constitutional policy. If doctrine was all that mattered, the Fourth Panel should have stayed on the safe course determined by the Precedent. The real question remained as to what changed the Fourth Panel's constitutional policy judgment? At first sight, it seemed baffling. Political polarization continued. The society continued to split along the blue v. green cleavage. If Li Ao stood for one of those millions of blue supporters firmly believing in the radical untrustworthiness of the DPP politicians, and the Court at one point considered imposing liability on such firm believers as unnecessary, such situations did not change at all in early

[67] Taiwan High Court Civil Decision 93-Shan(上)-865.

[68] Wang Tze-chien(王澤鑑), Rengequanbaohu de keti yu zhangwang (3) rengequan de jutihua yu baohufanwei (4) mingyuquan (人格權保護的課題與展望(3)：人格權的主體與保護範圍：名譽權)[Issues and Prospect of Rights to Personality(3)-Concretization and Scope of Protection(4)-Right to Reputation], 90 TAIWAN LAW JOURNAL 23, 31-5 (2007).

2007. In order to understand how the political environment had further changed, we need to go back and trace the rise of the so-called "culture of radical exposé".

B. The Culture of Radical Exposé and the Downfall of Actual Malice in Tort

On October 26 2005, over one year and a half after President Chen's extremely close reelection and less than two months before the nation-wide mayoral and county magistrate election, Legislator Qiu Yi(邱毅), who was a former opposition PFP member and was not partisan at that time, demonstrated in a political talk show a picture of Deputy Secretary General to the President Chen Zhenan (陳哲男)gambling along with former Vice President of *Kaohsiung Rapid Transit Corporation* Chen Minxian (陳敏賢)at a hotel casino in Seoul, South Korea, in 2002.[69] Though the verity of the picture was not beyond doubt at the time of exposure, the fact was corroborated the next day by the confession of Chen Minxian that he did go gambling with Chen Zhenan in Korea when they were both still in office. The revelation of the picture was explosive. The gambling itself is not the real problem, even though Chen Zhenan violated presidential decrees by going abroad without prior notice to the President. It was the highly suspicious company of the two Chens, implicating illegitimate deals, that set off the dynamite. Qiu Yi's exposure of the picture was seen by some observers as giving rise to the rampant *Baoliaowenhua,* a culture of wild exposé.[70]

The picture is a critical addition to a series of explosive scandals of corruption related to the *Kaohsiung Rapid Transit System*, which was still in construction under DPP Kaohsiung City mayor Frank Hsieh(謝長廷). What triggered the domino-like scandal exposés was a riot in the construction site

[69] The casino was later identified to be in Je-ju Do, instead of Seoul. Qui Yi later claimed that the misidentification of the casino location was deliberate, with intent to tempt self-disclosure by the accused.

[70] See Media Watch Editorial, Henche! Jizhekanbaoliaozuixingwen [Ridiculous! Reporters watch TVBS talk show 2100 People Speak up for source of news], 53 MEDIA WATCH [目擊者雜誌]15-19 (2006).

dormitory of Thai foreign laborers. In August 2005, the Thai laborers rioted against the Hua Qin (**華磬**) Management Company's harshly exploitive management practices. The Council of Labor Affairs of the central government interfered to investigate the riot. Based on the investigation, the Chairperson of the Council, a prominent DPP politician, Chen Ju (**陳菊**)intimated in a TV interview that the incompetent Hua Qin company must have "a strong backing" to become the sole contractor in charge of managing all of the 1700 foreign laborers, whom could well have been managed by more than one company.[71] Rumors swiftly abounded in news media and political talk shows guessing who the "strong backing" was. The guesses went wild, and those mentioned ranged from the major shareholders of the *Kaohsiung Rapid Transition Corporations*, high level Kaohsiung City officials, Mayor Frank Hsieh, First Lady Wu Shu-jen and even to President Chen Shui-bian. Yet most of the rumors converge on the Deputy Secretary General Chen Zhenan. Some rumors had it that Chen Zhenan went to Thailand with foreign labor brokers to straighten things out for importing the workers; some had it that he went to South Korea to launder bribery money; others even had it that he went to South Korea to frequent brothels. Chen Zhenan's immediate response was denial of all those foreign trips.

Before October 26, Qiu Yi was not distinguished from many other rumor mongers who made wild guesses about who the "strong backing" was. Even more, only a short while before, he made two obviously false accusations, which only furthered his public image as an irresponsible rumor monger. The first mistake was made on September 29 in the Legislative Yuan's Judicial Committee, when he was questioning the Prosecutor General. He charged that the prosecutor who initiated investigation into the Kaohsiung Rapid Transit System three years ago dropped the case because he was given free sex service in Kaohsiung's famous underground brothels. The Prosecutor General rebutted that the prosecutor in charge of the case was a female, and given the nature of the places Qiu indicated, it was

[71] Chen Suling(**陳素玲**), Yinbaozhenhandan Yulizhenshishishei ChenjubuIgniting (**引爆政憾彈 有力人士是誰 陳菊不知**)[Political bomb, Chen Ju does not know who the strong backing was], UNITED EVENING NEWS, August 24, 2005, at A3.

not possible for female attendance. The second mistake was made on October 20, when he charged in a press conference that some constructions of Kaohsiung Rapid Transit System made illegal use of sea sand, which was unsafe for lacking sufficient cohesiveness. He also charged that the sea sand was supplied by the brother of Su Jiaquan(蘇嘉全), a prominent DPP politician and the then Minister of Interior. One month later an independent investigatory report produced by National Chengkung University disproved Qiu's charge.

The picture exposure was a turning point for Qiu Yi as well as for the whole rumor mongering activities in the wake of the Thai laborers' riot. The picture shown by Qiu Yi proved that Chen Zhenan lied about not having those trips, even though whether he was bribed and how deep he was involved in brokering the foreign labors were in need of further investigation.[72] The picture became the tipping point of the DPP government's downgrading credibility. Before the exposure, the public opinion remained divisive with respect to the credibility of opposition leaders' and their allied news media's wild rumor mongering. DPP supporters and sympathizers, who roughly constituted almost half of the electorate according to President Chen's reelection votes, generally viewed those rumors as unfounded and as deplorable conspiracy to upset the DPP government. The picture decisively broke the stalemate in the mainstream public opinion which then swayed unfavorably away from the DPP government. Qiu Yi successfully stood out from others and dominated the remainder of related muckraking. This resulted in a resounding defeat of the DPP in the county and city level elections in December 2005.

With a decisive boost of credibility, Qiu Yi's aggressive muckraking enterprise forcefully expanded by attracting more insider leaks of potential corruption, as well as malignant accusers eager to find an outlet. Either way, his sources abounded. His methodical muckraking became so powerful that it

[72] Ironically, Chen Zhenan was found not guilty of bribery by the Kaohsiung District Court on August 24, 2007, because the court found the evidence was insufficient for conviction. This ruling was later sustained by the Taiwan High Court Kaohsiung Branch on January 15 2009. The prosecutors did not appeal to the Supreme Court.

actually changed the press-source relationship. The active role of the press in seeking and filtering information from the source was reduced to the minimum. Qiu Yi domineered all the news media, by gradually developing a pattern of muckraking.[73] In the morning, he held a press conference in the Legislative Yuan. What he was going to say was already provided the night before to the newspapers he favored, usually the United Daily News or China Times. The electronic news media reporters read the newspapers in the morning. And they were given press notice from Qiu Yi. In the press conference, Qiu Yi would reiterate and complement what was in the newspapers, so that the TV and Cable news channels got further reportage. Before noontime, Qiu Yi would leak a little more information to the evening newspapers. In the evening, he showed up on the TVBS 2100 People Speak Up talk show, not only to repeat what he said to the press during the day, but to add something more. By doing so, the press reporters were forced to watch the show to avoid missing any new pieces of information. By such highly developed methodology, Qiu Yi captivated almost all types of mainstream news media. And he became powerful enough to discipline those reporters who refused to write or report the way he wanted, by withholding information. During the height of his power, no journalists or news institutions, except perhaps the clearly pro-pan-green *Liberty Times*, dared risking being on Qiu Yi's blacklist.

Despite his success, Qiu Yi's wild exposé wreaked havoc on Taiwan's already shabby journalistic professionalism. A former reporter and a National Taiwan University master student Tsai Huiju reported her interview with journalists working during the height of Qiu Yi's muckraking business,

> One reporter (documented as A4 in her study) was documented saying, "Qiu Yi's exposés were often problematic. For example, he might have presented a genuine document. But he made inferences from the document, like something about the timing or events. He put together the

[73] See Tsai Huiju, Preliminary Study of Disclosure Journalism in Taiwan: Controversies over Qui Yi's Disclosure Craze, 93-6 (July 2009)(unpublished Master Dissertation, Graduate Institute of Journalism, National Taiwan University)(on file with National Taiwan University Library).

puzzles. Apart from the document, everything else was his conjectures." "Sometimes, when things get told again and again for a long time, people no longer know what is true or false. All he said involved complex political-commercial relationships, which ordinary folks were unable to tell. Over time, it gives an impression like, "Yes, that's it!" I think it is unfair to those he accused, and it hurts the authority of the judicial system."[74]

As a hero in contributing to the KMT's success in the 2005 county and city level elections, Qiu Yi was welcomed by the KMT after the electoral victory in a high profiled party-entry. The entry was made on January 24, 2006, the eve of the deadline for anyone who wanted to compete for the party's nomination for Kaohsiung Mayoral election, upcoming at the year-end. Qiu Yi's entry into the KMT was deemed as revealing his intent on running for Kaohsiung Mayor. His intent forced his potential competitors within the KMT, such as the KMT legislator Li Quanjiao (李全教)to join in the muckraking movement, which further inflamed the already rampant wild muckraking and rumor mongering. In addition to Qiu Yi's competitors in intra-party power struggle, his success attracted imitators of both political camps, and triggered a storm of wild exposés. Most of them were slipshod in terms of evidence and sources, including Qiu Yi himself. Political talk shows became the centers of political rumors. Shows on different channels took partisan stances and spread negative rumors about political figures on the opposite camp. Skillful rumor mongers became a powerful news source by daily feeding the news media with piecemeal information that guarantees ongoing newsworthiness. Associated political talk shows on cable TV channels scored high in audience rating. Apologies for wrongful accusations had become outlandish on the high tide of exposés. By April 2006, even the pro-pan-blue press began to lament the excess of culture of exposé. China Times, arguably among Qiu Yi's favorite press to feed his exposés, published a short editorial essay on April 19, 2006 of the title "Heaven of Exposé", which stated the following:

[74] *Id.* at 96.

"The culture of exposé has deeply hurt both the ruling and the opposition parties. Everyday the Presidential Office and the First Family are busy defending against corruption accusations, with their public image seriously jeopardized. The opposition has been preoccupied with exploding alleged scandals but was incompetent of showing the beef, which incurred detests from the public. The negative effects of the culture of exposé have been so obvious, that if the irresponsible muckrakers do not restrain themselves, one day the "heaven" of exposé could turn into the 'hell.'"[75]

Indeed in early 2007, political polarization continued and the political distrust continued to deepen. And so the regulatory foundation for false speech remained weak. However, what became clear by early 2007 was that the actual malice doctrine not only protected deeply biased and yet sincere believers of politically defamatory speech, but also numerous opportunists who took advantage of the political turmoil and rode high on the free-wheeling rumor mongering culture.

III. Radicalization of Actual Malice in Criminal Defamation

A. The divergence of tort and criminal defamation

As the culture of exposé and public rumor mongering went wild, Taiwan's courts were caught in a dilemma. On the one hand, political polarization had eroded social consensus on what constituted responsible speech and so it grew pointless to discipline someone deeply believing in otherwise unfounded rumors; on the other hand, opportunists began to take advantage of the free-wheeling rumor mongering culture, and these opportunists should be disciplined. The difficulty is that a

[75] Editorial, Baoliaotientang (爆料天堂)[Heaven of Exposé], CHINA TIMES, April 19, 2006, at A2.

principled distinction between bias-motivated true believers and opportunists is almost impossible to draw.

As aforementioned, the Fourth Civil Panel of the Supreme Court abruptly changed course and abandoned actual malice in early 2007 in *Yiu ching v. Wang Chienhsuan*. The Fourth Panel undid its own making and marked an end to the prevalence of actual malice in tort in the Supreme Court since late 2004. In retrospect, it is difficult to tell precisely why the Fourth Panel decided to change course. The panel did not give any reason for its choice of legal norms. Yet, what matters is not so much what was going on in the judges' minds, but how the decision was received. After *Yiu ching v. Wang Chienhsuan*, multiple Supreme Court Civil Panels had the chance to deliver important decisions, and all of them avoided actual malice and opted for relaxed negligence (close to gross negligence) in cases involving public figures plaintiffs.[76]

Meanwhile, actual malice grew increasingly entrenched in criminal defamation. According to my comprehensive survey and analysis of Taiwan High Court decisions from 2000 to 2010, the fault standards from 2000 through 2005 were generally in a stage of uncertainty. After 2006 there was a marked shift toward more lenience on speech, which means a more consistent shift toward actual malice among the multiple branches of Taiwan High Courts.[77] It means somehow the coordination problem among the multiple branches and panels of Taiwan High Courts was gradually solved. The Supreme Court's role in solving the problem cannot be ignored. It is true that according to Taiwan's Code of Criminal Procedures a misdemeanor such as criminal defamation was not appealable to the Supreme Court, and so the Supreme Court Criminal Panels had very few chances to directly speak on the issue. However, the Supreme Court exerted influence through an alternative type of cases. In the Civil Servants Election and Recall Act, Article 104 is a provision stipulating a special felony of electoral

[76] For an intricate analysis of the evolution of tort of libel cases in Taiwan's Supreme Court, see Jimmy Chia-shin Hsu, Yenlunziyo yu Mingyuquan de Tange: Wuoguo Mingyuqingquanfa Shiwuyulilun zi Huiguyuqianjan (言論自由與名譽權的探戈：我國名譽侵權法實務與理論之回顧與前瞻)[How to Balance Free Speech and Reputation? Reflections on I.509 after a Decade of Confusion], 128 NAT'L CHENGCHI U. L. REV. 206 (2012).

[77] Hsu, *supra* note 12, at 14-6.

defamation. It punishes intentional spreading of falsehood and rumors with motive to distort the election results. It is a felony punishable to five years in prison, which is appealable to the Supreme Court. When dealing with cases of the electoral criminal defamation cases, the Supreme Court gradually came to accept the influence of I.509. In a series of important decisions, the Supreme Court Criminal Panels interpreted I.509's influence on both the general criminal defamation and electoral defamation, and clearly pushed both toward actual malice.[78] The influence of Supreme Court decisions on electoral defamation hence overflowed to general criminal defamation on the lower courts by offering a focal point among multiple possible options.

Overall, the divergence of Taiwan's criminal and tort of defamation after 2007 is a sensible response to the difficult challenge. By "sensible response", I do not mean that it is a purposeful design of any particular courts, perhaps not even the Supreme Court, given that it never explicitly explicated its doctrinal twists and turns. The divergent development could well have been an equilibrium that gradually emerged in reaction to multiple influences on the courts, such as doctrinal debate in the legal academia, responses from the legal profession, media reportage, political repercussion, and so on. Nonetheless, in retrospect, such a development makes good sense. On the one hand, criminal defamation continued on the course of actual malice, because criminal punishment is symbolically more severe in moral condemnation than tort,[79] and the punishment is more consequential and the silencing effect more severe given the possibility of incarceration.[80] Further, it is more likely to be abused by

[78] Supreme Court Criminal Decisions 94-Taishan(台上)-5247 (2005), 97-Taishan(台上)-998 (2008), 97-Taishan(台上)-6156 (2008).

[79] It should be noted that there is no punitive damages for Taiwan's tort of defamation. Even when some of Taiwan's courts have used damages award of emotional distress for punitive purpose, the amount is far from comparable with the American punitive damages. In my survey of Taiwan High Court from 2000-2008, the average amount of damages awarded in defamation cases is about 256,000 TW dollars (about 8,000 US dollars). 75 percent of damages was under 400,000 TW dollars (about 13,000 US dollars). The highest damages awarded during the time span was 6,000,000 NT dollars (about 200,000 US dollars) See Hsu, *supra* note 13, at 203. Despite the comparatively insubstantial amount, the disciplining effect toward middle-class-income defendants, such as Taiwan's ordinary journalists, should not be underrated.

[80] However, in practice, the threat of incarceration should not be overestimated. In a survey I conducted of all Taiwan High Court criminal defamation decisions from 2000 to 2008, only 1 percent delivered a sentence of over six months in prison, which according to the Criminal Code means the prison term cannot be replaced with monetary fine

government prosecutorial function. All these characteristics of criminal defamation demand its restraint in polarized politics. On the other hand, the free-wheeling politics of rumors should be curtailed with moderate but still meaningful measure. The tort of defamation is more suitable for this function, because Taiwan's tort of defamation is not equipped with punitive damages, which helps avoid complete silencing by excessive damages. Negligence became a sensible effort to restore the collapsing social consensus on responsible speech.

B. The radicalization of actual malice in criminal defamation

Upon closer examination, the actual malice doctrine that gained ever wider acceptance in criminal defamation cases does not necessarily resemble its counterpart developed by the United States Supreme Court. In certain cases involving public figure victims, the courts adopted a version of actual malice that actually surpassed its American counterpart in its protection of speech.

I will illustrate my observation through one particularly exemplary decision. It is *The People v. Hu Zhongxin* (Taiwan High Court Decision No.96-Shanyi-2306), a criminal defamation ruling delivered by the Taiwan High Court on December 4, 2007. [81] The victim was Chen Xingyu, President Chen Shui-bian's daughter. The defendant was Hu Zhongxin, a famous political commentator and a frequent guest of pan-blue affiliated talk shows. On October 11, 2005, in the wake of Qiu Yi's successful exposé of Chen Zhenan's suspicious gambling in Korea, Hu made remarks on the political talk show that the President's daughter's recent trip to New York was actually not for learning dentistry techniques as publicly known, but for opening bank accounts to facilitate family money laundering. He said, "She went to New York to study tooth-planting, to study how to plant gold and diamond into the mouths of

and the convict has to be incarcerated. It constitutes only 3 percent of all guilty verdicts. Put simply, Taiwan's judges have been greatly reluctant to put people in jail for defamation, except the worst defamers. See Hsu, *supra* note 13, at 198.

[81] Taiwan High Court Criminal Decision No.96-Shanyi（上易）-2306. The following account is extracted from the court decision.

her father and mother. Yes, I am talking about her going to the bank to set up the account for money laundering."

Hu claimed that his source of information was some kind of "deep throat", whom he refused to identify in the show. During the trial, it was revealed that Hu's source was hearsay all along. Hu heard about Xingyu Chen's opening of bank account in New York from a friend, some Mr. Ji, who was well-known for having broad connections with prominent pan-green politicians. Mr. Ji heard it from two strangers he met at the train station, who approached him claiming that they were Taiwanese Americans who live in New York and they happened to witness Xingyu Chen opening bank accounts. No part whatsoever of Hu's source of information could corroborate that the opening of bank account, even if it happened at all, was related to money laundering.

Surprisingly, the court acquitted Hu. The court embraced "actual malice" as interpreted by Justice Su's concurring opinion, that is, "as long as the defendant did not fabricate the false statement, or the defendant uttered the false statement without gross negligence or recklessness, criminal liability shall be absolved."[82] Curiously, the defendant in this case could have easily been found reckless, given that his accusation was entirely founded upon uncorroborated second-hand hearsay. How did the court circumvent the "reckless" prong of actual malice and reach the verdict of not guilty?

The court reached the conclusion via two routes. First, the court devised a pair of new concepts to interpret I.509's key holding, namely as long as the defendant has "substantial reason to believe in the truth", criminal liability is absolved. The court reasoned that I.509's holding means that when "objective truth" was either falsified or not verifiable, it was sufficient for the defendant to entertain "subjective truth" in the defamatory statement. And the "subjective truth" was established insofar as the defendant could demonstrate he/she did have some reasons to suspect that the malfeasance

[82] Ibid.

occurred, if the defendant based his suspicion on certain verified facts, even though the factual basis offered only scant evidence of what the defendant inferred from it.

Second, upon the standard definition of actual malice rendered by Justice Su, the court placed another layer of meaning on it. That layer is "malicious motive". The court interpreted "actual malice" to require not only knowledge of falsehood or recklessness disregard of truth, but malicious motive toward the defamed victim, a misunderstanding not uncommon even by the lower courts in the United States.[83] However, distinct from common law malice which means the defendant's ill will or animosity toward the plaintiff, the court said that it means the defamatory statement was uttered with the sole motive to inflict harm on the defamed victim. This standard actually disarmed the actual malice doctrine, because it is always possible to find other motives on the part of the defendant. Particularly, in cases involving public figure victims, the defendant can always say that the statement was made to further some public interest, and ill will, even present, was not the only motive. Most remarkably, in this case, the court particularly mentioned that it believed the defendant made the statement out of more or less legitimate motive. That is, according to the defendant, by the time the statement was made, the former Deputy Secretary General of the President's Office Chen Zhenan and a host of other DPP officials were already mired in scandals. The defendant Hu claimed that he wanted to extend what was already wide-spread in the rumor circulation, in order to mount pressure on President Chen to explain himself to the people, and that he did not utter the statement out of ill will.

It is not difficult to see how the two concepts of "subjective truth" and "sole motive of malice" plucked out whatever remaining teeth actual malice might have, leaving it with only direct fabrication of facts to punish. The main question is how do we explain such radical protection of speech?

[83] See Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. REV. 273, 279 (1990).

I believe that the explanation begins with analysis of these extraordinary legal concepts. But first of all, it is notable that *The People v. Hu* is not exceptional in terms of its radical protection of speech. The concept of "subjective truth" may not have been employed in many other decisions. But it has its equivalent. In quite a number of cases[84] involving prominent political figures, particularly from the era in which "culture of radical exposé" was at its zenith, it was the concept of "reasonable suspicion" associated with "fair comment" that served to further relax actual malice. "Fair comment" here is not the same as understood in common law, which typically requires that the comments be concerning matters of public concern; based on true statements or on facts known to be true; comment be opinions reasonably based on the true statement; no malicious motives involved.[85] It only means that the defendant holds "reasonable suspicion" on what he knows. The effect is the same as "subjective truth." A defendant is relieved from criminal liability as long as he did not fabricate the whole scandalous matter, even though he made known his suspicion only on scant evidence. For example, in *Frank Hsieh v. Su Yingquei*, [86]former legislator Su Yingquei accused in a political talk show that the then Kaohsiung City Mayor Frank Hsieh was corrupt and was laundering money through a particular foundation. The accusation was inferred from prosecutorial investigations directed at certain Kaohsiung City officials, who were not necessarily close to Mayor Hsieh. The court found the defendant not guilty, because his accusation could be seen as "fair comment" on the investigation, and the defendant "reasonably suspected" the mayor's corruption, even though the inference was quite tenuous and the accusation never meaningfully corroborated.

No matter how the courts made the ideas of "subjective truth" appear complementary to actual malice, the concepts of "subjective truth" and "reasonable suspicion" actually subverted the foundation of actual malice. The doctrine of actual malice, as developed by the United States Supreme Court, is

[84] For example, Taipei District Court Criminal Decisions No.96-Zi(自)-204, No.94-Zi(自)-201, No.96-Zi(自)-169, No.96-Yi(易)-1220.

[85] DON R. PEMBER, MASS MEDIA LAW 174-5(5th ed., 1990); Alfred Hill, *Defamation and Privacy under the First Amendment*, 76 COLUM. L. REV. 1205, 1227 (1976).

[86] Taipei District Court Criminal Decision No.94-Zi(自)-201(2009).

meant to punish "calculated falsehood", and exonerate "honest, yet inaccurate utterance".[87] "Calculated falsehood" means that "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubt shows reckless disregard for truth or falsity and demonstrates actual malice."[88] The gist of this was quite aptly conveyed by the U.S. Supreme Court in *Harte-Hanks Communications, Inc. v. Connaughton.*[89] Even in a case in which the defendant conducted extensive investigation of the story, actual malice would still be found if he/she purposefully avoided truth by shunning critical evidence.[90] It means that the speaker worthy of protection is one who cares enough about truth and would refrain from speaking if serious doubts were harbored. The Taiwanese doctrines of "subjective truth" and "reasonable suspicion" subverted the "reckless disregard" prong of actual malice, because they protected publishers who publish the speech notwithstanding lack of sufficient evidence, to the extent that it shows disregard of truth or falsity.

Why did Taiwanese courts choose to protect reckless publishers? It is unlikely that the courts were tacitly pushing forward de facto de-criminalization of defamation, since the Constitutional Court has already declared it constitutional and re-interpreted it for higher protection of free speech. If de-criminalization should ever become a policy, it is the legislature that has the power to do it, not the judiciary, especially for a judiciary unaccustomed to policy-making such as Taiwan's.

We have to probe into this question by a further contrast between the American and Taiwanese jurisprudence. The "reckless disregard" prong refers to the state of mind of the publisher, that is, he/she publishes with serious doubts. But such state of mind can be established by the publisher's outward deeds. The U.S. Supreme Court gave a few examples in *St. Amant v. Thompson*: the "story is

[87] Garrison v. Louisiana, 379 U.S. 64, 75(1964).
[88] St. Amant v. Thompson, 390 U.S. 727, 731(1968).
[89] Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657(1989).
[90] *Id*, at 693.

fabricated by the defendant"; the story is "the product of his imagination or is based wholly on an unverified anonymous telephone call"; the story is "so inherently improbable that only a reckless man would have put them in circulation"; "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."[91]

These examples show that the actual malice doctrine is underpinned by a thick layer of social norms. These social norms constitute the code of civility and regulate publishing activities. When the social norms are generally effective and widely respected, they serve as more or less a stable indicator of the state of mind of publishers. When the act of publication violates the social norms to such an egregious and radical extent, such violation could be interpreted to signal publication with serious doubt of truth.

The doctrines of "subjective truth" and "reasonable suspicion" in some of Taiwan's court decisions signify that such social norms, at least in the public sphere of national politics, are seriously eroded by the political polarization. The mutual distrust of Taiwan's blue and green camps ran so deep, and the bias was so entrenched among the divided mass, that what in ordinary cases would be found unreasonable inference from known facts and unfair comment, no longer look so clear in the politically-charged cases. I.509's key holding "substantial reason to believe in the truth of the statement" was radicalized in such cases, because a great segment of the population shared the deep distrust and suspicion. The "substantial reason" part of the holding was inevitably diluted. And eventually it was the "subjective truth" on the part of the defamer and his/her audience that gained the upper hand in these types of cases. It does not matter whether the defendants as political elites truly believed in the truth of the statement, or were only manipulating the public opinion. What mattered was that the statement was believed by a significant segment of society to be true, despite lack of substantial evidence. In such circumstances, with regard to criminal sanctions, the courts had trouble

[91] St. Amant v. Thompson, 390 U.S. 727, 732(1968).

enforcing a more reputation-protective culpability standard, in order not to get entangled in the nasty political struggle.

Moreover, social norms were eroded by the fear of hidden corruption and government abuse of power at the highest level, at least in the eyes of opposition supporters. As revealed in the decisions, the courts were well aware of the political happenings which constituted the background of the case. The rising culture of exposé in late 2005 lent credibility to the serious doubt on the integrity of high-level DPP government officials. If truth-seeking is an important constitutional value, and knowledge about governmental corruption is a social good of the highest degree, it is justifiable under extraordinary circumstances to be radically lenient on speech critical of government officials. This may be seen as the checking value pushed to the extreme, just as Vincent Blasi suggested in his classic article that a theory based on the checking value might provide absolute protection for communications critical of public officials.[92] Such tolerant approach to defamatory speech allows the public sphere more freedom to expose political scandal at the highest level of government. But such radicalism can only be justified if it is absolutely necessary to rely on such traumatic cure. The checking value is only one value among many, and democracy is not just about people checking the government. When the people and government are divided and polarized, irresponsible criticism of public officials could be seen as part of partisan conflict and hence aggravate the conflict. Despite the potential public good, Taiwan's heated political polarization in the later days of Chen Shui-bian's second term could be attributed in part to the wild culture of exposé. The wild rumor mongering was seen by supporters of the defamed camps as a gross injustice and intensified the political polarization. Whatever the good that could be purchased through such radical protection of speech, it was obtained at a high price.

[92] Vincent Blasi, *The Checking Value in First Amendment Theory,* 1977 AM. B. FOUND. RES. J. 521, 582 (1977).

IV. CONCLUSION

In this article, I analyzed how the actual malice doctrine was transplanted in Taiwan and how it underwent extraordinary twists and turns in Taiwan's criminal and tort of defamation laws. I argued that Taiwan's severe political polarization first led to its rise in tort of defamation, and also to its eventual downfall. The eventual divergence of criminal and tort of defamation in terms of fault degree, with criminal defamation leaning consistently toward actual malice and tort of defamation back to negligence, was a sensible response to the wild culture of exposé that developed since 2005. This article does not aim only to report Taiwan's legal development. By investigating Taiwan's extraordinary experiment with the actual malice doctrine, I intend to use Taiwan's experience to shed light on the social foundations of a self-sustaining political speech market. In this article, I came to the revelation that actual malice actually presumed a thick layer of social consensus on what counts as irresponsible speech. When political polarization and distrust destroys the social consensus, the "reckless disregard of truth and falsity" prong of actual malice collapses along with it.

Paper n. 3

THE AGE OF INTEGRATION: CROSS BORDER FAMILY FACES FINANCIAL REMEDIES

by

Cinzia Valente

Suggested citation: Cinzia Valente, *The Age of Integration: Cross Border Family Faces Financial Remedies, Op. J.*, Vol. I, n.1/2013, Paper n. 3, pp. 90 - 110, http://www.opiniojurisincomparatione.org, online publication October 2013.

THE AGE OF INTEGRATION: CROSS BORDER FAMILY FACES FINANCIAL REMEDIES

by

Cinzia Valente*

Abstract

The migratory phenomena of recent decades have favoured the creation of families of cross-border relevance. These are unions between a foreigner and a citizen of the State in which the family decides to live, as well as unions composed of members with different nationalities who settle in a third country. They can also be families who live in a country different from their nation of origin. An overview of the phenomenon and the identification of the problems linked to applicable law, plus the remedies offered by national regulations in the proceedings of divorce and the consequences on financial assets of couples is contemplated in the first part of this paper. A succinct analysis, in a comparative perspective, of the Italian, English and French legal systems permits drawing some conclusions about the legal evolution of important issues. These include those concerning the protection of the weaker component of the couple, and the remedies acknowledged by various legal systems in favour of this component. In the following two paragraphs, attention is focused on the existence of legal convergences on the European scenario and on the recent community regulation no. 1259/2010, about the applicable law in divorce proceedings and the consequences. Among common objectives of European systems is the will to give a prominent role to the parties' autonomy in the distribution of assets, apart from the judicial intervention (if needed) inspired by principles of equity, either explicitly or implicitly.

Keywords: Cross border families, financial remedies, integration, uniformation

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I. Cross-border families: the law of the "jungle".

In recent decades, legal systems have had to acknowledge the existence of new family models[1]. The attitudes of each system with respect to such new models have been different and varied: "the intentional and conscious position to ignore the phenomenon"[2] or the specific regulation of some aspects of it (maybe to limit the effect of the institution and its consequences) constitute the alternative "remedies" laid down by European countries.

Cross border-families[3] play a major role within these new models. They have occurred both worldwide and particularly in Europe, as a result of the opening of borders (with the possibility of obtaining diplomas and qualifications at the European level, of finding jobs in countries other than those of origin, etc.) and of a cultural growth which recognizes in differences a source of enrichment of one's personal experience.

This intensification of the migratory flow[4] from non-European countries to European states has increased the possibility of encounters between extremely diverse legal cultures, such as those belonging to the western legal tradition[5] and those of an Islamic origin. Such circumstances have led to an increase in "mixed" marriages and consequently to a proliferation of divorces.

Although we can note a quite recent slowing in the number of cross border marriages[6], 2008 was characterized by an important increase in these transnational unions: 37.000 "mixed" marriages were recorded in Italy, i.e. 15% of the total (in 1995, these accounted for only 4,8%).

We do not ignore that such unions are often not made official by marriage, thus their statistical relevance is probably more significant.

Equally interesting data concern the subject of divorce: in 2005, the Istat recorded 7.536 separations of mixed couples compared to 4.226 in 2000. This is equivalent to a 76,7% increase[7].

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1 It is difficult to give an exhaustive definition of the family and to find a definition in national legislation or international regulations. Although some countries, like Italy, do not legally recognize cohabitation, it is common to refer the definition of the family to the nucleus based both on marriage and cohabitation, including homosexual unions, too; unfortunately this definition is not always legally binding. On this theme see: R. Probert A. Barlow, *Displacing marriage – Diversification and harmonisation within Europe*, in *CFLQ*, 2000, 12, 153; R. Bailey-Harris, *Law and the Unmarried Couple – Oppression or Liberation?*, in *CFLQ*, 1996, 8, pp. 137–147; C. Ricci, *La "famiglia" nella giurisprudenza comunitaria*, in S. Bariatti, *La famiglia nel diritto internazionale privato comunitario*, Milan, Giuffrè, 2007, p. 91 ss.; J. Murphy, *International dimension in family law*, Manchester, Manchester university Press, 2005.

2 We allude here to homosexual couples whose relationship, in some legal systems, is not recognized for legal purposes and therefore not regulated – except for limited aspects.

3 I refer to unions between a foreigner and a citizen of the State in which the family decides to live, and unions composed of members with different nationalities who settle in a third country and also families who live in a country different from their nation of origin. An interesting overview on this phenomenon is N. Lowe, G. Douglas, *Families across frontiers*, Tubingen, Martinus, Nijhoff, 1996.

4 On the problems concerning the migratory flow J-Y. Carlier, S. Sarolea, *Migration and Family Law*, in J. Meeusen, M. Pertegas, G. Straetmans, F. Swennen, *International Family Law for the European Union*, Intersentia, Antwerpen, Oxford, 2007, p. 439.

5 On the theme of European tendencies see E. Orucu, J. Mair, *Juxtaposing Legal systems and the principles of European family law on divorce and maintenance*, Intersentia, Antwerpen, Oxford, 2007.

6 See the data recorded in the last annual report on marriage in Italy for 2010, in www.istat.it.

In relation to such families, many difficulties can arise regarding identification of the applicable law, above all when, in moments of crisis, each party seeks to apply the rules of his or her own state of origin, these are better known and, obviously, easier to understand in terms of language and of the practical consequences.

The choice of the applicable law is a difficult process, because of the presence of different levels of regulation. These could include international law, European acts and national legislation, as well as an increasing volume of (not always uniform) case law.

The exact selection of rules can have considerable consequences, since many diverse approaches exist in the discipline of marriage, divorce, cohabitation, dissolution of the cohabitation, property regimes of the couple, personal and financial effects of the breach, including in reference to the relationship between parents and children.

We must not forget that in some countries religious beliefs and/or the input of philosophical ideas can condition family law, and provide for particular solutions such as through the Islamic institution of Rejection.

Moreover, the difference between the legal traditions is not without any consequence: according to the legal classification done by Mattei and Monateri[8], the law preponderance model (Rule of Professional Law) faces the social organization model given by tradition (Rule of Tradition), religious or philosophical trends (*e.g.* Islamic or far eastern Countries), or a political model (Rule of Political Law) which directs the nation's social life (see the developing countries in South-Africa or Latin America or the ex-socialist Countries).

In other words, the balance between interests among cross-border families is not focused solely on the legal rule, strictly considered, but is frequently subject to external influences. This is especially notable in consideration of the fact that sociological sciences have, in recent decades, started to interfere with these topics, and in particular with alternative dispute resolution (alternative to the judiciary resolution).

Consistent occurred changes had a significant impact on family law so that its own purpose has been slightly modified, since today the family itself is no more characterized by its social function, that is to say an economic instrument in favour of its members and a tool to assure progeny, that can be linked exclusively with the couple formed by a man and a woman married together. First of all there has been noted a prevalence, even if it is not a total exclusion, of the secular marriage in comparison to

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7 For the statistics see the following website: www.istat.it . On this subject I also refer to my work: C. Valente, *I rapporti patrimoniali nelle famiglie inter-nazionali*, in *Il dialogo tra le culture. Diversità e conflitti come risorse di pace*, edited by C. Baraldi, G. Ferrari, Donzelli, Rome, 2008, pp. 253 – 271.

8 U. Mattei, P. Monateri, *Introduzione breve al diritto comparato*, Cedam, Padua, 1997; and also in V. Varano, V. Barsotti, *La tradizione giuridica occidentale, Testo e materiali per un confronto civil law common law*, Turin, Giappichelli, 2010, pp. 32 ss.

the religious one; and an increasing number of divorces, which doubled in the seventies. These, together with the number of children born out of wedlock, have encouraged the establishment of cohabitation as an alternative solution to marriage. The spreading concept of freedom, in all its forms of expression, the sexual one included, has encouraged the coming out of homosexual couples and the legal claim by homosexual couples to the enforcement of a constitutional right to equality.

The traditional nuclear family based on marriage has been replaced by partnerships without any children, single-parent families, reconstructed families, cohabitation, homosexual relationships. These all have to be framed in the context of the predominant Human Rights concepts of today.

This appearance of the new social phenomena has not obtained a unambiguous result in every legal national context. We can think, for example, that only few countries regulate cohabitation, or that only a small number of states give a legal status to the homosexual relationship, or that the divorce's requisites are different from state to state. Also, there are consistent differences in medically assisted reproduction rules and family mediation is not an efficient tool in every country; children are not protected in the same way everywhere even if a general attention for their welfare exists, and children are recognized everywhere as legal persons who are entitled to rights, and are no longer only the subjects of a guardianship.

The differences are noticeable when the attention is moved from the western tradition to the eastern one, where the woman has not reached full emancipation yet. We must think about Islamic countries[9], which allow polygamy and repudiation of women, with all its serious consequences, including on an economic basis, to them and their children, who are still strongly subdued to the *pater familias*, and also may be subject to child marriage.

That being stated, and setting aside the problems of provisions governing the appropriate jurisdiction, the most important complications in divorce proceedings arise when the judge must identify the relevant provisions in a specific case.

It can occur that the Judicial Authority has to apply national legislation, in addition to International or European law[10]. The first step is, therefore, the interpretation and correct enforcement

9 On the topic of the integration of Islamic families and the problem of the recognition of their laws see C. Gonzales Beilfuss, *Islamic family law in the European Union,* J. Meeusen, M. Pertegas, G. Straetmans, F. Swennen, *International family law for the European Union,* Antwerpen, Oxford, Intersentia, 2007, p. 425 ff. where the author investigates the legitimacy of the rejection and child marriage respect of the public order principle and C. Ruiz Sutil, *Le nouveau règlement "Rome III": la separation de corps et le divorce de la population marocaine en Europe et en Espagne,* in *Revue Internationale de Droit Comparè,* 2012, 2, p. 525 ff. where an analysis of the Spanish systems is combined with Islamic pronciples.

10 We can recall for example the following: The Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, 19th October 1996; The Hague Convention on the law applicable to matrimonial property regimes, 14th March 1978, The Hague Convention on the law applicable to maintenance obligations, 2nd October 1973; Regulation 2201/2003/EC. It can occur that two or more country have signed bi-lateral or multilateral Treaties that have to be taken into account in the identification of law. Recently a French-Allemande project about the

of the rules that govern the conflict under domestic law. This procedure is not simple because it requires the coordination of different sources of law, endowed with diverse ranking in terms of the hierarchy of the law, and which can lead to different solutions in each State.

The result is a general uncertainty about the rules applied to a specific case. This is caused by the diversity of national regulations and by the circumstance that the domestic law, at times, does not provide for regarding a specific situation. Reference can be made, for example, to the dissolution of the French Pacs or to the dissolution of registered homosexual unions as in the English model, which have no parallel in the Italian legal system or the case of polygamous marriage which is unknown to most of European countries.

The situation is quite complicated, since it is possible that the applicable law is not necessarily the law of the state in which the dispute arises, nor the national law of the applicant. So when the choice falls back on foreign law[11] the judge could be obliged to enforce a foreign law. Thus, he must also have an understanding of the exact meaning of the provision, its exact application, and the implementation of the foreign rules, with the risk of a dangerous combination of rules with indefinite effects[12].

In other words, the citizens are deprived of the chance to know and evaluate in advance (before the crisis) the consequences of the personal and financial choices made during the course of the normal development of the relationship. Each party is inclined to believe that his/her national law is destined to discipline a dispute originated at the moment of the divorce proceeding.

On the one hand, a potential conflict arises in the event of diverse nationalities of the parties, who may seek to apply their own law in their own jurisdiction. On the other hand, the absence of uniform law sometimes produces the aberrant result of "forum shopping"[13] as the party will choose the judicial authority, either domestic or foreign, which is likely to provide the most favourable regulation of the specific case, in accordance with individual needs.

The result could be the removal of the proceedings from the "natural" judge, and the risk of protracting the duration of the process, thus increasing the legal costs, to the consequent detriment of all parties.

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matrimonial regime have to be underline; on the theme see P. Simler, *Le nouveau régime matrimonial optionnel franco-allemand de participation aux acquêts*, in *Droit de la famille*, 2010, 5, pp. 8 ff.

11 According to international private law in force in Italy, Law 31st May 1995 no. 218, art. 30, the family assets are subject to the law of the state where the common life has taken place. In addition, the couple can decide to indicate the domestic rules appointed to solve any dispute. For example, an Italian citizen and a person of French nationality could choose the French or Italian law to govern all financial relations when this provision is contained in a written and valid agreement concerning their relationship.

12 See A. Harding, *Global doctrine and local knowledge: law in south East Asia*, in *International Common Law Quarterly*, 2002, 51, pp. 35 ff.

13 J. Meeusen, *System shopping in European Private International Law in Family matters*, in J. Meeusen, M. Pertegas, G. Straetmans, F. Swennen, *International Family Law for the European Union*, Intersentia, Antwerpen, Oxford, 2007, p. 239 ss.

The aim of this article is to analyse the different remedies offered by systems belonging to common law and civil law traditions, to protect the weaker party of the marriage, with the scope of discovering points of divergence or convergence.

Through the gathering of common law case history combined with existing legislative texts, this short paper will also trace the importance of extra-judicial elements (recourse to principles of equity, reasonableness, and fairness in the specific case) and their effects on operational rules. This procedure may reveal that beyond the divergence among national legal texts, the needs of the parties can find analogous encounters in the different legal realities, so as to indicate a line of common tendency. At first, the essay focuses on the distribution of family assets (§ II) and a right to maintenance which guarantees the weaker party (§ III); in the following paragraph I intend to make a brief reference to the recent European regulation on the theme of divorce, to verify its power to create uniform European legislation; a conclusive remark traces some considerations on family trends.

With regard to the methodology, these analyses apply a typical method of study in comparative law. The starting point is that some areas of the law, such as family law, (areas reflecting the strong influences of tradition and profoundly linked to ethical and moral themes) are more sensitive than other legal areas to moral and ethical issues and social customs. Thus, they remain subject to the evolution of concepts of equality, reasonableness and justice. So, from the comparison of different provisions contained both within the legislative texts, as well as from judicial decisions and identifiable practice, and finally through a procedure using the inductive method, the analysis has been based on specific real cases, in an attempt to verify the possibility of common tendencies in this subject. This last element has the capacity to adapt the law, in a general sense, to changing historical circumstances. Then, beginning with concrete examples, the article investigates, not so much the compulsory force of the provisions, but the possibility of identifying common operational rules[14].

II. The division of property assets: is it possible to track trans-national tendencies?

When a cross border family comes to the end, the members have to find a reasonable settlement of all property and a resolution of personal affairs. The situation, which in general is not easy, is complicated by the transnational nature of the relationship that, as said, entails the application of domestic and/or foreign laws. In a practical dimension and in the absence of uniform regulation, the balance of the spouses interests are devolved upon the powers of the judge, who must choose the national regulation designed to solve personal and financial questions.

By restricting the scope of such short analysis to the economic consequences of the breach of the marriage, it must be considered that the financial choices made while living together and influenced

14 A. Gambaro, R. Sacco, *Sistemi giuridici comparati*, 3. ed., UTET, Turin, 2008, pp. 55 f.

by the emotional bond, could provide, at the point of divorce, an advantage to one party at a cost to the other.

In the natural course of their shared life, the couple does not consider the future consequences of their decisions because, regardless of the financial regime, any purchase is focused on the needs of the family. In such cases, some circumstances, like the fact that only one partner has a permanent job, or the choice of the wife to give up work or career prospects to dedicate herself to the care of the children, thus favouring the professional career of the partner, become unimportant. But, they constitute a risk for damaging the weaker party of the couple, because realistically, he or she has contributed, even indirectly, to producing for the family.

The remedies to such problems depend on the provisions applying to the family under the diverse regulations. For a long time, such differences were re-traced to the traditional opposition between systems belonging to the civil-law tradition and those belonging to common-law tradition.

A comparative analysis of national "policy", in particular of the English, French and Italian systems, consents us to draft some observations. The objective of the following considerations is the evaluation of the peculiarity of the common law European system in comparison with the civil law traditions, for the purpose of discovering points of convergence or divergence.

Most continental systems provide the couple with different possibilities regarding the choice of property asset regimes (from the regime of communion *tout court*, to the communion of only the purchases made during the marriage, to deferred communion, i.e. a separation of the assets with calculation of the final incomes at the time of the divorce, to a total separation) while foreseeing at the same time a default option.

On the contrary, the common law model is characterized by the separation of property assets as an automatic application of existing laws, to which the parties can of course make an exception[15].

At the time of the breakdown of the couple, the existence of family regimes in continental systems produces "hard and fast rules"[16] in which the power of the judge to give a property transfer[17] order is restricted. Instead, in English law, greater flexibility exists, despite the regime of separation.

Under the Italian model, the standard regime provides for the sharing of assets, assigning as joint property to the spouses property acquired after the celebration of the marriage, with the sole

15 Complete overview in A. Fusaro, *I rapporti patrimoniali tra coniugi*, in G. Alpa, G. Capilli (edited by), *Lezioni di diritto privato europeo*, Cedam, Milan, 2007, pp. 68 ff.

16 A.-F. Bock, *Dividing the Assets at the Dissolution of Marriage. A Comparative Assessment of Legal Systems Following a "Hard and Fast Rule" and Systems with a Discretionary Approach to the Division of the Assets*, in K. Boele-Woelki, T. Sverdrup (edited by), *European Challenges in Contemporary Family Law*, Portland, Intersentia, 2008, pp. 290 ff.

17 For example, in the French system, in the case of community of assets, the judge is the only one authorised, pursuant to art. 1476 of the civil code, to proceed to rule in favour of just one of the members of the couple, generally the parent with child custody. In this case, the person in question is entitled to the payment of a sum to offset the value of the property or to the attribution of assets of equivalent value.

exclusion of assets inherited by one party only or those used for professional and/or personal reasons[18]. A person who has contributed to family life, even only in terms of domestic work, is, in theory, "automatically"[19] protected in the separation and divorce proceedings, which allow an equal distribution of joint property.

When the parties opt for a separation regime[20], the protection of the weaker party must pass through the court system because he/she has to prove his/her contribution[21] and its exact value in economic terms. The path to the demonstration is very arduous when the parties disagree on the division of the property in a separation or divorce proceedings, so there is a concrete risk of losing what one party has contributed to acquiring[22]. In this context, the civil procedure regulations and the rules of the civil code (concerning property, contracts and donations) concur. To discipline the dispute, a complex *iter* is necessary to establish a property right and a series of rebuttable presumptions help the weaker party to claim, above all, chattels. Meta-judicial principles like *aequitas* and fairness help the judge to make a reasonable decision and to mitigate the rigid application of statutory laws. In this sense the evaluation of a series of elements like the care of the children and the house can contribute to give relevance to the wife position; an express recognition of the economical value of the housewife status is traceable in the topical decisions[23]. At the same time having this element repercussion on the ability to find a new work after the separation, the judge must take into account in the family asset[24].

In the same direction, the French system provides for a rigid regulation in the division of the asset tied to the elected family regime. In the communion category such as *communauté réduite aux acquêts*, *communauté de meubles et acquêts* and *communauté universelle* most of properties belong to the spouses in common and at the time of divorce they are divided into equal portion; on the contrary, in the separation regimes (*séparation de biens*, *participation aux acquêts*) each party is the owner of the assets

18 Art. 177 c.c. ff. In the sharing regime the Italian system allows a personal acquisition when the other spouse expressly consents to his exclusion from ownership: Cass. 19th February 2000 no. 1917, in *Giust. civ.* 2000, I, 1365, note of Finocchiaro, *Acquisto dei beni in proprietà esclusiva del coniuge in regime di comunione legale*; Cass. 7th July 1998, no. 6589 in *Giust. civ. Mass.* 1998, 1478.

19 Cass. 24th July 2003, no. 11467 in *Familia* 2005, 155.

20 The party retains ownership of assets purchased solely (art. 215 c.c.); there is, therefore, a legal presumption of joint property for the purchase of goods and chattel. See: A. Zaccaria, *La separazione dei beni*, in G. Bonilini, G. Cattaneo, *Il diritto di famiglia. Il regime patrimoniale della famiglia*, II, 2 ed., Turin, Utet, 2007, p. 357 ff.

21 In this context, "contribution" includes all aspects which are susceptible to economic evaluation but not quantifiable in terms of producing concrete income for the family; I refer to the "invisible" contributions such as the care of the family, a partner giving up or slowing their own professional path as defined by E. Al Mureden, *Nuove prospettive di tutela del coniuge debole. Funzione perequativa dell'assegno divorziale e famiglia destrutturata*, Milan, Ipsoa, 2007, p. 11 ff. On the presumption of personal property see Cass. 6 march 2008 n. 6120 in *jurisdata* 2012.

22 The civil code, art. 219 c.c., provides for a presumption of community with the exception of the case in which the party can demonstrate the sole property. Therefore, the application of this rule to real estate is discussed; see Cass. 10th february 1995 n. 1482 in *jurisdata* 2012.

23 Cass. 29th march 2012, n. 5107 in *iurisdata* 2012; Cass. 15 may 2009, n. 11291 in Diritto & Giustizia 2009.

24 Trib. Bari 3rd november 2010, n. 3276 in *iurisdata* 2012.

acquired solely, so the weaker party has to prove the entitlement to justify a property right: the recognition of a donation between the spouses or the demonstration of a contribution to the increasing value of the family property could be a valid remedy to give protection to the partner[25], as the recent jurisprudence has declared.

As regards to other European systems which recognize a regime of separation of assets, the task of protecting the weaker party is undertaken by specific legislative provisions or common law remedies.

In the English system, the category of beneficial rights balances the effects of the rigid application of the law[26] on property and contracts, as specific provisions concerning family regime are not present. In this way, the judge has the power to provide for the transfer of assets from one partner to the other. In particular, with reference to the family home the judge can declare a trust[27] and consequently rule for the assignment of the house based on the needs of the children of the couple or, having checked certain conditions (including when any children reach the age of majority and financial independence), the judge can order the sale of the family home (and impose the distribution of the income).

The trust for sale of the family home in the form of a *Mesher* or *Martin order* and, in general, the recognition of an implied trust can preserve the party without income; beside these provision the court

25 The distribution of the family assets is a complex procedure as it needs the evaluation of the income and debt and consequently the assignation of the properties or the economic adjustments. For an exhaustive analysis see: P. Raynaud, *Les régime matrimoniaux*, III ed., Sirey, Paris, 1986; A. Albarain, *Les régimes matrimoniaux en droit fracais. Aspects the droit civile et droit fiscal*, in A. Bonomi – M. Steiner, *Les régimes matrinoiaux en droit comparé et en droit International privé*, Librairie Droz, Geneve, 2006, pp.117 ff.; Y.H. Leleu, *Les régimes matrimoniaux*, Vol. 3, Larcier, Paris, 2002; K. Boele-Woelki (edited by), *Principles of european family law regarding divorce and maintenance between former spose*; Antwerp – Oxford, Intersentia, 2004; on the theme see: Cour de Cassation., 12th December, 2007 n° 2007-041899, in *LexisNexis*, 2012; Cour de Cassation, 14th October 2009, n° 08-16.876, in *LexisNexis*, 2012; Cour d'appel Lyon, 12th February, 2009, Numéro JurisData 2009-376923, in *LexisNexis*, 2012.

26 It is interesting to briefly acknowledge the developments which have taken place at regulatory level in such context. Before the Seventies, the separation of property assets along with the rules on property and contract often led to unfair results considering that husband and wife maintained the ownership of the assets acquired both before and after the marriage; after such period and with the introduction of the Matrimonial Causes Act 1973, the situation changed considerably. The doors have been opened to the age of the discretionary system (or as the US system calls it - equitable distribution) characterized by the absence of pre-established rules with the sole exception of the provisions of Sec. 23 of the Matrimonial Causes Act 1973, which indicates a series of elements to be taken into account in the distribution of assets (child welfare, needs of the parties, contribution of each, standard of living, duration of marriage, age of the parties, etc.). The application of similar criteria has often resulted in the splitting of the assets into equal parts for the purpose of also making the parties independent in the shortest possible time; this means that in most cases, preference is given to the needs of the parties (and above all the children) in particular habitation needs, with the setting up of a trust or guaranteeing a periodical payment or a capital. Such principle has been departed from in favour of a proportionate distribution (*Charman v. Charman*, in *EWCA Civ*, 2007, 503, following *White v. White*, in *FLR*, 2000, 2 981) in the so-called big money cases in which the mathematical division of the assets could produce unfair results if the marriage has been a short one or the weaker party has never made any effort to contribute to increasing the family assets or to reaching economically advantageous positions. On the financial remedies in general see: S. Cretney, *Family*, in A. Burrows, *English Private Law*, II ed., Oxford, Oxford University Press, 2007, p. 93 ff.

27 See C. Valente, *Coniugi e coabitanti nella giurisprudenza di equity*, in *Le situazioni affidanti*, edited by M. Lupoi, Turin, Giappichelli, 2006, p. 129-145; M.D. Panforti, *Intervento legislativo e reazione giurisprudenziale nella vicenda inglese del trust for sale* in *Riv. Dir. civ.*, 1996, I, 485.

has statutory power to make an order against either spouse (lump sum payment, unsecured periodical payment, secured periodical payment)[28].

As seen, the typical property regime of the common law tradition is separation, meanwhile, the civil law models vary from separation, to community, to other forms of community of acquests. Each option entails diverse forms and different levels of protection for the weaker party.

In the first cases, the lack of specific regulation to preserve the weaker party is balanced by the procedural law that gives the judge the power to transfer the assets of the family.

The continental choice is tied to the selected regime or the default regime; in any case the court's possibility to intervene in the transfer is not formally enunciated, but a system of presumption helps to make a reasonable arrangement.

A point of convergence comes out in the participation regime where the intervention of the court can produce results similar to the English solution[29], as the deferred community recognizes to the judges a wide discretion on the distribution of assets. Such a regime consents a great autonomy to the spouses in the administration and enjoyment of the assets acquired during the marriage. Only at the breach of the common life is the reconstruction of the entire familiar property necessary in order to proceed to an equal division. In this context, the transfer of assets and related adjustments are permitted, thus causing the same results typical of the English systems, where the discretion of the judges constitutes a fundamental element.

Another point of convergence is traceable in all European countries, where the indirect protection of the weaker party passes through the recognition of an occupation right on the family home (generally the most important asset of the family) to the parent with child custody (generally the weaker party) until the children reach the age of majority.

For example, in the French system[30], as a consequence of the divorce the judge can order the "enforced" rental of the *logement* in favour of the spouse who is not the owner but has care of the offspring[31].

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28 *Mesher v Mesher and Hall,* in *All ER,* 1980, 1 126; *Martin v. Martin,* in *Fam,* 1976, 335 CA; *Elliot v Elliot* in *FCR,* 2011, 477 the judge ordered the sold of the family home with the aim to acquire another houses to guarantee the habitation need of both member. In *Vicary v Vicary,* in *FLR,* 1992, 2, 271, CA the wife did not contribute directly to husband's business, but her contribution in the care of the home and the children enabled the husband to accumulate his wealth, so she was entitled to share in the result.

29 See S. Cretney, *Community of property imposed by judicial decision,* in *Law Quarterly Review,* 2003, p. 349 ff.

30 The legislator provides, also, a specific guarantee to the family home, and indirectly, to its occupant during the marriage: the civil code (art. 215-3 civil code) prevents the partner disposing of the home without the consent of the spouse. On the family financial remedies: P. Malaurie, L. Aynès, *Les regimes matrimoniaux,* Defrenois, Paris, 2004; F. Boulanger, *Droit civil de la famille,* IV ed., Paris, Economica, 2000; A. Benabent, *Droit civil: la famille,* 11 ed., Paris, Litec, 2003; F. Debove, R. Salomon, T. Janville, *Droit de la famille,* II ed., Paris, Vuibert, 2006 ; A. Colomer, *Droit civil: régimes matrimoniaux,* 10ème éd, Paris, Litec, 2000; N. Peterka, *Régimes matrimoniaux,* Paris, Dalloz, 2008; F. Terré, *Le couple & son patrimoine: biens communs et biens propres,*

In the same direction, the Italian system provides for the assignment of the home to the parent, without property rights, to guarantee the welfare of the children. Analogous results are realised in the English system through the imposition of an implied trust in the interest of the offspring, when the judge does not enforce the transfer of the asset.

Although the aforementioned results do not assure a property right in itself, they do allow the possession and detention of the house, often for a long time. That is to say that, in practice, the occupant has almost the same power as the owner, above all towards third parties. This, even if for a limited time, is useful for achieving a new economic balance.

The study of cited European systems reveals that the national regulations have a different legislative approach for the treatment of the family home in general, and the protection of the weaker party in particular (which appears strongest in the English context). But case law demonstrates that the relevance recognized to concrete circumstances (such as the couple having children) acts as an element for catalyzing the existing differences and operates as an indirect protection of the weaker member, despite the separation or community regime of the family.

III. The maintenance of the weaker party in the national regulations.

In addition to the effect on real property, another relevant aspect of divorce proceedings merits to be investigated. This relates to the interest of the weaker party to have an economic contribution after divorce, in order to maintain the living standard existing during the marriage.

A general debate about the protection of the weaker party through the payment of an indemnity[32] after the separation or the divorce has to be mentioned.

In the Italian system a member of the couple has the right to a contribution when he/she does not have adequate means[33] and he/she cannot provide for the family for objective reasons[34]. The

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concubinage, divorce, donation entre époux, régime matrimonial (choix, changement), logement de la famille, société entre époux, transmission aux enfants, Paris, Éditions du Jurisclasseur, 1999.

31 The protection of the family home is enacted also in a case involving rental: the spouse who is not a party to the rental contract can obtain the assignment of the house in consideration of social and familial interests.

32 We note in the Italian system that the assignment of the family home cannot constitute a form of maintenance because it represents exclusively a remedy to guarantee the children's interests; this point has been clarified, after a contrasting interpretation of art. 155 quarter c.c., by the introduction of the reform on separation of parents and shared custody of children (by law no 54 of 8th February 2006 applicable in all cases where parents do not longer live together like legal separation, divorce or simply interruption of cohabitation in the case of unmarried parents), Cass. 17th December 2007, no. 26574 in *Foro It.*, 2008, 5, 1487. On the contrary, the assignment of the family home constitutes a part of the general settlement in the considerations of the English judge involved in the division of the family asset: K. Standley, *Family Law*, III ed., Palgrave, 2001, 165 ff.; F. Burton, *Family Law*, London, Cavendish Publishing, 2003, 159 ff.

33 According to a recent judicial tendency, the condition of inadequate means has to be interpreted in its wider sense; it is not referring to a necessary status, but it has to indicate a significant deterioration of the previous economic situation. See Cass. 12th September 2008, no.. 23549 in *Guida al diritto* 2008, 43, 52.

34 Art. 9, Law on divorce 1st December 1970 no. 898. It must be highlighted that in the Italian system separation precedes the decision of divorce. In that first phase the party can make an agreement concerning the patrimonial assets, in general, and maintenance in particular, or the judge can impose the payment in case of judicial

payment is due in consideration that the applicant cannot maintain a standard of living similar to that which she/he enjoyed while the couple was living together[35]. In other words, the right to maintain the pre-existing economic standard is a general rule, with the aim to avoid negative repercussions after the divorce. However, following the divorce, this is evidently difficult to achieve in most cases; in this sense, some Italian judges take into account the incidence of the costs for both parties in defining the new style of living[36], as well as the general assets of each party and their potential in terms of professional careers and property[37], plus, finally, the personal and economic contributions of each partner to family life, the income of both parties, and the duration of the marriage[38].

A noteworthy element is the fact that the amount of the maintenance is always subject to modification when the situation of a party improves or worsens. Jurisprudence has to consider any new cohabitation of the beneficiary, and any child/children born in the second family of the party[39], as elements to justify a variation.

The couple can arrange the payment of a lump sum[40] as maintenance and recently judges have tried to operate[41] in this direction.

In the French system[42] the *prestation compensatoire*, generally payment of a sum, has the function to compensate[43] the economic disparity after the rupture of the marriage in the life of the spouse[44]. If

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separation. These statements are not mandatory in the phase of divorce in which the condition to determine a decision on the spousal support are subject to autonomous judgement: Cass. 21st February 2008, no. 4424 in *Foro It.*, 2008, 7-8, 2124; Cass. 28th January 2008, no. 1758, in *Giust. civ. Mass*. 2008, 1, 97. The decision concerning the family assets in separation proceedings can, at most, represent an index of reference, Cass., 30th November 2007, no. 25010, in *Giust. Civ. Mass.*, 2007, 11.

35 The living standard must be evaluated in the light of the future economic improvement of the spouse due to circumstances present during the life together, see Cass. 8th October 2008, no. 24858 in *Guida al diritto*, 2008, 46, 81. Also the continued donations of the father-in-law can contribute to determine living standards and to calculate the amount of the maintenance, Cass. 23rd July 2008, no. 20352, in *Diritto & Giustizia*, 2008. Even the amount of money recognized to a party as compensation are considered in the calculation of the maintenance, see Cass. 10th July 2008, no. 19064 in *Giustizia & Diritto* 2008. Obviously, the contribution of the wife in the care of the house and the offspring constitutes an element of evaluation: Cass. 14th January 2008, no. 593, in *Giust. Civ.* 2008, 3, 608.

36 I refer to the decision of Trib. Bari, 23rd September 2008, no. 2120, in *giurisprudenzabarese.it*, 2008. The Court did not consider it fair to give pre-eminence to doubling the costs of the wife; it pondered the expenses met by the husband to find, for example, a new house. The party burdened with the maintenance has the right to enjoy a similar standard of living, although not the same.

37 Cass. 12th July 2007, no. 15610 in *Giust. Civ. Mass.*, 2007, 7-8.

38 They are the same criteria introduced in the Principles of European Family Law taken from the analysis of the reply of a questionnaire sent to national European reporters. Obviously they are not binding principles as they represent the result of academic work; see E. Orucu, J. Mair, *Juxtaposing Legal systems and the principles of European family law on divorce and maintenance*, *op. cit.* pp. 265.

39 Cass. 22nd November 2000, no. 1505, in Nuovo dir. 2001, 563; Cass. 9th April 2003, no. 5560, in *Famiglia e diritto* 2003, 487; Cass. 28th June 2007, no. 14921, in *Diritto & Giustizia* 2007.

40 Art. 9 Law no. 898 of 1st December 1970; Cass. 18th July 2002 no. 10458 in *Giust. civ. Mass*. 2002, 1272.

41 Cass. 24th may 2007, no. 12157, in *jurisdata* 2012.

42 French family law has been subject to an important movement of reforms with the Law n°2000-596 of 30th June 2000 and Law n°2004-439 of 26th May 2004. See also before the reform: J. Carbonnier, *Les regimes matrimoniaux*, in *Essais sur les lois*, 2 ed., Paris, Defrenois, 1999, p. 41 ff.

there is no common consent, the amount is determined by a judge on the basis of different criteria[45] among which, art. 271 code civil, are the professional choices during common life "*pour l'éducation des enfants et du temps qu'il faudra encore y consacrer ou pour favoriser la carrière de son conjoint au détriment de la sienne*"[46].

The payment has to take place in the form of a lump sum[47] or the transfer of an asset or of a concrete interest in an estate[48]. The monthly payment should be an exceptional event, related to specific circumstances of the creditor or the debtor and limited to 8 years. A life-long annuity is recognized in special cases[49].

The tendency to reduce the term of the periodical payment, and the favouring of the immediate definition of any economic claim, is also typical of the English system[50]. This result comes to fruition

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43 For instance in a recent case the maintenance has been denied in a short marriage where the wife has able to work: Cour d'appel Bordeaux, 28th february 2012, n. 10/04177, in *LexisNexis France*, 2012. In the evaluation of the consequences of the family breakdown the contribution due for the children's maintenance must not interfere: Cour de Cassation 25th May 2004 no. 02-12.922 in *Bulletin*, 2004, I, 148 p. 121.

44 Art. 270 et ss. code civil. On the general regulation of the family and its assets P. Malaurie, H. Fulchiron, *La famille*, 2 ed., Paris, Defrenois, 2006. It must be underlined that the payment of such indemnity is not automatically recognized by the judge who must consider whether a disparity exists consequent to the divorce; in such context, this has been denied due to the shortness of the marriage; see Cour de Cassation, 15 février 2012, n° 206 in *Bulletin on line*, 2012, Cour de Cassation, 15 février 2012, n° 208 in *Bulletin on line*, 2012.

45 A recent decision of the Cour de Cassation clarified that the common life prior to the marriage does not represent an element able to consider the needs and the resources of the wife: Cour Cassation 16th April 2008, no. 07.12814 in *Dalloz*, 2008, 1271, obs. V. Avena-Robardet.

46 The total commitment to the care of the children, and the consequent sacrifice of professional work, is a reasonable element to confirm a life annuity in favour of the wife: Cour de Cassation, 11th July 2006 no. 05-19.862 in *Bulletin*, 2006, I, 381 p. 328; recently Cour d'appel Lyon, 16th January 2012, n° 10/07500, in *LexisNexis France*, 2012; Cour d'appel Chambéry, 18th October 2011, n° 10/01758 in *LexisNexis France*, 2012.

47 It is singular that "payment" in the form of capital can be made in instalments even for small amounts; with sentence of the Cour d'Appel de Paris, 24ème Chambre A, 13 June 2007, the judge ruled payment of a sum of € 4,800 split up into € 200 instalments; Cour d'appel Bordeaux, 6th September 2011, n. 10/05639, in *LexisNexis France*, 2012.

48 The *prestation compensatoire* can be in the form of the allowance of occupation of the family home: Cour de Cassation 19th April 2005 n° 03-16.140 in *Bulletin*, 2005, I, n° 190, p. 160; Cour de Cassation, 31 mars 2010, n° 377, in *Bulletin on line*, 2012.

49 Cour d'appel Dijon, 1st March 2012, n° 11/01269; in this case the obliged party was authorized to periodical payment because he didn't have liquid asset. Due to the possibility of forfeiture, the *prestation compensatoire* is subject to particular regulation as regards its revision. The periodic payments can be modified only in their duration; the life annuity can be suspended or ended when important changes intervene in the condition of the parties. Obviously it is impossible to make a revision of the lump sum or other statement regarding the estates; this explains why the second marriage or cohabitation do not have negative repercussions on the *prestation compensatoire*. All the changes known at the moment of the divorce and considered in fixing the *prestation compensatoire* do not justify a claim for revision Cour de Cassation 3rd November 2004 no. 02- 18.509 in *Recueil Dalloz* 2004 p. 3037. Also in the regime prior to the reform of the 2004, in the case of a life annuity the second family cannot be an unforeseeable element able to weight the amount of the contribution without a concrete evaluation of the costs of the new familial situation: Cour de Cassation 25th April 2006 no. 05 – 16.345 in *Bulletin* 2006, I, 198 p. 174. The Court can suspend, cease and modify the periodical payment when a change in the conditions of the party is registered: Cour d'appel Douai, 18th November 2010, n° 09-06518, in *LexisNexis France*, 2012.

50 In *AMS v. Child Support Office*, in *FLR*, 1998, 1, 955 the capitalised maintenance was considered a valid alternative to secured periodical payment. On the English system see: C. Valente, *Regno Unito*, in *Il diritto di famiglia nell'Unione europea. Formazione, vita e crisi della coppia*, edited by F. Brunetta D'Usseaux, Milan, Cedam, 2005, p. 323 ss.

through the "clean break", a practise that utilizes the payment of a sum of money or the transfer of an asset whose value represents the financial settlement. All elements are considered in quantifying the clean break compensation, thus going beyond the duration of the marriage and each party's resources, to include the consequences of the professional choices of each party[51].

Although this is the better solution[52] in the division of the assets, the English judge has a wide discretion in the application of ancillary relief exercised in accordance with a just and reasonable criteria[53]; so, according to the statutory provisions[54] the Court may provide for periodical payments of variable duration linked to the life of the parties and subject to modification in the event of a change in the condition[55] of the partners. These situations are advisable in the presence of children or when a party does not have realistic expectations of economic independence[56].

Therefore, despite the existing differences[57] in the national provisions, the practical results can be often analogous; that is to say the consequences of the family breakdown can produce similar effects when the focus is the operative procedure of the rules (law in action).

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51 In this sense the express right to compensation for the wife's dedition to family care is in *SRJ v. DWJ (Financial Provision*), in *FLR*, 1999, 2, 176.

52 As Baroness Hale noted in *Miller v. Miller* and *McFarlane v. McFarlane "the periodical payments are a continuing source of stress for both parties"*; the aim of the divorce should be the reaching of independency. *Miller v Miller*; *McFarlane v McFarlane*, in *UKHL*, 2006, 24.

53 The concepts of fairness and reasonableness are obviously in evolving criteria influenced by social and moral values. As specified above, after the case *White v. White*, in *UKHL*, 2000, 54 it has been clear that the yardstick of equality cannot guarantee always a fair result above all in the treatment of both short and long marriages. It appears impossible to apply the same rules to all cases: for example the assignment of the home, the sole relevant element of the family assets, represents a problem linked to general marriages which, on the contrary, do not characterize the so called "big money case". A new trend has been introduced in *Miller v. Miller* and *McFarlane v. McFarlane* op. cit. in which the distinction between non–matrimonial and matrimonial property became the discussion point on the way to share the family asset: M. Welstead, *Judicial reform or an increase in discretion – The decision in Miller v. Miller; Mcfarlane v. Mcfarlane*, in *The International Survey of Family Law 2008 Edition*, Jordan Publishing, 2008, p. 61 ss.; J. Miles, *Charman v. Charman (No. 4) – making sense of need, compensation and equal sharing after Miller/Mcfarlane*, in *CFLQ*, 2008, 20, 3, p. 378.

54 Sec. 23 Matrimonial Causes Act 1973: the court can make an order for periodical payment, secured or unsecured, an order for a lump sum and also an order to transfer the property of the family home or other real estate or even to sell the house. According to section 25 there are numerous elements to take into account amongst which are the welfare of the children, current and potential income, earning capacity, property and other financial resources, financial needs, family standards of living, the age of the parties, the duration of the marriage.

55 The re-marriage and the start of a new cohabitation are changes which can lead to a revision of the financial orders, Matrimonial Causes Act 1973 sec. 28. The relevance of the cohabitation, in this context, has been contested: the English system in fact does not recognize cohabitation as having the same effect as marriage, and in particular that relationship does not give the partner legal rights against the other's assets. See the opinion of Thorpe L.J. *in Flavell v. Falvell*, in *FLR*, 1997, 1, 353.

56 C v C (Financial provision), in FLR, 1989, 1, 11: the divorce proceeding begun after twenty years' marriage, the judge limited her periodical payments to 12 years by which time the younger child would be 18. He said the idea of periodical payments for life for a young or youngish wife (W was then 44 and had significant earning potential) with substantial capital is largely obsolescent. On the contrary in *M v. M (Financial Provision)*, in *FLR*, 1987, 2, the termination after five years would be inappropriate and unjust because of the age and the limited work experience of the wife, in the same direction *Barrett v Barrett*, in *FLR*, 1988, 2, 516, CA.

57 In the same way, European legal systems have also indicated the payment of a sum for alimony to offset the position of the weaker party; this is the case, *inter alia*, of the Czech and German systems. The detailed report on national regulation is available in K. Boele-Woelki, B. Braat, I. Sumner, *European Family Law in action, II, Maintenance between former spouses*, Intersentia, Antwerpen, Oxford, New York, 2003; M. D. Panforti, C. Valente

For example, in this context a common aspect concerning maintenance is represented by the function of indemnity, recognized in the payment, and by the tendency of countries to reduce the duration to a definitive term. Both these elements represent the instrument to establish a fair situation, and guarantee a standard of living similar to the previous one, when the parties cannot immediately resolve financial matters[58].

IV. The "solution" provided by the recent European regulation.

The evolution of the national regulations towards standardized solutions is a slow and gradual process, which does not prevent the risk of a general uncertainty. Even though the above mentioned factors of convergence constitute an excellent basis for the research of uniform solutions, the legal evolution of family law is characterized by fragmentation and uncertainty in cross border conditions.

An important step towards the simplification of such relations was recently made by the European Community which, already in 2005[59] had begun work to assess a "revision" of European legislation on family law[60].

The general aim of such initiative was to provide a clear and complete juridical representation on the subject of divorce and provide members of the couple with adequate solutions as regards legal certainty, predictability, flexibility. The detriment to the economically weaker member of the couple, and instead, the position of the party best able to sustain the legal costs necessary for the proceeding (in the hope of obtaining a favourable ruling) represented the factors for evaluating the new legislative asset[61].

Such a procedure has led to the adoption of Regulation no. 1259/2010 dated 20 December 2010, into effect on 21 June 2012[62].

The reform does not harmonize national laws (expressly recognised as the result of different historical and cultural processes) but it makes the task of the judge called upon to settle the dispute

(edited by), *Rapporti familiari ed esigenze abitative. Le risposte in uno studio comparato*, Mucchi, Modena, 2012; Z. Kralickova, *Legal protection of unmarried and divorced mothers in Czech Republic*, in B. Verschraegen (edited by), *Family Finances*, Vienna, Jan Sramek Verlag, 2009, pp. 281-291.

58 See also: T. Auletta, *Il diritto di famiglia*, 9 ed., Turin, Giappichelli, 2008.

59 I refer to the green book on applicable law and jurisdiction on divorce matter. A specific analysis is laid down in regulation of European Council on 17 july 2006 COM 399 (available on website http://eur-lex.europa.eu/it/index.htm) and S. Tonolo, *Il libro verde della Commissione europea sulla giurisdizione e la legge applicabile in materia di divorzio*, in *Riv. Dir. Int*., 2005, pp. 776 ff.

60 A critical paper is M. Buschbaum, U. Simon, *Les proposition de la Commission européenne relatives a l'harmonisation des règles de conflit de lois sur les biens patrimoniaux des couples maries et des partenariats enregistres*, in *Rev. Crit. DIP*, 2011, 100 (4), pp. 801 ff.

61 See on the matters of "rushing to court": M.C. Baruffi, *Due gli obiettivi del "sistema" UE: evitare il forum shopping e definire un quadro normativo certo*, in *Famiglia e minori*, 3, 2011, pp. II ff.; R. Clerici, *Il nuovo Regolamento dell'Unione Europea sulla legge applicabile al divorzio e alla separazione personale*, in *Fam. Dir*., 2011, pp. 1053 ff.; I. Ottaviano, *La prima cooperazione rafforzata dell'Unione Europea: una disciplina comune in materia di legge applicabile a separazioni e divorzio transanazionali*, in *Dir. Un. Eur*., 2011, pp.113 ff.

62 The sole art. 17, relating to the notification obligations of member States to the Commission, applies starting on 21 June 2011.

easier, with prior indication of the applicable law; and it also allow the couple to have sufficient elements for appreciating the consequences of the breach[63] of the marriage in advance.

Such a result was achieved by means of a procedure widely used in many international treaties, specifically by granting the parties the chance to reach an agreement on applicable law[64]. This principle follows in the wake of a movement, which tends to "privatize"[65] relations within family law. The trend already present in common-law countries, has also made an appearance in continental law, in order to promote negotiation and mediation between individuals, and to reduce the interventions of a public nature. The traditional view of the family, linked to the status concept, to whom the State grants rights and/or powers, has been replaced; nowadays, all the family members are entitled to autonomy in the conduction of family life and above all to manage family assets.

In this context, the regulation[66] has enabled married couples to formalize a choice tied to the law with which the parties have or have had some links. The aim is to discourage, as much as possible, the recourse to foreign jurisdictions and, indirectly, to protect the economically weaker member. The option must therefore fall between the laws of the country of habitual residence of the couple, or that of the country of last habitual residence, if either of them currently lives there, or that of the country where one of them has nationality or, finally, the *lex fori*; all this with reference to the time the contract is made.

Whenever the parties have not stipulated such an agreement, the regulation itself indicates the applicable law, listing, in order, that of habitual residence of the couple, or lacking this, that of the last habitual residence (as long as no more than one year has passed before appealing to the judicial authority), if one of them still lives there. Or in the absence of such, that of the country of which the married couple are nationals; the *lex fori* still remains to be considered at the time the case is established.

63 The regulation don't furnish the definition of divorce but a common opinion refers to all proceedings before the court, except the religious institution; in this sense the rejection of Islamic nature declared by a rabbinic tribunal or religious authority has been excluded by the application of the European act. On the extension of the reform see K. Boele – Woelki, *For better or for worse: the Europeanization of international divorce law*, in *Yearbook of Private International Law*, 2010, p. 13 ff.

64 On this subject: M. Condinanzi, C. Amalfitano, *La libera circolazione della "coppia" nel diritto comunitario*, in *Dir. Un. Eur*., 2008, pp. 399 ff..

65 On this subject: A. Zoppini, *L'autonomia privata nel diritto di famiglia, sessant'anni dopo*, in *Riv. Dir. Civ.*, 2002, I, pp. 213 ff.; B. Braat, *Indépendence et interdépendence patrimoniales des epoux dans le regime matrimonial legal des droits francais, neederlandais et suisse*, Intersentia, Berne, 2004, A. Miranda, *Le modèle italien: la privatisation des modèles familiaux face aux développements sociaux*, in O. Roy, *Réflexions sur le pluralisme familial*, Parigi, Press Universitaire de Paris Ouest, 2011, pp. 93 ff. and also S. Sica, M. Messina, *Famiglia non fondata sul matrimonio ed autonomia negoziale*, in G. Autorino Stanzione (edited by), *Il diritto di famiglia nella dottrina e nella giurisprudenza*, Vol. I, Giappichelli, Turin, 2011, pp. 409- 433.

66 See M. Velletti, E. Calò, *La disciplina europea del divorzio*, in *Corr. Giur*., 2011, pp. 719 ff.

However, such an innovative approach to the problem of identifying the applicable law does leave various problems unsolved[67] for reasons including the lack of case law, due to the very recent nature of the reforms.

One of the purposes of such regulation[68] is to limit the application of the foreign law and to convince the married couple to prefer the law of the place in which the case will probably be established. This does not, however, guarantee the exclusion of the foreign law, with the well-known difficulties this entails: problems in the understanding the foreign legal language and the institutions as a whole, difficulties discovering the sources of the foreign law, lack of acquaintance with foreign procedures and jurisprudences.

The target of the European legislation is to prevent delays and additional costs affecting divorce/separation cases, and therefore to protect the weaker member of the couple. This must also be reconsidered because the possibility of coming to an agreement[69] on applicable law does not necessarily put the members of the couple on an equal position, and above all the choice is not always made in an aware manner[70].

In addition, there is a risk that the indication of the criteria would not meet the expectations of the parties. We can refer the case in which a couple transfers their residence after the agreement relating to the applicable law. This would obviously give rise to a series of problems concerning predictability and would place major obstacles in the way of reconstructing the will of the parties, as well as the governance of the disputed relations.

Last but not least in terms of importance, to this must be added the fact that, among others, there are matters relating to the validity of the marriage, the property effects of the marriage, parental responsibility and alimony obligations that all remain outside the application of the mentioned regulation; without ignoring the circumstance whereby such regulation only applies to marriage unions. This leaves numerous problems relating to partnerships and recorded unions unresolved, for both homosexual and heterosexual unions.

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67 A critical aspect concernes the universal character of the regulation that has to deal with the nature of enhanced cooperation of the text to which only a certain number of nation have accepted; see M.C. Baruffi, *Il regolamento sulla legge applicabile ai "divorzi europei"*, in *Il diritto dell'Unione Europea*, 2011, 4, pp. 869 ff.; S. Peers, *Divorce, European style: the first authorization of enhanced cooperation* in *European Constitutional Law Review*, 2010, 339 ff.; P. Hammje, *Le nouveau règlement (UE) n. 1259/2010 du Conseil du 20 décembre 2010 mettant en œuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps*, in *Revue critique de droit internationale privé*, p. 295 ff.

68 G. De Marzo, *Il regolamento (Ue) 1259/2010 in materia di legge applicabile al divorzio e alla separazione personale: primi passi verso un diritto europeo uniforme della famiglia*, in *Foro it.*, 2011, I, 918 ff.

69 Problems must also be included relating to the form of agreement (art. 7) as the law require the written form but makes a reference to national law as to the validity of the agreement as the formal criterion.

70 Even thus the regulation encourages the couple to consult an expert to appreciate the consequences of any decision, this might not be enough, including in the light of any changes in the life of the couple.

It is important to underline that, in accordance with the definition given by European Court[71], the family regime includes the discipline of the property during the marriage as far as the financial relationship which originated in the marriage, and having effect in the divorce proceedings.

With the above mentioned restrictions, the effectiveness of the regulation is limited to the grounds for divorce and the personal consequences of the divorce (and separation)[72]. Paradoxically the risk is that, in the presence of a valid agreement about the applicable law, the disadvantaged party could sustain a case for a limited effect of the contract and the regulation, in order to promote the enforcement of his/her national law. In effect, the lack of a consensus about laws governing the specific case can produce aberrant results. The impossibility of adopting regulation criteria imposes the need to refer to the principles of international private law, which differs in every country. Generally, the reference is to the national law of the common residence, or to the last residence of the couple, or to the citizenship. This causes the well known problems and consequences of uncertainty.

V. Financial autonomy: the aim of divorce proceedings in European systems.

It is clear that on the European level the uniform discipline of family law is still far from being reached. Even though there is severe opposition to the uniformity of law, coming from supporters of nationalism, the harmonization process has already started. In the nineties the idea of harmonization was discussed for the first time, as a consequence of the internalization of private law in general terms.

The work of The Hague Convention cannot be ignored, as it is an inter-governative organization that represents approximately one hundred and thirty states, and has been established in order to develop trans-boundary legal tools, which are to be applied in several fields of law, to answer to the real needs of the coming uniformity of such law. Starting from the leading need to give effect to foreign judicial sentences, this organization has worked in order to adopt conventions able to remove uncertainties. Among those conventions are the agreement on the international abduction of minors, the convention on international adoption, the one on alimony, on recognition of divorce, and on wills.

On a comparative basis, in the year 2001 the International Commission on European Family Law (CEFL[73]) and its Expert Group, composed of academics and national experts on family law issues, focused on the processing of the Principles of European Family Law. Even though the results of this focused work were important (several papers on the requisites for divorce and for alimony, parental responsibility, homosexual cohabitation), there are still many questions to be resolved. These include

71 European Court 17th march 1979, De Cavel I, n. 143/78, in *Raccolta*, 1979, 1055 and European Court 31st march 1982, C.H,.W., n. 25/81, in *Raccolta*, 1982, 1189.

72 G. Rossolillo, *Ambito di applicazione, relazione con il regolamento CE n. 2201/2003, definizione e carattere universale*, in *Nuove leggi civili commentate*, 2011, 6, pp. 1462.

73 On this theme, amongst the other, see: K. Boele- Woelki, *Perspectives for the unification ah harmonisation of family law in Europe*, Antwerp, Oxford, New York, Intersentia, 2003; K. Boele- Woelki, J. Miles, J. M. Scherpe, *The future of family property in Europe*, Cambridge, Antwerp, Portland, 2011.

the choice of the law able to be more broadly applied in some areas tied to local tradition. Topics, for example, include the many clashes on issues concerning fundamental rights such as dispute resolution regarding health. In many cases these involve not only legal matters, but ethical and religious ones as well. That is to say the law regarding euthanasia, end of life therapeutic treatment, or feminine genital mutilation, typical of some African areas.

The published studies demonstrate that even though the differences between the provisions are still significant, points of convergence can be understood among the various European models, probably because the execution of the rules produces increasingly similar results.

The sensation is that these common tendencies are the effect of both a natural evolution in the area of family law and of social changes occurring in this area[74].

One element worthy of mention is the tendency to favour the reaching of economic independence by both parties once the marriage has been dissolved. In this sense, the recent European regulation will play an important role in facilitating the prompt solution of controversies, thanks to the identification of applicable law.

The clean break model originating in Anglo-Saxon countries seems to have been imported into the continent where, ever more often, solutions are adopted which are suitable for defining consequences of the breakup of the marriage in a definitive way. A typical example is the payment of a lump sum instead of periodical payments or the transfer of real estate[75].

This phenomenon is so widespread that today some authors[76] can speak of a sort of "erosion" of the principle of marriage solidarity.

Political and social evolution, i.e. the fact that women have a certain amount of economic independence (which they also maintain during the marriage), the change in costumes and mentality (increasingly more marriages break up and after only a short time), the change in the very concept of marriage (by now no longer considered an indissoluble instrument of financial security) are all aspects which undermine such solidarity.

In effect, despite the property asset system of the family, the decisions of different legal systems are now turned towards restricting the economic consequences of the breach of the marriage in a

74 We must underline that the phenomenon of modernisation has affected each European system but has not eliminated completely the existing differences. On the evolution of family law and its consequences see: M. Antokolskaia, *Harmonisation of Family Law in Europe: a historical perspective. A tale of two millennia.*, Intersentia, Antwerpen, Oxford, 2006; M.A. Glendon, *The transformation of family law: State, Law, and Family in the United States and Western Europe*, Chicago & London, University of Chicago Press, 1989; C. McGlynn, *Families and the European Union. Law, Politics and Pluralism*, Cambridge, Cambridge University press, 2006, pp. 176 ff.

75 We can mention *Gojkovich v. Gojkovich* in *Fam.*, 1992, 40 where the judge order a lump sum of 1 million to wife to buy hotel (and to start a business plan).

76 On this subject see H. Fulchiron, *Des solidarités dans les couples séparés*, in B. Verschraegen (edited by), *Family Finances, op. cit*, pp. 517- 531.

relatively short time. Discussions no longer centre on extending a legal and moral obligation but only on the need to achieve a fair distribution, in order to ensure that both parties have an economic base suitable for making them independent. Thus, this could be considered as reducing the meaning of marriage solidarity to the utmost.

A right to life-long maintenance is no longer guaranteed, but the switch from the breakage of the bond to the new status[77] must be made easier, at economic level, by means of the fair sharing of all assets, a process to be completed as quickly as possible.

In this context, the distinction between common-law countries and civil law countries lessens and seems capable of being overlooked, as does the traditional dichotomy between the separation of assets (most typically found in common law systems) and the sharing of assets (most frequently adopted by civil law systems)[78].

Another point is the situation often introduced into continental systems, in which measures permit the judge to reach a decision based on *equitas*[79], in order to balance the effects of a rigid application of rules for the family in question.

In general, the recourse to meta-judicial criteria has been introduced in the resolution of proceedings where the discretionary use of the law is recommended for the best balance of the interests. The rigidity of national regulations can be mixed with fairness and equal principles with the aim of adapting interpretation of the law to the specific need of the case.

This is another typical *modus operandi* imported from the English system to the continental ones. It can be said that the process of "familiarisation" of property[80] began in the second part of the last century in the English system has started to produce the same effects in the continental nations. The guiding principle is the need to make the property rules affecting ownership of family home flexible, and to recalibrate the assets in relation to the specific necessities of the family members.

The autonomy reserved to the parties by national legislation is not to be ignored. The possibility of regulating property relations, in view of a possible breakdown of the partnership (maintenance or

77 For example, in French law, the percentage of married couples which obtain alimony is very low - just 16.14% of cases; see Foulchiron, *Des solidarités dans les couples séparés, op.cit*., p. 520.

78 See on the subject T. Sverdrup, *Maintenance as a separate issue - The relationship between maintenance and matrimonial property*, in K. Boele- Woelki, *Common Core and better law in European Family Law*, Intersentia, Antwerp, Oxford, 2005, p.119 ss.; L. Fox, *Reforming Family Property – Comparisons, Compromises and Common Dimensions*, in CFLQ, 2003, 15, pp.1–19, V. Roppo, G. Savorani, *Crisi della famiglia e obblighi nell'Unione Europea*, Turin, Giappichelli, 2008; C. McGlynn, *Families and European Union Law*, in R. Probert, *Family life and the Law. Under one roof*, Aldershot, Ashgate, 2007, p. 247.

79 See also J. Copson, *Financial provision in England after an overseas divorce*, in *FLQ*, 45, 3, 2011, pp. 361 ss.; A. Laquer Estin, *International divorce: litigating marital property and support rights*, in *FLQ*, 45, 3, 2011, pp. 293 ff.

80 The reference is to the Jhon Dewar theory (J. Dewar, *Land, law and the family home*, in S. Bright, J. Dewar, *Land law: themes and perspectives*, Oxford, Oxford University Press, 1998, pp. 327 ff.) as explained in the recent article of A. Hayward, *Family property and the process of familialisation of property law*, in *Child and Family Law Quarterly*, 2012, 24, 3, 284 ff. Even if the theory is elaborated to mitigate the effect of rigid rules concerning property in the dissolution of cohabitation couple, the effect could be *a fortiori* extended to marriage.

separation agreements) typical of the common law traditions has started to enter in some civil law countries, where the validity and effectiveness of such agreements is currently under evaluation. In this direction, a specific regulation currently appears in the Principles elaborated by CEFL[81].

That aspect is a concrete representation of the major phenomenon regarding the privatization of family law. It is well demonstrated by the habit of resolving, on a judicial level, the still existing relationship (clean break) question: for example, the transfer of property, or the payment of a lump sum, or the more frequent use of alternative dispute resolution instruments.

In addition, the common social evolution[82] had a deep impact on the family law of European countries. These include the secularisation of marriage, the new concept of couple should be not necessarily bound by marriage, liberalisation and the introduction of no-fault divorce, the phenomenon of the re-composed family, and the necessity to guarantee all the needs of family components, independently of the genetic ties.

The affirmation of the above-mentioned principles permits us to discuss a natural convergence of systems. The diffusion of models and forms of indirect communication such as the circulation of national decisions, bring about an evolution, albeit slow, of the law, and have often led to a "legal transplant" of national rules[83].

To this scope we must add the willingness of national legislators to cooperate, encouraged by an interest in the study of foreign law, to offer further valid solutions.

Natural convergence is undoubtedly the best instrument for achieving a commonly accepted uniform discipline. However, it is a slow process and probably difficult to carry out regarding the aspects which remain largely linked to local tradition[84].

In conclusion, it can be said that all direct efforts aimed at standardizing family law seem to be based on a common point of departure: minimizing state intervention, apart from issues concerning the care of the child, and preferring the autonomy of the parties and the intervention of the judge, based on equitable principles.

81 See K. Boele-Woelky, F. Ferrand, C. Gonzales Beilfuss, M. Jantera-Jareborg, N. Lowe, D. Martiny, W. Pintens, *Principles of European Family Law regarding divorce and maintenance between former spouses*, Antwerp, Oxford, Intersentia, 2003.

82 M. Antokolskaia, *Comparative family law: moving with the times?*, in E. Orucu, D. Nelken, *Comparative Law. a handbook*, Oxford, Portland, Oregon, Intersentia, 2007, p. 241 ff.

83 A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, Scottish Academic Press, 1974.

84 See on the subject A. Fiorini, *Rome III – Choice of law in divorce: is the Europeanisation of Family Law going too far?*, in *International Journal of Law, Policy and the Family*, 22, 2, 2008, pp. 178 – 205.

Essays

Essais

Ensayos

Paper n. 4

INTERNATIONAL COOPERATION AND CONSUMER PROTECTION IN RETAIL ENERGY MARKETS

by

Cristiano Artizzu

Suggested citation: Cristiano Artizzu, *International Cooperation and Consumer Protection in Retail Energy Markets, Op. J.*, Vol.I, n.1/2013, Paper n. 4, pp. 111 - 133, www.opiniojurisincomparatione.org, online publication October 2013.

INTERNATIONAL COOPERATION AND CONSUMER PROTECTION IN RETAIL ENERGY MARKETS

by

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Abstract:

The promotion of consumer protection and competition is essential for the well functioning of the energy sector. Consumers need to make informed choices and a well functioning market should enable them to choose between various energy suppliers and offers. Despite retail competition has been supported by a gradual reform in many countries, most customers are not actively participating in the energy markets. The European Commission and UE National Regulatory Authorities support the development of the energy sector by promoting competition as well as consumer protection. Moreover, the Energy Community and the Association of Mediterranean Regulators for Electricity and Natural Gas operate to establish a common frame and a well functioning energy market.

Thanks to the above mentioned entities, the best regulatory models are shared for the benefit of customers and in order to deal with numerous areas of concern, such as the lack of incentives for new suppliers to enter the market, the unfair terms and asymmetries affecting consumers in a negative way and the need of measures to ensure the supply to vulnerable customers.

The purpose of the present paper is to provide an overview of the international cooperation in the field of consumer protection in the energy sector and of the way private law tools (regulated contract terms or mandatory quality standards, for example) may be used to overcome inequalities in bargaining power and to ban unfair practices which distort competition and harm consumers. The paper will be also focusing on the Italian retail energy market as a case study.

Keywords: Consumer protection; energy law; regulation; national regulatory authority; retail markets; international cooperation; contract terms; quality of service.

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1. Introduction

The past few years have seen numerous legislative developments and regulatory policies addressing consumer protection in the energy markets. Moreover, the interconnection of national markets and the birth of new entities are expected to further support the promotion of consumer interests as well as giving rise to positive changes in the energy sector. Competition in EU energy markets has been underpinned by a gradual reform in many countries and the latest changes to the legal and regulatory framework have provided consumers with the opportunity to benefit from a competitive energy market. On the other hand, however, most customers are not actively participating in it and they are not aware of the chance to exercise choice among different offers. The action of EU Member States and of their National Regulatory Authorities aims to adopt new measures in order to ensure that consumers may take advantage of competition in retail energy markets. Undoubtedly, these measures can be more efficient and fruitful when transparency is really effective.

The present contribution addresses the wide topic of consumer protection and empowerment in retail energy markets, without restricting the survey to EU countries (even though the EU energy sector has undergone significant changes and the solutions implemented by very recent Directives are regarded as a remarkable pattern by other jurisdictions and countries).

Consumer protection may be valuably enhanced by a stable and harmonised regulatory framework, especially when it is set up for the benefit of a much wider community. Apparently, this does not cause the weakening of consumer interests as long as common rules and shared values aim to guarantee the best practices. By focusing on the approach of different countries and jurisdictions, one can notice how actively and positively new organisations are working to establish a common frame and a well functioning energy market. The Energy Community and the Association of Mediterranean Regulators for Electricity and Natural Gas (hereinafter referred to as MEDREG) represent indeed worth noting experiences in the achievement of the above mentioned objectives.

A competitive and integrated market is able, or rather, is bound to maximise consumer benefits as well as optimising the allocation of resources. However, it is necessary to assess whether the energy

sector also needs the implementation of tougher rules, such as the obligation on suppliers to provide customers with information to compare prices[1] and terms and to switch to better deals: generally speaking, making them benefit from a set of standards of conduct that retailers have to comply with when dealing with household customers and small businesses.

A well functioning market should enable consumers to choose between various energy suppliers and offers; as a consequence, consumers need to be given the opportunity to make informed choices between different suppliers and products. As stated by BEUC[2], consumers are still not benefiting from the liberalised energy market. Consumers will benefit from it and informed choices will be easier for them if clear, reliable and accessible information is available and offers on the market are easily comparable. Consumers need also to be enabled to easily switch supplier and to be provided with information on their consumption.

Each country faces however its own difficulties and a wide range of areas of concern may be analysed. In some jurisdictions consumers seek lower prices and innovative services or, on the contrary, they do not take advantage of switching and, even worse, they switch to higher-cost suppliers. In other countries customers do not have the chance to choose among different offers.

Governments and National Regulatory Authorities consequently deal with different problems and they are committed either to empower customers (through information obligations and the implementation of smart technologies) or to overcome the lack of incentives to switch supplier. In addition, regulatory concerns address: the adoption of the necessary measures to ensure the supply to vulnerable customers; the lack of investments if prices do not fully cover the costs of production, generation and transportation; the challenge of opening the energy market to competition or the lack of incentives for new suppliers to enter the market[3].

[1] Consumers are generally confused when comparing tariffs and prices.
[2] BEUC is the European Consumers' Organisation. It has a membership of 42 national consumer organisations from 31 European countries and its main task is to defend the interests of all Europe's consumers.
[3] In addition, please see Waddams Price, C., and Pham, K. (2007), *The impact of Electricity Market Reform on Consumers*, CCP Working Paper 08-7, 3, electronic copy available at: http://competitionpolicy.ac.uk/it/publications/utilities-policy: in South East Europe many residential customers pay much less than the minimum tariff required to sustain supply in the long run, even though, on the other hand, the increase in tariffs is bound to place a heavy burden on consumers whose incomes are generally low.

According to Cseres's opinion, "consumers are often not able to take the advantages made possible by effective competition as a result of information asymmetries, unfair trade practices, unfair standard contract terms, high search and switching costs or imperfect decision-making processes"[4]. It is certainly true that state regulation should focus only on those aspects of transactions displaying market failures5; on the other hand, this intervention cannot be limited to address the phenomenon of unfair standard terms used by companies entering into numerous similar transactions. The intervention should also guarantee an adequate quality of service regardless the degree of competition and it should ensure that all consumers have access to energy (meeting the needs of remote customers, for example).

The purpose of the present paper is to provide an overview of the international cooperation in the field of consumer protection in the energy sector and of the way private law tools and rules may be used, from a regulatory perspective, to the benefit of competition and consumers. This depends, however, on the level of maturity of the market: in some jurisdictions, for example, information obligations are not immediately useful if competition has not been implemented yet, but other regulatory tools may be adopted, such as regulated contract terms or mandatory quality standards. A part from this, the analysis of the interventions in the retail energy sector across Europe and in the Mediterranean basin is useful to assess if regulatory tools and techniques are effective in the daily task of balancing opposite interests between different customer classes or between energy companies and consumers. Broadly speaking, the regulatory approach may represent an intervention into the sphere of the freedom of contract and into the development of private autonomy; at the same time, it is necessary to overcome inequalities in bargaining power and to ban practices which distort competition and harm consumers. The paper will be also focusing on the Italian retail energy market regarded as a case study.

[4] Cseres, K. J. (2008*), What Has Competition Done for Consumers in Liberalised Markets?*, in *The Competition Law Review*, Volume 4, n. 2, 78, electronic copy available at: http://ssrn.com/abstract=1273611.
[5] Basedow, J. (2008), *Freedom of Contract in the European Union*, in *European Review of Contract in the European Union*, 905.

2. EU energy markets: consumer protection and empowerment as a means of stimulating competition

EU energy markets are fully opened to competition and consumers are entitled to choose among a wide range of available retailers and offers. According to the opinion of the Advocate General delivered on 20th October 2009 with reference to Case C-265/08[6], however, "once barriers have been removed there remain certain requirements which the market alone is not able to meet"[7]. For this, state involvement in the market should focus on the protection of consumer rights.

One is nowadays aware that competitive injury is no longer a necessary element to protect consumers, even though consumer protection plays a very important role in the path to competition.

New EU directives - especially Directives 2009/72/EC and 2009/73/EC of the European Parliament and of the Council of 13th July 2009 - aim to reduce information disparities and asymmetries between undertakings and customers. At the same time, this goal is eased by the setting of National Regulatory Authorities whose activities can support and guarantee the transition to a fully competitive market as well as taking into account consumer issues and needs.

Competition does not entail the uselessness of consumer protection rules. Although "not all consumer protection measures aim at fostering competition" - and "more often than not, there will be a tension between different goals: measures which promote competition could be incompatible with

[6] Reference for a preliminary ruling from TAR Lombardia, Regional Administrative Court, Lombardy.

[7] The request for a preliminary ruling addressed a different dilemma: whether it is contrary to the provision of Article 23 of Directive 2003/55/EC and to the principles of community law for a national provision to maintain in effect after 1st July 2007 the power of the National Regulatory Authority (pursuant to an italian law) to set reference prices for the supply of natural gas to domestic customers which suppliers are bound to include in their commercial offers or the provision in question (Article 23) is to be read in conjunction with Article 3 of the same Directive, which provides that Member States may impose on undertakings, in the general economic interest, public service obligations which relate to the price of supplies as meaning that it is not contrary to those provisions of community law for a national provision which, having regard to the circumstances of the market, still characterised by an absence of conditions of effective competition, at least in the wholesale sector, to allow a public authority to set a reference price for natural gas.
According to the Judgment of the Court of Justice of 20th April 2010, the answer to the questions referred must be that Articles 3 (2) and 23 (1) of Directive 2003/55 do not preclude national legislation which permits determination of the price level for the supply of natural gas by the definition of "reference prices" after the 1st July 2007, provided that such intervention: pursues a general economic interest consisting in maintaining the price of the supply of natural gas to final consumers at a reasonable level having regard to the reconciliation which Member States must make, taking account of the situation in the natural gas sector, between the objective of liberalisation and that of the necessary protection of final consumers pursued by Directive 2003/55; compromises the free determination of prices for the supply of natural gas after the 1st July 2007 only in so far as it is necessary to achieve such an objective in the general economic interest and, consequently, for a period that is necessarily limited in time; is clearly defined, transparent, non discriminatory and verifiable, and guarantees equal access for EU gas companies to consumers.

those which impose public service obligations"[8] - one should take into account that competition does not eliminate the need for "obligations on retailers to disclose detailed energy offer information to customers, as well as general consumer protection laws that prohibit, amongst other things, misleading, deceptive and unconscionable conduct"[9].

Customers, whether they be consumers or small businesses, need tools, information and tips to make efficient decisions in terms of swift, easy and effective choice[10]. Areas of concern thus include misleading marketing activities because of unfair commercial practices that may undermine consumer confidence in the market and competition as well[11]. An open market enables all consumers freely to choose their suppliers, but the increasing number of suppliers adds to the complexity of consumers' choices as they now face new costs and difficulties[12]. In addition, consumers are sometimes not able to switch to the best supplier[13].

Information obligations make the offers of the different suppliers easier to compare. However, the regulatory intervention that relies only on information obligations is not able to positively affect those consumers who are less educated or insensitive to information[14].

Directive 2005/29/EC of the European Parliament and of the Council of the 11th May 2005 aims to protect consumer economic interests from unfair commercial practices. This Directive also indirectly protects undertakings from their competitors who do not play by the rules provided by it and

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[8] Bellantuono, G., Boffa, F. (2008), *Residential energy markets in Europe: Designing effective institutions*, 11, electronic copy available at: http://ssrn.com/abstract=1121272.

[9] *Consumer Protection in a Deregulated retail Energy Market* (2008), Final Report, 21, Monash Centre for Regulatory Studies, Faculty of Law, Monash University, electronic copy available at: http://www.eraa.com.au/db_uploads/ConsumerProtectioninaDeregulatedRetailEnergyMarketFinalReporttotheERAAApril08.pdf.

[10] Cseres, K. J. (2008), *What Has Competition Done for Consumers in Liberalised Markets?*, cit.,120.

[11] Misleading commercial practices can deceive consumers and prevent them from making an informed and efficient choice. Directive 2005/29/CE of the European Parliament and of the Council of 11th May 2009 addresses the topic of unfair business-to-consumer commercial practices in the internal market.

[12] Bellantuono, G., Boffa, F. (2007), *Energy Regulation and Consumers' Interests*, Final Report, 33, Regional Technical Centre of Research on European Consumption – CTRRCE, electronic copy available at: http://ssrn.com/abstract=1120928.

[13] For interesting findings on the degree of capacity of customers to choose the best alternative suppliers, see Wilson, C. M., Waddams Price, C. (2006), *Do consumers switch to the best suppliers*, electronic copy available at: http://else.econ.ucl.ac.uk/conferences/consumer-behaviour/wilson.pdf.

[14] Rott, P. (2007), *Consumers and services of general interest: Is EC consumer law the future?*, in *Journal of Consumer Policy*, 51, who points out that only the Unfair Contract Terms Directive 93/13/EEC fully protects uninformed consumers by declairing unfair terms not binding.

guarantees, in this way, the fairness of competition and commercial practices in the internal market. According to its Article 1, this Directive aims to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests. Thus, its main goals are the promotion of freedom of decision-making, market transparency and information[15] in order to overcome market failures originated by misleading practices "which cause damage to consumer confidence in general and not simply cause injury to particular individual victims of fraud and duress"[16].

The protection of consumers by the undue influence of a supplier, for example, requires to ban the exploitition of a position of power thanks to which the business applies pressure in a way which significantly limits the consumer's ability to make an informed decision. For this reason, according to article 5 of the Directive a commercial practice shall be regarded as unfair if it is "contrary to the requirements of professional diligence" and if "it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers".

In addition, on 3rd December 2009 the European Commission issued a Guidance on the implementation of the above mentioned Directive, providing a very useful guidance on its provisions and practical examples on how they work.

Moving on to general remarks, it is important to highlight that regulation may make use of private law tools to guarantee a better functionality of the market – by regulatory functions of private

[15] Micklits, Hans-W. (2009), *Unfair commercial practices and misleading advertising, Micklits*, Hans-W., Reich, N., Rott., P., *Understanding EU Consumer Law*, Intersentia, Antwerp – Oxford – Portland, 71.
[16] Collins, H. (2006), *The Alchemy of Deriving General Principles of Contract Law from European Legislation: In search of the Philosopher's Stone,* in *European Review of Contract Law*, 217.

law some authors significantly mean the ability of private law instruments to address market failures[17] - despite the likely contrasts between private law and regulation[18].

Consumer empowerment may be enhanced by making customers aware of their rights and of market opportunities. A recent Study – which has pointed out the problems consumers face in making the right choice for them - has proposed the tools that can help consumers participate more actively in the market[19]. Liberalization has the potential to deliver the best prices, choice and innovation, on conditions that the opening of the market is accompanied by measures to protect and empower consumers. Member States whose retail markets opened earlier have already adopted useful measures, for the benefit of consumers, which can serve as a source of inspiration for other markets.

The findings of the survey show how competition widens consumer choice, but they provide at the same time the evidence of the complexity of this choice. For example, consumers are not aware of potential savings and believe that the incentives to switch are too small when compared to the costs. In addition, consumers struggle to compare products and offers and the complexity of tariffs and prices cause their disengagement and contributes to their resistance to change.

By focusing on detailed findings, one can notice that only 28% of consumers across the EU were satisfied with the way their complaint was dealt with. More than one in three consumers who have a problem do not even make a complaint (as they do not know how or where to complain or they think the sum involved is too small, that they are unlikely to get a satisfactory solution or that submitting a complaint is too difficult)[20].

[17] Cafaggi, F., Muir Watt, H. (2007), *The making of European Private Law: Regulation and Governance design*, 5, electronic copy available at: http://www.ihs.ac.at/publications/lib/ep13.pdf.
[18] Collins, H. (2006), *The Alchemy of Deriving General Principles of Contract Law from European Legislation: In search of the Philosopher's Stone*, cit., 219.
[19] "The functioning of the retail electricity markets for consumers in the European Union" (2010), Commission staff working paper, electronic copy available at: http://ec.europa.eu/consumers/strategy/docs/SWD_function_of_retail_electricity_en.pdf.
[20] Ibid., 27-28.

The role of information duties thus shifts from a mere contractual guarantee to an empowerment tool, which should enhance transparency and participation of consumers by providing them with easy and accessible information on their rights and on their consumption data[21].

3. EU energy markets: the Third Energy Package

Directive 2009/72/EC and Directive 2009/73/EC – also known as the Third Energy Package - have been adopted on the grounds that previous rules and measures had not provided the necessary framework for achieving the objective of a well functioning internal market. A fully competitive market oughts to always overcome barriers to access for new entrants and to give customers the opportunity to save on their bills by swithching supplier.

According to recital n. 37 of Directive 2009/72/EC concerning common rules for the internal market in electricity, energy regulators should be granted the power to decide on appropriate measures ensuring customer benefits through the promotion of effective competition necessary for the proper functioning of the internal market. Moreover, recital n. 42 provides that household customers and, where Member States deem it appropriate, small enterprises should also be able to enjoy public service guarantees, in particular with regard to security of supply and reasonable tariffs.

As significantly stated in recital n. 51, "consumer interests should be at the heart of this Directive": existing rights of consumers need to be strengthened and guaranteed and consumer protection should ensure that all consumers benefit from a competitive market. The promotion of competition in the energy sector is essential for the benefit of consumers. Market sharing, to cite just on example, is a very serious antitrust infringement as it hinders price competition and deprives customers of more choice of suppliers[22]; moreover, provisions on unbundling are necessary remedies to

[21] Please see Di Porto, F., Lorenzoni, L. (2012), *Consumer protection in Europe*, 5-6, electronic copy available at: www.iern.net.
[22] Hariharan, S., Ghaya, K. (2011), *Competition Law in the Energy Sector: The European Experience*, in *European Energy and Environmental Law Review*, 201.

overcome anticompetitive practices, as the lack of these measures would make the market suffer a great deal "and ultimately the same would be passed on to the consumers"[23].

Indeed European Union pursues the aim of allowing consumers to take full advantage of the opportunities of a liberalised internal market. And it is, of course, one of the most important tasks that energy regulators are called to carry out.

Article 3 (3) of Directive 2009/72 plays a very important role for consumer protection when it lays down that Member States shall ensure that all household customers, and, where Member States deem it appropriate, small enterprises (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million), enjoy universal service, that is the right to be supplied with electricity of a specified quality at reasonable, easily comparable, transparent and non discriminatory prices[24]. Member states shall also take appropriate measures to protect final customers and shall ensure that there are adequate safeguards to protect vulnerable customers. In this context, each Member State shall define the concept of vulnerable customers which may refer to energy poverty and to the prohibition of disconnection of electricity to such customers in critical times. In addition, they shall ensure high levels of consumer protection - particularly with respect to transparency regarding contractual terms and conditions -, general information and dispute settlement mechanisms and that eligible customers are able easily to switch to a new supplier. As regards at least household customers, the above mentioned measures shall include those set out in Annex I.

Annex I contains a list of measures on consumer protection. These measures aim to ensure that customers have a right to a contract with their electricity service provider that specifies: the duration of the contract; whether withdrawal from the contract without charge is permitted; any compensation and the refund arrangements which apply if contracted service quality levels are not met including

[23] Ibid., 201.

[24] Article 3 (3) of Directive 2003/54/EC of the European Parliament and of the Council of 26th June 2003 in the same way stated that Member states shall ensure that all household customers, and, where Member States deem it appropriate, small enterprises (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million), enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable and transparent prices. To ensure the provision of universal service, Member States may appoint a supplier of last resort.

inaccurate and delayed billing. Conditions shall be fair and well-known in advance and information should be provided prior to the conclusion of the contract. The measures aim also to guarantee that customers are not charged for changing supplier and benefit from transparent, simple and inexpensive procedures for dealing with their complaints.

Directive 2009/73/EC concerning common rules for the internal market in natural gas expresses the same objectives of Directive 2009/72/EC.

In addition to the already mentioned provisions, the importance of complaints handling is stressed in recital n. 51 by stating that greater consumer protection is guaranteed by the availability of effective means of dispute settlement for all customers and that Member States should introduce speedy and effective complaint handling procedures.

Moreover, Member States shall ensure the provision of single points of contact to provide consumers with all necessary information concerning their rights and the means of dispute settlement available to them in the event of a dispute. They shall also ensure that an independent mechanism, such as an energy ombudsman or a consumer body, is in place to guarantee efficient treatment of complaints and out-of-court dispute settlements[25].

Generally speaking, Directives 2009/72/EC and 2009/73/EC enhance the role of National Regulatory Authorities on a wide range of consumer issues. Specifically, these Directives pursue, among others, the aim to make consumers more confident and informed. Unfortunately, consumers are sometimes reluctant to deal with the formalities involved in changing the supplier and their confidence in the market is not high. For this reason, they need to be fully aware of their rights and the experiences developed by some countries may represent very good footsteps to be followed by countries where liberalisation is moving.

Regulation is expected to enhance consumer protection and it should be regarded as a suitable answer to market failures, especially when conflicting interests need to be balanced. As regards

[25] On alternative dispute resolutions see the European Commission's *Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR),* issued on 29th November 2011.

transparency, there is no word that matters to energy regulators more: consumers need transparent information about prices, comprehensible bills, guaranteed quality of supply standards; on the contrary, the lack of information may affect their interests. In addition, it's not easy for consumers to keep up with changing prices. As a consequence, the role of regulation is to make prices and contract terms clear and to make it easy to compare one supply or product with another.

On 19th June 2008 the European Parliament issued a resolution on "Towards a European Charter on the Rights of Energy Consumers". This document has represented a very important step in the direction of consumer protection: it has significantly pointed out that in a sector with imperfect competition market mechanisms alone do not always fully ensure consumers' interests and it has consequently proposed the enforcement of customer protection and stressed the need to ensure the protection of universal rights - especially access to energy and security of supply - also by promoting cooperation between Member States and neighbouring countries. In addition, the resolution has significantly stated that energy regulators must have the competence to protect consumers against unfair commercial practices and cooperate with the competent competition authorities[26].

4. Cooperation in UE countries and protection of energy consumers by enforcing regulation measures and competition law

Market integration and infrastructure development have been generally supported by economic interests. Nevertheless, current challenges as well as shared practices addressing consumer protection may lead to new remarkable improvements and pave the way for accelerating the deployment of electric and gas transmission lines and networks. The Council of EU Energy Regulators (hereinafter referred to as CEER) is a not-for-profit association, which represents the voice of EU National Regulatory Authorities of electricity and gas. Thanks to the setting of CEER, energy regulators cooperate and exchange best practices in order to ease the creation of a single, competitive and efficient

[26] For an example of cooperation between a National Regulatory Authority and an Antitrust Commission, see the Memorandum of Understanding signed on 13th September 2012 by the Italian energy regulator and the Italian competition authority, available at: www.agcm.it and www.autorita.energia.it.

EU energy market. CEER activities are performed by working groups and task forces, composed of staff members of National Regulatory Authorities; and as regards consumer issues, CEER constantly points out that regulation is expected to protect and empower customers without creating unjustified barriers for market entry. In order to make consumers feel confident in the energy market, CEER suggests that basic information about market functionality and consumer rights should be available and easy to understand. Especially suppliers are called to provide customers with easy to understand information and to deal with complaints and enquiries promptly and efficiently[27].

CEER activities are strongly supported by the European Commission. On 10th November 2010 a "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions" was issued in order to address the "Energy 2020 A strategy for competitive, sustainable and secure energy": the Commission announced the need of new measures to help consumers better participate in the market and specifically the development of guidance based on best practice in the area of switching, the implementation and monitoring of billing and complaint-handling recommendations and the identification of best pratices in alternative dispute resolutions.

The role of European institutions is really important to promote consumer protection and it can be appreciated also by focusing on the regulatory and enforcement tools used by the European Commission to overcome market malfunctioning, such as the implementation of the Third Energy Package and the numerous antitrust and merger control investigations and proceedings (often closed with commitment decisions). It is in fact clear that access by new entrants to the energy, the networks and the customers is essential to the well functioning of the market and barriers or obstacles to any one of these elements may render "futile any progress achieved" on the regulatory front[28].

[27] "Retail market design, with a focus on supplier switching and billing Draft Guidelines of Good Practice" (2011), A CEER Public Consultation Paper, 10, available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME. This public consultation has addressed the role and responsibilities of market players in the EU electricity and gas retail markets.

[28] Calzado, J. R., Motta, R., Leoz Martin Casallo, M. E. (2011), *The European Commission's Recent Activity in the Electricity and Gas Sectors: Integrated Approach, Pragmatism and Guidance in EU Competition Enforcement*, in *The European Antitrust Review*, 90-91.

Moreover, the Commission has established a Citizens' Energy Forum aimed at implementing competitive, energy efficient and fair retail markets for consumers and involving energy companies, network operators, national regulatory authorities, consumers associations and independent dispute resolution bodies. Significantly, since 2007 the Forum has been dealing with critical topics such as billing, complaint handling and smart metering[29] and a Vulnerable Consumer Working Group and a Price Transparency Working Group have been established to focus on the issues raised in the Forum.

5. MEDREG: the Association of Mediterranean Regulators for Electricity and Natural Gas

MEDREG was established in 2006 as a permanent working group and it became a non-profit Association in 2007. It currently gathers energy regulators from Albania, Algeria, the Palestinian Authority, Bosnia-Herzegovina, Croatia, Cyprus, Egypt, France, Greece, Israel, Italy, Jordan, Lebanon, Malta, Montenegro, Morocco, Portugal, Slovenia, Spain, Tunisia and Turkey. MEDREG is co-financed by the European Union with the purpose of promoting a stable and harmonised legal and regulatory framework for an integrated Euro-Mediterranean energy market. MEDERG's activities aim to facilitate the development of investments and infrastructures and to support the integration of energy markets in the Mediterranean basin. In fact, a greater harmonization of energy markets is destined to foster sustainable development in the sector and to stimulate initiatives of mutual interest; the above-mentioned activities are also able to guarantee the maximum benefits to energy consumers in the region[30]. As a consequence, this will make countries much more than just neighbours and their cooperation and mutual support will create a common vision of energy regulation.

MEDREG has been set up with the aim to enhance and foster a closer cooperation and coordination among Mediterranean countries and energy regulators through the mutual exchange of experiences. It is an answer to the widespread need for public authorities and energy regulators in

[29] *An energy policy for consumers* (2010), Commission Staff Working Paper, electronic copy available at: http://ec.europa.eu/energy/gas_electricity/doc/forum_citizen_energy/sec(2010)1407.pdf

[30] "MEDREG Response to EC Public Consultation on the External Dimension of the EU Energy Policy" (2011), 1, available at: http://www.medreg-regulators.org/portal/page/portal/MEDREG_HOME.

charge of monitoring the implementation of competition rules, empowering consumers and making them more aware of their rights and of the opportunities provided by the market.

As a matter of fact, the harmonisation of legal, technical and economic frameworks is strongly linked to the setting up of a stable regulatory context, which is bound to encourage investments and guarantee a high level of consumer protection[31]. Thus, MEDREG's role will support permanent collaboration between EU National Regulatory Authorities and energy regulators of the Mediterranean countries[32]. Energy regulators need to share an inventory of current practices in terms of rights and obligations of consumers, with a particular attention to the protection of vulnerable customers. As self regulation was proven unsatisfactory in some countries, it's necessary that energy regulators are endowed with powers to protect consumers.

Energy regulators have different tools to enhance consumer protection. In some countries[33], the regulator has provided that consumers are entitled to withdraw from a contract without penalties and that termination fees must be consequently removed. Moreover, the protection of consumers in default service is guaranteed by a set of rules - addressing billing and meter reading frequency, payment of bills, interest rates for non payment, payment by instalments, disconnection - that have been issued by the energy regulator. For customers who have entered into a contract in the market, clauses are agreed between consumers and suppliers but retailers have to disclose information for the benefit of prospective users.

Different regulatory approaches in MEDREG countries have encouraged energy regulators to take steps towards the harmonisation of consumer protection rules. In fact, MEDREG Institutional AdHoc Group – Customers Task Force has issued a set of "Recommendations on minimum requirements considered necessary to ensure consumer protection in the field of electricity and gas in

[31] "MEDREG Response to EC Public Consultation on the External Dimension of the EU Energy Policy" (2011), cit., 2-3.

[32] The Institutional Issues Working Group has been set up with the aim to enhance closer cooperation and coordination among countries participating in the MEDREG. A Task Force on Consumer Issues has been created in order to assess the state of the art and to issue recommendations on consumer protection in the Mediterranean Region.

[33] In Italy, the energy regulator has issued numerous resolutions addressing the topic of consumer protection and empowerment.

the Mediterranean region"[34]. As a consequence of the data submitted by energy regulators (on the legal and institutional framework on competition and consumer protection, on the overview of the market and on consumer protection and transparency), a set of minimum requirements has been regarded as a necessary means to ensure consumer protection in the energy markets. Among the best practices, it is recommended for MEDREG countries to have, in addition to the general law on consumer protection, a specific legislation which ensures the supply of energy, its continuity and the quality of service. The legislation should also grant the regulator or another independent authority a specific power addressing complaints handling, access to networks and assessment of the performance of the public service. The document issued by MEDREG points out that some countries have fully opened their market (generation and supply) to competition whereas for others the energy market is partially or not at all opened. As regards consumer protection and transparency, energy regulators should: be able to allow the setting of service quality standards, both technical (quality of supply, duration of outages, regulation of voltage) and commercial (such as response time to complaints or punctuality to appointments with customers); improve the set of information given to consumers (e.g. prices transparency, consumer consumption, readability of bills); allow consumers to be compensated if the operator fails or causes damages; have a dedicated department dealing with complaints and imposing fines on companies when they do not meet their obligations; have a clear procedure for the settlement of disputes between customers and operators.

If the market is not (fully) opened to competition, most consumers are not likely to focus on clear pre-contractual information on non-core matters and there is no incentive to compete in the sense of providing better or different contractual terms[35]. Nevertheless, the regulatory approach should try to improve the participation of consumer associations and customers in the regulatory process and should intervene when the quality of service, from a technical and commercial point of view, is poor. Moreover, the lack of competition and inequalities in bargaining power should lead each country to

[34] Available at: http://www.medreg-regulators.org/portal/page/portal/MEDREG_HOME.
[35] Rott, P. (2009), *The user-provider relationship: protection through private law,* in *The changing legal framework for services of general interest in Europe. Between competition and solidarity,* edited by Kraiewski M., Neergaard U., Van De Gronden, J., T.M.C. Asser Press, 223.

grant its own National Regulatory Authority the competence to impose fair contract terms on suppliers. Private law tools may be used by the energy regulator, on the grounds of its expertise and knowledge of the market, to protect consumers by the asymmetry of contractual power they suffer from in the relationship with their supplier and to specifically envisage contractual provisions which take into account the interests and needs of consumers (without leaving the definition of all supply terms to the discretion of the other party, the energy company)[36].

6. The Energy Community

On 25th October 2005 the Treaty Establishing the Energy Community was signed by the European Community and the authorities of Albania, Bulgaria, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Romania, Serbia, Montenegro and the United Nations Interim Mission in Kosovo[37]. Moldova joined the Energy Community on 1st May 2010 and Ukraine on 1st February 2011.

By signing the Treaty the above mentioned countries are committed to implement the *acquis communautaire* on electricity, gas, environment, competition and renewables. In fact, the Treaty aims to establish "an integrated market in natural gas and electricity, based on common interest and solidarity" and "to create a stable regulatory and market framework capable of attracting investment in gas network, power generation and transmission networks". This means the creation for the parties of a market without internal frontiers, which includes the coordination of mutual assistance in case of serious disturbance to the energy networks or external disruptions and the achievement of a common external energy policy.

The Energy Community Regulatory Board (hereinafter referred to as ECRB) has been established by Article 58 of the Energy Community Treaty: it takes the role of a coordination body of the national regulators of the Energy Community for exchanging knowledge and developing common

[36] One of the challenges for legal regulation of markets has been the requirement to restrict the advantages of businesses when they deploy standard form contracts: Collins, H. (2003), *The Law of Contract,* LexisNexis Butterworths, UK London, 3.
[37] For details on the Treaty and the Energy Community please visit www.energy-community.org.

best practices. Significantly, the activities of ECRB are characterized by the following objectives and priorities: development of competitive national gas and electricity markets; integration of national markets and development of competitive regional markets in electricity and gas; abolishment of barriers for cross border trade and competition; protection of customers; security of supply and quality of service. As regards consumer protection, support schemes for protection of vulnerable energy customers operate in most contracting parties, such as direct subsidies (through government funds), specific energy prices and protection against disconnection from the network during winter and extreme cold weather. Tipically, low income customers and disabled people are entitled to use energy related support schemes[38]. However, there is broad agreement that competition cannot be hindered by the support system implemented and that is necessary to allow customers to take part in the liberalized market and take advantage of cheaper offers[39].

Some countries have below-cost energy prices and "the transition to pricing covering costs plus a reasonable return on capital will imply a rise in end-user energy prices, which might not be affordable to certain consumer groups"[40]. To address this social matter, the implementation of voucher financing can stimulate competitive pricing and it may provide poor consumers with an incentive to choose the cheapest supplier[41]. "It is obvious that in new conditions traditional forms of consumer protection have to undergo changes and to be adjusted to the requirements of the liberalised market"[42].

As a consequence, consumer protection should be addressed by implementing "transparent information about supply prices and network tariffs, comprehensible bills, non-discriminatory contracts, dispute settlement mechanisms and guaranteed quality of supply standards. Almost all countries recognize these criteria in their legislation and include it in their regulation"[43], but at the moment "credible steps toward developing high levels of protection for customers have not been

[38] Please see the paper *Treatment of the vulnerable customers in the Energy Community*, 11, 14, 18, electronic copy available at: http://www.energy-community.org/pls/portal/docs/1296177.PDF.
[39] Ibid., 19.
[40] Filipovic, S., Tanic, G. (2008), *The Policy of Consumer Protection in the Electricity Market*, in Economic annals 2008, Volume 53, 159, available at: http://www.doiserbia.nb.rs/img/doi/0013-3264/2008/0013-32640879157F.pdf.
[41] Ibid., 172-173.
[42] Ibid., 180.
[43] Ibid., 172.

presented by most of the Contracting Parties. Instead, most still try to ensure customer protection via non-cost reflective regulated energy tariffs, which leads to market distortion and ultimately endangers security of supply"[44].

7. The retail energy markets: a case study. Conclusions.

Competition alone is not sufficient to protect or empower customers and a set of rules is necessary to achieve the goal of an effective consumer protection. From this point of view, the recent experience shows that regulation, especially when it is regarded as the set of rules issued by a National Regulatory Authority, is necessary to overcome market failures[45] in parallel with the enforcement of competition law.

Consumer protection is one of the necessary requirements for a well functioning and competitive market and regulation issued by a National Regulatory Authority should shape contracts and behaviours where necessary, especially to overcome market failures and asymmetries. Furthermore, "the quality of consumer protection measures is a significant variable in reducing prices" and consumer protection rules support the development of competitive retail markets[46].

Due to the fact that competition is still to function well, energy regulators should have the power to impose contractual terms in residential energy markets. For example, "residential consumers should have the right to terminate the contract at any moment. Allowing energy companies to apply restrictive conditions to consumers' withdrawal risks increasing switching costs. Moreover, there isn't any convincing evidence that energy companies are not able to bear the risk of early termination"[47].

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[44] Annual *Report on the implementation of the Acquis under the Treaty establishing the Energy Community*, issued on 1st September 2012 and available at: www.energy-community.org.

[45] Laguna de Paz, J. C. (2012), *Regulation and Competition Law*, in *European Competition Law Review*, 77. The author points out that the concurrence of two separate sets of rules – competition law and regulation – governing the same conduct entails legal uncertainty and he significantly recalls the Deutsche Telekom case, when the European Commission fined the abuse of a dominant position of a vertically-integrated company, although its prices had been authorised by the national regulator. For more information on the case, see Vedder, H. (2011), *Competition in the EU Energy Sector – An Overview of Developments in 2009 and 2010, European Energy Law Report VIII*, 11-12, edited by Roggenkamp, M. M. and Hammer, U., Intersentia, Cambridge – Antwerp – Portland.

[46] Bellantuono, G., Boffa, F. (2008), *Residential energy markets in Europe: Designing effective institutions*, cit., 18, 29.

[47] Bellantuono, G., Boffa, F. (2007), *Energy Regulation and Consumers' Interests*, cit., 20.

If one regards regulation as a set of measures only indirectly affecting private law, it is true that "private law examines the particular case, whereas regulation contemplates the distributive effect on groups in the market of a type of market transaction" and that "private law is concerned with the outcome between individuals" whereas " regulation with consequences on the operation of the market and on economic groups"[48]. However, in the energy markets "sector regulation interferes with contractual relationships to promote competition and, in some cases, to give final users what markets are not able to deliver (eg universal service, a specific level of service quality)"[49] and the role of a National Regulatory Authority increases its own importance with reference to this topic .

In a modern regulatory perspective, the function of the law of contract is to regulate markets, improve competition and steer "contractual relations in ways that are likely to help to maximise the joint wealth of the parties"[50]. As a consequence, a better enforcement of competition law and of consumer protection measures is necessary. In addition to the promotion of competition, effective consumer protection calls for the setting of regulated terms and compulsory obligations on energy businesses in order to balance the opposite interests of suppliers and consumers. Regulated terms should be adopted especially if one takes into account that there is no competition with reference to contractual terms[51]; and specifically, these terms should address different provisions of the supply contract, such as billing frequency, billing transparency, payment, fair procedures before disconnecting a customer for non payment, complaints handling, alternative dispute resolution and short notice without penalties to terminate the contract. Moreover, service quality needs to be guaranteed both by the supplier (in terms of complaints handling and management of customers' requests) and by the network operator (with reference to interruptions and activation time); and a commercial code imposed on suppliers may play a very important role to overcome the risk of unfair commercial practices.

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[48] Collins, H. (2006), *The Alchemy of Deriving General Principles of Contract Law from European Legislation: In search of the Philosopher's Stone*, cit., 219.

[49] Bellantuono, G. (2010), *The Limits of Contract Law in the Regulatory State*, 2, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628691, also published in *European Review of Contract Law*, 2010, 115.

[50] Collins, H. (2003), *The Law of Contract*, cit., 35.

[51] Collins, H. (2003), *The Law of Contract*, cit., 260, who clearly states that one of the causes of market failures is "consumer ignorance of the terms of contracts apart from key items such as price, so that there is no incentive for traders to compete with respect to the other terms on offer". Price is in fact the main driver for switching.

As regards the above mentioned measures, the Italian experience is worth noting. Law 14th November 1995, n. 481 has instituted the Regulatory Authority for Electricity and Gas (hereinafter referred to as AEEG) and set its main objectives: guaranteeing the promotion of competition and efficiency in the electricity and gas sectors; ensuring adequate service quality standards[52]; ensuring uniform availability and distribution of services throughout the country by establishing a clear and transparent tariff system based on set criteria; promoting the interests of users and consumers.

With reference to the quality of service, AEEG has set specific service standards supported by automatic refund mechanisms for users and consumers if standards are not met, such as response time to complaints[53] (40 days) or the time to respond to requests of billing adjustments (90 days). After the birth of AEEG, service quality regulation is no longer established by each company (before 1997 service quality regulation was under the citizen's charter and very few utilities adopted automatic compensation mechanism schemes). Provisions addressing service quality aim to guarantee an efficient and timely performance of contracts and automatic compensations are suitable tools to make companies comply with rules issued by AEEG as well as deterring them from breaching the supply contract.

The Commercial code of conduct approved by AEEG applies to all gas and electricity suppliers presenting commercial offers to household customers and small businesses (customers who have less bargaining power than larger corporations and are thus in greater need of protection). The Code sets specific obligations in terms of transparency of information, means of presenting offers, comparability of prices, breaking down of the various components that determine the final cost for the customer and

[52] Please see AEEG's website: www.autorita.energia.it . As regards service quality regulation, it's necessary to make a distinction between services provided by the network operator (the DSO still performs a monopoly activity and in most countries the distribution activity is separated from the supply activity) and services provided by the supplier (company acting under competitive conditions).

[53] A complaint is a written communication sent to the supplier regarding the non compliance of the supplied service with the terms of the contract or with regulation. Complaints handling can help energy regulators find out market failures and whether a supplier is infringing rules or giving poor service quality and evaluate the state of the art (in order to propose changes to current rules).
Complaint handling standards have been defined for suppliers. There is an obligation to answer and a complete answer should be given within 40 days. When the standard is not met, compensation must be paid to the customer. Before the issuing of commercial standards regarding the time to respond to complaints, customers were largely dissatisfied with the way suppliers handled complaints. Complaints are a direct and easy way for customers to communicate their needs and concerns.

simplicity of contract wording. For the benefit of customers, suppliers have to provide prospective users with a written document that summarises their main rights and allow them to verify if the contract being offered complies with AEEG's resolutions. The content of the Code, i.e. the detailed list of obligations imposed on energy suppliers, may even represent an appropriate answer to the criticism regarding concepts such as good faith and fair dealing requirements in precontractual negotiations[54].

The Code "regulates the pre-contractual phase, requesting the suppliers to communicate with the consumers through a specific format aimed at simplifying the comparability of offers". Moreover, it "regulates marketing practices, the terms to be included in each contract and the procedure for their modification, consumers' termination rights and automatic refunds in case of breach by the supplier"[55]. The experience of early liberalizations shows that the failure of competition in retail markets can be avoided if the following solutions are implemented: a code of commercial practice that regulates the precontractual phase and the comparability of offers discouraging energy firms from creating unnecessary complexity in their offers[56].

In conclusion, the best practices implemented in some countries should be regarded as a valuable experience by other jurisdictions and the mutual exchange of consumer protection regimes should be encouraged in order to support the harmonisation of regulatory models not only at the retail level. The commitment to sharing practices and enhancing coordination between energy regulators – which should be extended to the cooperation between energy regulators and antitrust commissions[57] - is essential in the direction of a well functioning market. Energy regulators are thus called to cooperate in order to empower consumers in the market and to balance consumers' demands with the necessity

[54] As regards criticism on good faith please see *Allen&Overy Response to European Commission green paper on policy options for progress towards a European contract law for consumers and businesses*, available at: http://ec.europa.eu/justice/news/consulting_public/0052/contributions/5_en.pdf.
[55] Bellantuono, G., Boffa, F. (2007), *Energy Regulation and Consumers' Interests*, cit., 63.
[56] Bellantuono, G., Boffa, F. (2007), *Energy Regulation and Consumers' Interests*, cit., 65-66.
[57] This kind of cooperation is recommended especially when the same conduct may be regarded as an infringement both by the energy regulator and by the antitrust commission or, on the other hand, when it is regarded as an infringement by the antitrust commission although it complies with the rules issued by the energy regulator. In addition, one should take into account that commitment decisions – by which the antitrust commission closes, for example, an unfair commercial practice proceeding - often contain regulatory measures which add to the current regulation without being approved by the energy regulator. These regulatory measures, adopted by an energy supplier to avoid the fine, might in some cases represent a competitive advantage.

of an efficient management of energy companies, also in the light of the promotion of energy efficiency and of environmentally friendly energy sources.

Conference Proceedings

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Paper n. 5

SOME IDEAS FROM "INTELLECTUAL PROPERTY BETWEEN TRADITIONAL DOGMAS AND MODERN CHALLENGES" SCUOLA SUPERIORE SANT'ANNA SEMINAR SERIES MARCH- APRIL 2013

by

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Suggested citation: Silvia Scalzini, *Some Ideas from "Intellectual Property between Traditional Dogmas and Modern Challenges"* Scuola Superiore Sant'Anna Seminar Series March- April 2013, *Op. J.*, Vol.I, n.1/2013, Paper n. 5, pp. 134 - 140, http://www.opiniojurisincomparatione.org, online publication October 2013.

SOME IDEAS FROM "INTELLECTUAL PROPERTY BETWEEN TRADITIONAL DOGMAS AND MODERN CHALLENGES" SCUOLA SUPERIORE SANT'ANNA SEMINAR SERIES MARCH- APRIL 2013

by

Silvia Scalzini*

Many people argue that the development of the so-called "knowledge-based-economy"[1] has given a new input to reflections on intellectual property (IP) issues. In fact, the fast technological progress has led to a paradigm shift, resulting in the loss of importance of traditional forms of wealth and in the increasing value of new goods, such as the digital ones. In this context, IP law often proves to be inadequate to face for the changing economic and social needs. In particular, the greater emphasis on users/consumers' interests, and the opening to diffuse interests has engendered new tensions between the interests underlying the balance of IP rights (IPRs).[2]

What are the origins of IP, and how has the legal, economic and value-laden approach to its regulation changed over the centuries? To answer these questions, the Seminar Series "Intellectual Property Between Traditional Dogmas and Modern Challenges", organized by Scuola Superiore Sant'Anna in March and April 2013, brought together leading Italian scholars and public officers. The aim was to offer to PhD candidates and undergraduate students the opportunity to have a diachronic glimpse over three main areas: IP and private law, IP and competition law, IP and ethics.

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[1] See, among others, FEDERAL TRADE COMMISSION, *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*, available at www.ftc.gov; R. HILTY, S. KRUJATZ, B. BAJON, A. FRUEH, A. KUR, J. DREXL, C. GEIGER, AND N. KLASS, *European Commission - Green Paper: Copyright in the Knowledge Economy - Comments by the Max Planck Institute for Intellectual Property, Competition and Tax Law* (December 3, 2008). Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 08-05. Available at SSRN: http://ssrn.com/abstract=1317730 or http://dx.doi.org/10.2139/ssrn.1317730; R. P. MERGES, *A new dynamism in the Public Domain*, in *The University of Chicago Law Review*, Vol. 71, No. 1 (Winter, 2004), pp. 183-203.

[2] For these considerations see G. GHIDINI, L. BRICEÑO MORAIA, *Il futuro della proprietà intellettuale: un universo in espansione*, in *Il diritto industriale*, 2, 2011, 201 ss.

The first introductory seminar focused on the private law roots of IPRs. As Professor Francesco Donato Busnelli pointed out several times, the field of IP is characterized by a persistent bipolarity, where the interaction between private law and industrial law creates overlaps which impacts both on the IP terminology and its regulation. In this sense, the Italian case represents a paradigmatic example of the effects caused by the absence of a single body of law regulating IPRs in a homogeneous and coherent manner[3]. To mirror such dualism, the seminar consisted of a stimulating dialog between an expert in civil law, Professor Busnelli, and an expert in intellectual property law, Professor Luigi Carlo Ubertazzi.

Using traditional private law language, concepts and institutions, Professor Busnelli emphasized several interpretative issues affecting IPRs that captivated the attention of experts in civil law. After a short overview on the sources of the law, he discussed the nature and status of IPRs, with particular regard to the relationship with property rights, and their interplay with fundamental rights. In the chapter "Person" he asked himself <<the author, who was "costui"[4] ?>>, touching upon the problems posed by moral rights and the persisting differences in their protections among Europe and the United States. Then, he analyzed the problem posed by the negotiations of IPRs between parties with different bargaining power, devoting particular attention to the risk of hold-up in a contractual relation. Finally, Professor Busnelli turned to civil liability, mentioning currently debated issues such as liquidation of non-pecuniary damages in case of IP infringement.

After stating that IP is a projection of law and not necessary *de rerum natura*, Professor Luigi Carlo Ubertazzi retraced the evolution of IP protection systems from the onset to the present days, both from the perspective of the history of legal institutions and from the perspective of the history of the sources of law. Then, he identified the conflicting interests involved in IP Law and the various measures provided for their protection. In this context, he underlined – followed by Professor Erica Palmerini during the discussion – how we are now witnessing a new rebalance of authors' and users' rights, due to the revaluation of the latter. Professor Ubertazzi emphasized also the fact that IP is mostly governed by private law, while just few issues pertain to the realm of public law. As a matter of fact, IP is dominated by a private law culture. As to the most stimulating matters of private law, he found that the issue of the circulation of IPRs rights might be of great interest. Along the same line, during the final discussion he pointed out the risk of incurring in a reduction of Party Autonomy when negotiating international agreements, due to the global standardization of contractual models.

[3] I.e. author's right is regulated by Law 22.4.1941, n. 633, while trademarks, patents, and so on, are regulated by Legislative Decree 10.2.2005, n. 30, Industrial property Code.
[4] It's a typical Italian expression. The English translation could be "Who was that fellow?"

The second seminar focused on the interplay between IP and Competition Law. In fact, there is an intersection between these two bodies of law, which legitimize the intervention of antitrust rules on the exercise of IPRs. Indeed (and for the sake of simplicity) IPRs "*can give rise to significant market power in particular cases*"[5] that may hamper competition; nevertheless, there are many who argue that the two bodies of law can share the same purposes of promoting consumer welfare, innovation and an efficient allocation of resources [6]. Nowadays, the relevance of the topic is increasingly evident, while the share of regulatory efforts between private and public ordering deserves particular attention. The seminar offered a profitable dialogue between theory and practice, introduced by Professor Raffaele Teti, with particular attention to the latest decisions of the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato, ICA*). As stated by Professor Roberto Pardolesi, a convergence and a possible coexistence between IP and Competition Law is today widely accepted, but the feasibility of this statement is increasingly slippery and depends on the recognition of the role and of the functions of IPRs. For the purposes of innovation, IPRs are a second best solution that deals with the problem of information as a public good[7]. However, the recent paradigm shift in economy, the best example of which is the relocation of American economy centrality to Silicon Valley, has led to a remarkable and alarming extension of the protection granted by IPRs. After considering the consequences of this extension, Professor Pardolesi discussed the goals of Competition Law and wondered whether or not, beyond the explicit conflict between IP Law and Competition Law, these two bodies of law could converge towards the same objective. The reality is that this interplay creates a series of tensions, with the result that the challenge is to determine to what extent one discipline can coexist with another.

As a discussant, Gianluca Sepe, Official at *Autorità Garante della Concorrenza e del Mercato*, illustrated how ICA evaluates antitrust cases when dealing with IP matters. After recalling the well-known Fichte's Parable on the Caliph Harun al Rashid (a story repeatedly mentioned during the Series of Seminars to show the different approaches to IP issues), he talked about the Competition Authorities' trend to incentivize innovation and promote consumer welfare, by showing a specific case decided by the Italian Authority. In case under N. A415 - SAPEC AFRO/BAYER-HELM, ICA applied the essential facility doctrine and established an abuse of dominant position, consisting in the refusal to grant access to some studies on

[5] See A. HEIMLER, *Competition law enforcement and intellectual property rights,* 2 (2008), http://ssrn.com/abstract=1105326.

[6] See i.e. Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, *§* 5; see also *A Competition Policy Perspective on Patent Law: The Federal Trade Commission's Report on the Evolving IP Marketplace,* by E. RAMIREZ AND L. KIMMEL, August, (2011), www.atitrustsource.com.

[7] In the sense of Ronald Coase' s example of the lighthouse.

vertebrates, protected by IPRs. Hence, Gianluca Sepe illustrated the steps of the Authority's evaluations and the resulting case-law on this decision.

The third and final seminar of the Series examined IP from the point of view of ethics and social norms, with particular attention to models of knowledge diffusion and the importance of considering the public as a stakeholder, especially in digital environment. The importance of this topic is also shown by the latest generation political movements' agendas (e.g. Pirate Parties), which often suggest changes to IP rules in the name of public interest. Given the growing consensus towards these movements across Europe, a careful consideration on these issues was fully appropriate.

As a consequence, Professor Maria Chiara Pievatolo illustrated the philosophical eighteenth-century debate that gave rise to the foundations of contemporary IP law – and particularly of copyright/author's right law-, comparing the ideas of two great philosophers: Fichte and Kant[8]. In this respect, she made a comparison between a classical theory on intellectual property and a theory that she considered to be more open and actual, because it explains the author's right without relying on the concept of intellectual property, but by referring to public use of reason. Indeed, she clarified that, according to Kant, a book- or a text- is a speech and so an action is a way to relate with the public and is the subject of personal rights (not of rights on things)[9]. The role of the publisher is justified only in terms of putting the author in contact with the public, and so the publisher has to be authorized by the author. The interests of the public deserve to be recognized, because the public must be able to interact with the author, if the author wants it. Through a re-reading of Kant, Professor Pievatolo proposed an alternative conceptualization of copyright, which gives more prominence to the interests of the public.

Professor Roberto Caso offered his own interpretation of the issues at stake from a legal perspective[10]. After considering the various interests underlying IP laws today, he pointed out the marginal of the role played by the public's interests – seen as the interests of communities that express social norms- in the balance provided by laws currently in force Then, he emphasized how the digital revolution has made many copyright rules obsolete and created new problems to be solved (such as, e.g., the switch from the concept of copy to the concept of access, DRM etc.). Here, the most innovative rules often arise from the interaction between social norms, technology and contracts. He showed how in some cases social norms created new rules through contractual tools, which aimed to temper or even contrast the exclusive

[8] The slides of the lecture entitled "*L'uso pubblico della ragione e i suoi vincoli. Filosofie della "proprietà" intellettuale"* are avaiable at archiviomarini.sp.unipi.it.

[9] For more details, see M. C. PIEVATOLO, *Freedom, ownership and copyright: why does Kant reject the concept of intellectual property?*, in *Società italiana di filosofia politica*, 2010, available at http://eprints.rclis.org/12886/.

[10] The slides of the lecture entitled "*L'immoralità della proprietà intellettuale. Dall'alba del copyright al tramonto (?) del diritto d'autore*" are avaiable at archiviomarini.sp.unipi.it.

control granted by IP law. Some examples of such are the Open Source Initiative, the Open Access Movement and the Creative Commons Licenses. In addition, according to Professor Caso, technology is a tool that drafts the boundaries within a community work, as well as the concept itself of community. Technology also changed the way individuals think (at cognitive level) and their interactions with the community. So the way to draw a technology weighs on the interactions of individuals in a community and, therefore, on its social norms. As the moderator Professor Enza Pellecchia pointed out, these scholars combined best practices with their theories and, in this regard, they explained the importance of Open Access in scientific research, especially if publicly funded. Professor Pievatolo, in particular, explained that the main problem of the diffusion of Open Access culture is the lack of interest of many scholars in the publication process, considered only as a technical problem untied with research issues. According to Professor Pievatolo, such lack of interest limits the possibility for a scholarly work to produce further research. In response, Professor Caso highlighted the need to implement Open Access principles through specific policy actions. He also pointed out that Open Access is a way to multiply the visibility of a work and its possibility to be quoted, thus increasing (and not decreasing) academic freedom. At this point Professor Busnelli emphasized the basic importance of providing access to information, especially to young people.

The Seminar Series started from the fundamental evolutionary path of IPRs to emphasize the most debated current issues in the field of IP. Each speaker highlighted, more or less explicitly, how changing economic and social needs have influenced the approach towards IPRs, and provided several suggestions for future research.

To mention few examples, the constantly changing interplay between opposite interests and the revaluation of the "public" as stakeholder are forefront issues which require further investigation and the adoption of a multi-layered analytical perspective[11]. Particular attention should be devoted, in this sense, to the field of digital copyright, where the greater access to knowledge for users, made possible by new technologies, is at the same time over-constrained by laws and technological tools implemented to guarantee an effective control over protected works and to avoid infringements[12].

[11] For example, through the lens of international human rights. See, e.g.. L. SHAVER- C. SGANGA, *The Right to Take Part in Cultural Life: On Copyright and Human Rights* (July 21, 2009), in *Wisconsin International Law Journal*, Vol. 27, p. 637, 2009, available at SSRN: http://ssrn.com/abstract=1437319.

[12] On this issue, particular attention should be given to the recent U.S. discussion on the policy issues critical to economic growth; see, in particular, U.S. DEPARTMENT OF COMMERCE, *Green paper on Copyright Policy, Creativity, and Innovation in the Digital Economy* (July 2013), available at http://www.uspto.gov/news/pr/2013/13-22.jsp.

Another concern of the changing interplay of interests in the digital era is the one of the declining role of traditional intermediaries, such as publishers. In new digital markets the interests of authors and intermediaries no longer coincide as usual[13], because of the possibility for the author to reach the public more easily and less costly. As a consequence, the issue of the renewed emphasis on the author should be subject of a deeper comparative analysis, with special regard to the protection of author's moral right in digital environment, where the attribution and the integrity of the works are more vulnerable[14]. In addition, the declining role of traditional intermediaries goes hand in hand with the rise of new intermediaries and new business models, that often take advantage of third party's content without sharing the additional value generated. Their characteristics and implications require a careful analysis, as shown by the rise of disputes such as the one between Google Books Search and printed books' right holders[15], or between news aggregators and traditional publishers[16]. Here, the need to protect IPRs clashes with the importance of stimulating and protecting innovation, development and access to information, and of drawing a new balance which already appears to be lost.

The role and limits of private autonomy in the field of IP are topics far from being fully analyzed and understood. Here, the main challenge is to determine the optimal share of regulatory efforts between private and public ordering. In this direction, one of the most interesting line of research concern IP in digital environment, where, as discussed during the seminars, contracts are tools that may temper or even contrast with the exclusive control granted by IP Law[17]. This issue is also linked with the particular nature

[13] For the example of the e-Books market see N. ELKIN-KOREN, *The Changing Nature of Books and the Uneasy Case for Copyright. George Washington Law Review*, Vol. 79, p. 101, 2011. Available at SSRN: http://ssrn.com/abstract=1909176.

[14] See, in particular, J. C. GINSBURG, *Moral Rights in the US: Still in Need of a Guardian Ad Litem* (February 16, 2012). *Columbia Public Law Research Paper No. 12-293*. Available at SSRN: http://ssrn.com/abstract=2006548 or http://dx.doi.org/10.2139/ssrn.2006548.

[15] See, among others, F. MÜLLER-LANGER- M. SCHEUFEN, *Just Google It! – The Google Book Search Settlement: A Law and Economics Analysis*, in *Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 11-06;* R. PARDOLESI, *Tramonti Americani: Il Rigetto Del Google Books Settlement*, Nota a Corte federale distrettuale Stati uniti d'America, distretto meridionale di New York 22 marzo 2011 in *Il Foro italiano*, 2011, fasc. 5 pag. 277 – 280; P. SAMUELSON, *The Google Book Settlement as Copyright Reform* (April 21, 2011), in *Wisconsin Law Review, Forthcoming; UC Berkeley Public Law Research Paper No. 1683589*, available at SSRN: http://ssrn.com/abstract=1683589.

[16] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), *The Evolution of News and the Internet*, Directorate for Science, Technology and Industry, Committee for Information, Computer and Communications Policy Working Party on the Information Economy (2010), available at: www.oecd.org; See also KIMBERLY ISBELL-CITIZEN MEDIA LAW PROJECT, *The Rise of the News Aggregator: Legal Implications and Best Practices*, in *The Berkman Center for Internet & Society Research Publication Series (Harvard)*, Research Publication No. 2010-10 August 30, 2010; for the latest developments in Europe see the German Law "Leistungsschutzrecht für Presseverleger" (Achte Gesetz zur Änderung des Urheberrechtsgesetzes).

[17] The consequences of which have been described also in terms of legal marginalism. See N.W. NETANEL, *Copyright and a Democratic Civil Society*, in 106 *Yale Law Journal* 283 (1996) and see also the reflections of G. SPEDICATO, *Sul marginalismo della legge e gli equilibri del sistema: riflessioni in tema di autonomia privata e digital copyright*, in S. BISI, C. DI COCCO (a cura di), *Open source e proprietà intellettuale: fondamenti filosofici, tecnologie informatiche e gestione dei diritti*, Bologna, Gedit, 2008.

and approach of the European Antitrust intervention on the exercise of copyright and other IPRs, from the control over contractual relationships[18] to more incisive measures directed to grant access to protected works[19]. The debate on the matter is inserted in the context of broader proposals of reform of the current patent system, where scholars have already advocated for the extension of the mechanism of compulsory license in order to stimulate innovation[20].

A final consideration concerns the increasing reference to a continuous and constant comparison and reapprochement between different legal systems, due to the changing dimension of marketplaces and the increasing number of cross-border negotiations. Here, future policies should aim to implement shared solutions, but without prejudice to values and principles of each legal systems (especially with regards to less developed countries[21]).

These are only few of the interesting hints and grounds for future research provided by the interesting discussions of this Seminar Series. Much work has still to be done to tackle the challenges posed by contemporary IP law, and this is the reason why these seminars constituted just the beginning of Scuola Sant'Anna's research endeavors in the field.

[18] See, in particular, Commission Regulation (EC) No 772/2004 of 7 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (whose date of expiry is upcoming) and Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements.

[19] See, for example, Court of Justice of the European Union, 6 april 1995, case C-241/91, C-242/91, RTE, IPT vs Commission (Magill case); European Commission, 13 august 2003, case COMP D3/38.044, NDC Health vs. IMS Health (IMS Heath Case); European Commission, 24 march 2004, case COMP/C-3/37.792 (Case Microsoft). See also J. DREXL, *Research Handbook on Intellectual Property and Competition Law*, Edward Elgar Publishing, 2008.

[20] See, in particular, the suggestions of G. GHIDINI, *Innovation, Competition and Consumer Welfare in Intellectual Property Law*, Edward Elgar Publishing (2010), 80 ff.

[21] For an in-depth discussion, see, among others, G. GHIDINI, *Innovation, Competition and Consumer Welfare in Intellectual Property Law*, Edward Elgar Publishing (2010), 247 ff.; R.D. ANDERSON, *Competition policy and Intellectual Property in the WTO: more guidance needed?*, in J. DREXL, *Research Handbook on Intellectual Property and Competition Law*, Edward Elgar Publishing, 2008, 451 ff.

News

Annonces

Noticias

Conference

Getting around the cloud(s) - "Technical and legal issues on Cloud services"

November 30, 2013 – Palazzo del Consiglio dei Dodici, Piazza dei Cavalieri, 1 – Pisa

Richiesto accreditamento al Consiglio dell'Ordine degli Avvocati di Pisa per 8 crediti formativi

09.00 **Registration**

09.30 **Welcoming and Introduction**
- Prof. Dr. Giovanni Comandé, *Director LIDER-Lab, Scuola Superiore Sant'Anna*
- Prof. Dr.Pierdomenico Perata, *Rector Scuola Superiore Sant'Anna*
- Prof. Dr.Emanuele Rossi, *Director Istituto Dirpolis*
- Prof. Dr. Olivier Deshayes, *Université de Cergy-Pontoise TransEuropeExperts*

10-12.30

Data Protection, Privacy and Regulation on the Clouds

Chair: Prof. Dr. Olivier Deshayes, Université de Cergy-Pontoise

- New challenges and global nature of cloud computing at international level: the EU Data Protection Reform, *Prof. Giovanni Buttarelli, Contrôleur européen adjoint de la protection des données.*
- "Something's got to give" - Cloud Computing, as applied to lawyers – comparative approach US and EU and practical proposals to overcome differences, *Prof. Nathan Crystal – Emeritus University of South Carolina, Distinguished Research Scholar at Charleston School of Law – Avv. Francesca Giannoni, Esq. (New York, Washington and Italy), Crystal & Giannoni-Crystal, LLC*
- Crowding it the cloud, data protection and permissible business models, *Prof. Célia Zolynski, Université Versailles-Saint-Quentin - Romain Perray, Avocat at the Paris Bar, Lecturer at Univerisité Paris I – Panthéon-Sorbonne.*
- Standardizing vs. regulating: hard law vs. soft law?, *Prof. Dr. André Prüm, Université du Luxembourg*
- Information privacy: bridging American and European clouds, *Prof. Giovanni Comandé, Scuola Superiore Sant'Anna*

- Q&A

Lunch 12.30 – 13.30

13.30-16.00

Contractual and Liability Issues

Chair Prof. Bénédicte Fauvarque Cosson – Université Pantheon-Assas Paris 2

- Medicine in the cloud: opportunities and potential liabilities, *Prof. Luc Grynbaum, Université Paris Descartes, Member of Institut Droit et Santé*
- Avoiding a jungle of contractual clauses: a possibility, *Dr. Chantal Mak, University of Amsterdam*
- Exemption clauses and IP, *Dr. Caterina Sganga Central European University, Budapest*

- Q&A

Break 16

16.15-19.00

Young Researchers Perspectives and Business Interests

Chair : Prof. Giovanni Comandé, Scuola Superiore Sant'Anna

- *Dr. Paolo Guarda, Università di Trento, Blue sky above the cloud(s): challenges and chances for e-health.*
- *Avv. Valentina Gavioli, Università di Pisa, Public Administration around the clouds: getting lost or modernization opportunity?*
- *Alicja Gniewek Université du Luxembourg, This is a story about control. Presentation of the ongoing PhD research on data protection challenges in Cloud Computing.*
- *Dr. Gianluca Ciminata, Senior Executive Capgemini, The innovation is behind of the sky ? How the cloud computing could be the "new paradigma " between Social comunity and the industrializzation company .*
- *Silvia Scalzini, Phd Scuola Superiore Sant'Anna, IP Licensing and Competition law in the Clouds: an European Perspective.*
- *Stefano Alberti, Scuola Superiore Sant'Anna, Cloud providers and contractual liability. An itinerary among law, customs and terms.*
- *Sofia Milone, Scuola Superiore Sant'Anna, Cloud provider's liability for illegal content: the need for legal certainty in notice-and-action procedures.*
- *Giulia Schneider, Scuola Superiore Sant'Anna, Managing data and metadata in the clouds: where intellectual property issues reach privacy concerns.*
- *Giuseppe Di Vetta, Scuola Superiore Sant'Anna, Copyright infringement in cloud computing: the critical issue of enforcement models in the European area.*
- *Gianclaudio Malgieri, Scuola Superiore Sant'Anna, Qualifications and scopes for data processing in the cloud computing: finding shapes in the sky.*
- *Francesco Lazzeri, Scuola Superiore Sant'Anna, The EU's right to be forgotten as applied to cloud computing in the context of online privacy issues.*
- *Cosimo Gabbani, Pietro Meineri, Scuola Superiore Sant'Anna, Governing cloud contracts: consumer, business and conflict of laws rules.*

Closing remarks (10 min)

Le domande di iscrizione al Convegno, redatte sull'apposito modulo scaricabile sul sito del LIDER-Lab – sezione Didattica e Conferenze - dovranno pervenire entro e **non oltre le ore 14:00** di **mercoledì 20 novembre** all' indirizzo e-mail s.lenzi@sssup.it o via fax al numero 050 883530.
Il luogo e l'orario di svolgimento potrebbero subire delle modifiche, si prega di monitorare costantemente il sito del Laboratorio LIDER-Lab: www.lider-lab.sssup.it
Per info: s.lenzi@sssup.it oppure tel. 050 883540 (dal lunedì al venerdì, ore 9:00 - 15:00) – fax 050 883530 - www.lider-lab.sssup.it
The registration form can be downloaded from the LIDER-Lab website - Section "Didattica e Conferenze" and must be submitted **no later than 14.00 of Wednesday, November 20** by email to s.lenzi@sssup.it or by fax to +39050883530. Venue and time schedule of the Conference are subject to change. Please, check our website www.lider-lab.sssup.it for regular update. For more information, please contact us by email: s.lenzi@sssup.it or call +39050883540 (Monday to Friday, from 9:00 to 15:00) - Fax +39050883530.

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