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NEW TASKS FOR ITALIAN SUPREME COURT: PRELIMINARY REFERRAL AND EUROPEAN REVOCATION

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Abstract: The recent reform of the Italian civil trial also involved the proceedings before the Court of Cassation, with several changes. Among these, the contribution focuses on the two new functions attributed to the Supreme Court (*i.e.*, that of providing an "early" interpretation of the law at the request of the judges of merit and that of examining applications for specific form of reparation brought against domestic judgments already deemed contrary to the ECHR by the Strasbourg Court), highlighting their criticalities.

Keywords: Court of Cassation – *Nomofilachia* – Preliminary Referral – *Saisine pour avis* – European Convention of Human Rights

Abbreviations

Cass. – Italian Supreme Court, *i.e.* Court of Cassation (*Corte di cassazione*)

Corte cost. – Italian Constitutional Court (*Corte costituzionale)*

c.p.a. – Italian Code of Administrative procedure (*Codice del processo amministrativo*)

c.p.c. – Italian Code of Civil procedure (*Codice di procedura civile)*

CPC – French Code of Civil procedure (*Code de procédure civile)*

c.p.p. – Italian Code of Criminal procedure (*Codice di procedura penale)*

CPP – French Code of Criminal procedure (*Code de procédure pénale)*

COJ – French Code of Judicial organization (*Code de l'organisation judiciaire)*

ECHR – European Convention on Human Rights

WBR – Dutch Code of Civil procedure (*Wetboek van Burgerlijke Rechtsvordering*)

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1. INTRODUCTION

As a part of the general post-pandemic recovery plan, the Italian Government has intervened for the umpteenth time on civil trial rules, including those relating to the Supreme Court.

Actually, the reform approved by delegation Law no. 206/2021 and implemented by Legislative Decree no. 149/2022 is grafted onto a draft law (namely, the Bill A.S. 1662) which predates the Covid spread and in which there was no provision for further changes to the proceedings before the Court of Cassation[1]. As a result of a series of amendments, however, such proceedings, albeit not radically reformed, underwent several capillary changes, mainly due – on the one hand – to the generalization of the telematic civil process (which has resulted in the disappearance, or at least the reshaping and redistribution, of a series of burdens previously placed on the parties), and – on the other – to the abolition of the Sixth Section (previously charged with filtering out inadmissible appeals), which has been an occasion for the consolidation of procedures.

In addition, and in apparent countertendency to the primary objective of the reform (as of all the most recent reforms), *i.e.* that of reducing the Court's workload, Decree no. 149/2022 also gave the Court of Cassation two new powers: that of issuing early principles of law at judges on the merits' request (the so-called preliminary referral, regulated by article 363-*bis* c.p.c.) and that of deciding appeals explained against those judgements which had already been declared incompatible with the ECHR by the European Court of Human Rights, in order to ensure, as far as possible, the reinstatement in specific form of the violated rights (the so-called European revocation, regulated by article 391-*quater* c.p.c.).

1 Which has already been reformed many times in recent years: see Legislative decree no. 40/2006; Law no. 59/2009; Law no. 134/2012; Law no. 197/2016.

With respect to both innovations, the Italian legislature clearly drew inspiration from homologous French solutions; but in both cases, one would say, unthinkingly.

2. THE PRELIMINARY REFERRAL TO THE COURT OF CASSATION: PRELIMINARY REMARKS

Embracing an idea that had already surfaced – only to be discarded – about 20 years ago in the course of the work of the so-called Vaccarella Commission[2], and most recently re-proposed by the so-called Luiso Commission, article 1, § 9, lett. g), Law no. 206/2021[3], had delegated the Government to introduce the so-called preliminary referral to the Court of Cassation. In so doing, Italian legislator was declaredly inspired by the French *saisine pour avis de la Cour de cassation*[4]; but, if the admissibility conditions and the whole procedure appear to be largely borrowed from the French experience, the Italian preliminary ruling differs from that of alleged inspiration in one fundamental feature, which is also the reason for the major criticisms raised by Italian scholars: in fact, unlike the *avis* of the *Cour de cassation*, the principle of law issued by the Italian Supreme Court is binding for the judge who requested its intervention and for all those subsequently involved in the same proceedings[5]. And, as it will be stressed later in this

2 Sassani, Bruno, *Corte Suprema e jus dicere*, *Giurisprudenza italiana,* 2003, 822 ff.; Tommaseo, Ferruccio, *La riforma del ricorso per cassazione: quali i costi della nuova nomofilachia?, ivi*, 826 ff.; Tedoldi, Alberto, *La delega sul procedimento di cassazione, Rivista di diritto processuale,* 2005, 925 ff.

3 For a commentary on the provision of the delegation Law (and for further references), see Capasso, Valentina, *Il rinvio pregiudiziale alla Corte di cassazione e il « vincolo » di troppo, Rivista trimestrale di diritto e procedura civile,* 2022, 587 ff. On article 363-*bis* c.p.c. see, among others, Comastri, Michele Andrea, *La pregiudiziale interpretativa innanzi alla corte di cassazione*, in Cecchella, Claudio (a cura di), *Il processo civile dopo la riforma. D.lgs. 10 ottobre 2022, n. 149*, Bologna, Zanichelli, 2023, 141 ff.; Carratta, Antonio, *Le riforme del processo civile*, Torino, Giappichelli, 2023, 113 ff.; Tiscini, Roberta, *Il rinvio pregiudiziale alla Corte di cassazione dell'art. 363-bis c.p.c. La disciplina. La casistica, Giustizia Civile*, 2023, 343 ff.; Briguglio, Antonio, *Esperienze applicative del rinvio pregiudiziale interpretativo ex art. 363 bis c.p.c. - Prima Puntata,* available at *www.judicium.it*, 2023; Id., *Esperienze applicative del rinvio pregiudiziale interpretativo ex art. 363 bis c.p.c. – Seconda Puntata,* ivi, 2023; Id., *Esperienze applicative del rinvio pregiudiziale interpretativo ex art. 363 bis c.p.c. – Terza Puntata*, ivi, 2023.

4 Introduced by article 441-1 COJ - amended by Law No. 91-491 of May 15th, 1991 -, regulated by articles 1031-1 ff. CPC and since 2015 also extended to the interpretation of working collective agreements, French *saisine* had long since attracted the interest of Italian legal literature: see Silvestri, Caterina, *La saisine pour avis della Cour de cassation*, *Rivista di diritto civile,* 1998, I, 495 ff.; Silvestri, Elisabetta, *Il parere preventive delle Corti supreme*, *Rivista trimestrale di diritto e procedura civile,* 1993, 873 ff.; Normand, Jacques, *La richiesta di parere alla Corte di cassazione, Rivista di diritto processuale,* 1998, 127 ff.; Giordano, Rosaria, *La «saisine pour avis» alla Cour de cassation*, *ivi*, 2005, 109 ff.

5 In this respect, then, the mechanism appears more similar to the Dutch *Prejudiciële vragen aan de Hoge Raad* envisaged by articles 392 ff. WBR (see article 394, § 1, which states that, unless the answer to the question given by the *Hoge Raad* is no longer necessary to decide on the claim or request, the trial judge has to «tak[e its] ruling into account»).
It should be noted, however, that even the *Prejudiciële vragen* was, in turn, inspired by the French experience, of which the Danish legislator was well aware: cf. *Versterking van de cassatierechtspraak. Rapport van de commissie normstellende rol Hoge Raad*, Den Haag, februari 2008, 51 note 86, where the limited use of the

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paper, while the *advisory* function of the Supreme Courts, where admitted[6], may well escape the guarantees of jurisdiction, the same cannot be said when – as in the present case – the mechanism devised by law is intrinsically *adjudicative*.

2.1. Admissibility criteria

Clearly drawing inspiration from the criteria established by the French legislature for the admissibility of *saisine pour avis*, article 363-*bis*, §§ 1 and 2, c.p.c. states that the question submitted to the Supreme Court must – cumulatively – be i) of pure law, ii) necessary to the (even partial) definition of the dispute, iii) new (that is: not yet decided by the Court of Cassation)[7], iv) difficult to resolve (because susceptible to give rise to multiple interpretations, to be indicated in the order issued by the trial judge) and v) susceptible to arise in several proceedings (so-called seriality)[8] .

The catalog just sketched does not reproduce one of the characters identified by the delegation Law, namely that of the «particular importance» of the question; but, as it has already been noted, such a suppression seems to be «more apparent and formal than real», because the said requirement ends up coinciding either with seriality, or with the difficulty of the question[9]; and, on the other hand, it seems reasonable to expect that the Court, in checking whether the abovementioned requirements are met, will draw from the principles it has already elaborated in the field of the so-called principle of law in the interest of the law under article 363 c.p.c.[10]

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saisine, especially in criminal matters, is reported. In the Netherlands, by contrast, the preliminary referral has met with some success: cf. Krans, Bart, *The Dutch preliminary Ruling Procedure: questions from lower courts to the Dutch Supreme Court*, Lecture at Complutense Universidad, Madrid, 20 June 2023.

6 For some examples, see Passanante, Luca, *Il precedente impossibile,* Torino, Giappichelli, 2018, 94 ff.

7 If the issue has already been dealt with by the Court of Cassation, even once, it is not new for the purposes of article 363-*bis* c.p.c. (Scarselli, Giuliano, *Note sul rinvio pregiudiziale alla Corte di cassazione di una questione di diritto da parte del giudice di merito,* available at *www.giustiziainsieme.it,* 2021, § 7). On the contrary, it is irrelevant that even a plurality of trial judges have already ruled on the point. Indeed, it has been pointed out that the very existence of divergent interpretations makes the Supreme Court's intervention appropriate (Salvato, Luigi, *Verso la riforma del processo tributario: il "rinvio pregiudiziale" ed il ricorso del P.G. nell'interesse della legge,* available at *www.giustiziainsieme.it*, 2021, § 3.1*).* The remark, however reasonable, ends up in conflict with the purpose of the referral, which aims to *prevent* interpretive contrasts, not to *resolve* those that have already occurred (Capponi, Bruno, *È opportuno attribuire nuovi compiti alla Corte di Cassazione?,* available at *www.giustiziainsieme.it*, 2021).
It is worth noting that, in order not to be new, the issue must have been *decided* (by the Supreme Court): any *obiter dicta* are therefore irrelevant.

8 Since the assessment of this requirement is largely discretionary, it has already been pointed out that evaluations of judicial policy are likely to influence the First President's decision of admissibility or inadmissibility: see Briguglio, Antonio, *Il rinvio pregiudiziale interpretativo alla Corte di Cassazione,* available at *www.judicium.it,* 2022, § 4.

9 Briguglio, Antonio, *supra* note 8.

10 Salvato, Luigi, *supra* note 7, § 3.1.
According to article 363 c.p.c., when the parties have not appealed within the time limits prescribed by law or have waived their right to do so, or when the decision is not susceptible to be appealed before the Court

2.2. The proceedings (before the trial judge and before the Supreme Court)

Once the parties heard on the appropriateness of the preliminary referral, the trial judge who still wants to make use of this option shall issue an order[11], which results in the automatic stay of the proceedings before him or her. The stay, however, does not prevent the taking of urgent acts[12] and of evidence concerning matters which are not related to the one submitted to the Court of Cassation (article 363-*bis*, § 2, c.p.c.): this may happen, for instance, when more than one cause of action is at stake, and the prior intervention of the Supreme Court is only essential to deal with one of them.

The order, which must give an account of the fulfillment of the requirements provided for by article 363-*bis*, §§ 1 and 2, c.p.c. (and, in particular, of the existence of a plurality of interpretive possibilities), is communicated to the parties and transmitted to the Court of Cassation, to be subjected to an initial examination by its First President, who has to rule on its admissibility within 90 days: indeed, the lack of even only one of the abovementioned requirements would entail the inadmissibility of the referral. Moreover, according to some Scholars[13], the First President should also issue a decree of inadmissibility when the trial judge has failed to provoke cross-examination on the matter being referred.

By contrast, if all conditions are met and the *audi et alteram partem* principle has been respected, the First President will assign the matter to the competent Chamber, which – once acquired the Public Prosecutor's indictment and the parties' pleadings, to be filed within the time limit referred to in article 378 c.p.c. – will issue its decision, always in public hearing (article 363, § 4, c.p.c.); the judgement will then be immediately communicated to the trial judge by the clerk's office, so that the proceedings can resume its course before him or her.

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of Cassation, the Public Prosecutor at the Court of Cassation may ask the Court to set forth in the interest of the law the principle of law with which the trial court should have complied. The principle of law may also be pronounced by the Court of its own motion, when the appeal brought by the parties is declared inadmissible, if the Court finds that the appeal involves a question of special importance. In any case, the Court's *dictum* has no effect on the decision of the trial court. This instrument also finds a correspondent in the French tradition: it is the so-called *pourvoi dans l'intérêt de la* loi (see article 17 Law n° 67-523 of July 3rd, 1967 and articles 639-1 ff. CPC).

11 The expression, as already explained elsewhere (Capasso, Valentina, *supra* note 3, 593 s.) refers to civil and tax judges, not also to special judges (*i.e.*, administrative and accounting judges). Moreover, although the provision does not set limits as to the degree of the referring trial judge, it can be ruled out that the remittal can come from the remand judge (who is already bound by the principle expressed by the Court, and unable to detect profiles overlooked by it), unless the question arises as a result of ius superveniens, which has thus been (physiologically) disregarded by the Supreme Court. In the sense of the exclusion also of the Appellate Court's legitimacy, see Califano, Gian Paolo, *Il nuovo giudizio di appello (dopo la riforma di cui al decreto legislativo 149/2022), Il Diritto processuale civile italiano e comparato,* 2023, 75 ff.

12 According to a model which is already known to the codified system: cf. articles 298 and 669-*quater* c.p.c.

13 Trisorio Liuzzi, Giuseppe, *La riforma della giustizia civile: il nuovo istituto del rinvio pregiudiziale*, available at *www.judicium.it*, 2021, III.

2.3. Critical remarks: effectiveness…

Doubts regarding both the success of the mechanism and its legitimacy have been raised since the aftermath of the approval of the enabling act.

As for the first profile, indeed, it is apparent that, in order for the goal pursued by the legislature to be effectively achieved, at least two conditions are necessary: first, that the intervention of the Court of Cassation be provoked by the lower Courts whenever the case actually requires it[14]; second, that the answer provided by the Supreme Court is capable of settling interpretative doubts.

Actually, though it is still too early to estimate the real propensity of the lower Courts to make use of the new mechanism, they seem to have welcomed the innovation, as numerous preliminary referrals have already been raised within a few months[15]. This, however, still says nothing about the prospective effectiveness of the institution: since the Supreme Court's *dictum* is only formally binding in the proceedings in which it is rendered[16], it is apparent that the aim underlying the referral (that is, the early standardization of jurisprudence) cannot but be based on the persuasiveness of the Supreme Court reasoning[17]. To date, the Court has only responded to two preliminary re-

14 The same French experience, as already pointed out taken as a model by the Italian legislature, has shown a certain reluctance in the use of *saisine*: there are, in fact, about ten a year, so much so that the *Cour de cassation* itself has recently proposed expedients in order to increase the propensity of trial judges to raise preliminary references.

15 In the period between March and September 2023 alone, 23 preliminary referrals were raised.

16 Nor could it be otherwise, at least when the Constitution is unchanged (cf. article 101, § 2, Const.).
Thus, beyond the cases in which the referral has been assigned to the united Sections – whose *dictum* assumes, but for the other Sections of the Supreme Court only, a "semi-binding" value (see article 374, § 3, c.p.c., which, unchanged, provides that «[s]ince the simple section considers that it does not agree with the principle of law enunciated by the united sections, it remits to the latter, by reasoned order, the decision of the cassation appeal»), the delegated legislator – bound by the delegation Law on this point – could only foresee the effects of the ruling on the proceedings in which the referral is made: according to article 363-*bis*, last paragraph, c.p.c., in fact, «[t]he principle of law enunciated by the Court Shall be binding in the proceedings in the context of which the question was referred and, if the latter is extinguished, also in the new proceedings in which the same question is proposed between the same parties».
Unlike French *avis*, which remains non-binding even for the referring judge (see article 441-3 COJ), the pronouncement will bind, therefore, the referring judge and all subsequent ones, including the Court of Cassation, within the same proceedings; as a consequence, any change occurred in jurisprudence in the meanwhile would not be applied by the Supreme Court, possibly seized (again) in the same proceedings, (but) according to the normal *cursus impugnationis:* Scoditti, Enrico, *Brevi note sul nuovo istituto del rinvio pregiudiziale in cassazione*, *Questione giustizia,* 3/2021, 109. It is worth noting, however, that the *Hoge Raad* – whose preliminary ruling, as already stressed, is binding for the referring judge – affirmed its own freedom from its prior ruling if, seized with an ordinary appeal in the same proceeding, the facts turn out to be different from those assumed at the time of the preliminary ruling: HR 8 februari 2013, ECLI: NL: HR: 2013: BY4889, *NJ* 2013/123 (m.nt. H.J. Snijders). In essence, using Italian categories, it would not be possible to plead violation of the law, but its false application; and nothing prevents from believing that the same applies to the Italian mechanisms.

17 In other words, the standardization of jurisprudence requires that the Court's *dictum* (which is nothing but a *precedent*) is then actually followed, and becomes, therefore, *case law*. On the difference between precedent and case law, see Taruffo, Michele, Precedente e giurisprudenza, Napoli, Editoriale Scientifica, 2007.

ferrals related to the same issue[18]. This, again, makes any general judgment premature; however, it is worth noting – along with the first commentators[19] – that, in this very case, the Supreme Court does not seem to have sufficiently justified the chosen solution, among those put forward by the trial judges. In essence, at least in this case, the promptness of the response seems to have come at the expense of its convincingness.

2.4. … and legitimacy

As for the preliminary referral constitutional legitimacy profiles, it has already been mentioned that they stem essentially from the adjudicative, and not advisory, function here fulfilled by the Court, which is meant to issue a principle of law that binds the referring court and all judges who (in the same or another proceeding) will be seized of the same dispute between the same parties.

It is precisely this latter circumstance that has been seen by some commentators as detrimental to article 101, § 2, Cost., stating that «[j]udges shall be subject only to the law»: as a consequence of the cogency of the Supreme Court's *dictum*, in fact, the first judge's choice to refer the question to the Supreme Court deprives all subsequent judges of the possibility of directly interpreting the law, since they are required to apply the interpretation already provided by the Court[20].

This criticality may *perhaps* be overcome by following the idea of those who argue for the mere preclusive nature of the question of law decided by the Court, which would be within the power of the legislature to provide for in view of the gradual pathway leading to *res judicata*[21].

However, the same idea is not sufficient to answer all the doubts raised by article 363-*bis*: on the one hand, in fact, the discretion left to the President of the Court to choose the section responsible for deciding the preliminary referral appears contrary to the principle of the natural judge pre-established by law (article 25, § 1, Const.)[22];

18 See Cass., July 21st, 2023, no. 21874 and no. 21876.
It is worth stressing that, unlike in France, where the Cour de cassation has to respond to the *saisine* within 3 months (otherwise, the trial judge is entitled to issue his/her decision without waiting for the avis), article 363-*bis* does not set a time limit within which the Supreme Court is required to rule. However, it is to be expected that the Court, even if unofficially, will give some priority to preliminary referrals over ordinary cassation appeals.

19 Capasso, Francesco, *Le prime decisioni della Cassazione su rinvio pregiudiziale*, *Il Diritto processuale civile italiano e comparato,* 2023, 771 ff.

20 Scarselli, Giuliano, *supra* note 7, § 4.

21 Carratta, Antonio, *Il rinvio pregiudiziale alla Cassazione e la decisione "soggettivamente complessa", Giurisprudenza italiana,* 2023, 471.

22 It is true that at least one of the parameters for assigning cassation appeals to the United Sections (the occurrence of a question of particular importance: article 374, § 2, c.p.c.) already leaves a great deal of discretion to the First President. The rule, however, is designed for cases in which the dispute has already gone through two levels of jurisdiction. When the preliminary reference is ordered by the judge of first instance, by contrast, the dispute ends up being essentially decided by a judge not predetermined by law.

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on the other hand, and above all, it should be considered that, since the Supreme Court is designed by the Constitution as an appellate judge[23], the Court can in no case accommodate a decision at first and sole instance[24]: but this ends up occurring where the referral is ordered by the judge of first instance. And here, the legislature's discretion is out of play, because even the law encounters an insuperable limit, *i.e.* that of constitutional dictate.

3. THE EUROPEAN REVOCATION: PRELIMINARY REMARKS

If, as seen, the preliminary referral aims at the prospective reduction of the overall litigation, albeit at the cost of an immediate (and hopefully transient) increase in the workload of the Court of Cassation, the second novelty brought by the reform would seem to be totally unrelated to any efficiency-based logic: the introduction of the so-called European revocation, indeed, appears to be rather aimed at increasing the effectiveness of the system, since it allows to specifically restore the rights guaranteed by the European Convention on Human Rights, whose violation has been established by the Strasbourg Court.

Actually, albeit the logic of human rights protection is preponderant, the introduction of such a remedy may also serve the economic needs of a State. Indeed, it is true that, while «[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties» (article 46 § 1 ECHR), the Convention does not expressly require them to provide the reopening of domestic proceedings; but it is also common ground that such remedy is often the best, if not the only, means to achieve *restitutio in integrum*[25]. In those same cases, then, failing such a provision, the consequence is often an automatic monetary compensation, which, on the one hand, may be unsatisfactory for the victim of the violation; on the other hand, results in a fixed (and perhaps avoidable) cost to the State.

Despite such drawbacks, however, the possibility of reopening of proceedings – if not expressly provided for by the law – can hardly be granted by ordinary Courts, since it runs up against the necessary predetermination of extraordinary appeals, which char-

23 Under article 111, § 7, Const., «[a]ppeals to the Court of Cassation in cases of violations of the law shall always be allowed against judgements and against measures affecting personal freedom issued by ordinary and special Courts».

24 Capasso, Valentina, *supra* note 3, 604, recalling an idea already expressed by Cipriani, Franco, *Il regolamento di giurisdizione*, Napoli, Jovene, 1988 (rist.), 30 note 31. This limitation appears to be overlooked even too often: for further cases of violation of article 111 Const. in this respect, see Capasso, Valentina, *Nullità degli atti e offensività necessaria. Contributo alla difesa della legalità del processo civile*, Roma, Dike, 2022, 316, note 435.

25 See Council of Europe. Committee of Ministers, *Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights*, Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies, available at https://rm.coe.int/.

acterizes every branch of procedural law, and not only in Italy[26]. Legislature inaction, yet, has not prevented case law to try to force the limits of the law, either by way of interpretation or by resorting to the Constitutional Court. This has certainly happened in Italy, first and foremost in the field of criminal trial: here, after some unsatisfactory attempts to use already existing provisions, made by the Court of Cassation, the question has been repeatedly referred to the Constitutional Court, which, in 2011, noting that its previous admonition to the legislature[27] had remained unsuccessful, introduced the so-called European revision, by declaring the illegitimacy of article 630 c.p.p. in the part in which it did not provide, among the cases justifying the revision, the one of the judgment declared contrary to the Convention[28]. As to civil and administrative proceedings, instead, any attempts to provoke an additive intervention by the Constitutional Court were unsuccessful[29]: not so much because of the different importance of the rights at stake, but because the Court felt that it could not replace the legislature in balancing the protection of the winning party before Strasbourg Court and the one who had already obtained a favorable judgment in the domestic process, and who is not normally a party to the conventional proceedings (see article 36, § 2, ECHR).

Against this background, article 1, § 10(a), Law No. 206/2021 – unexpectedly[30] – authorized the Government to introduce a new ground for extraordinary revocation «in the event that the content of a judgment which has already become res judicata is subsequently declared by the European Court of Human Rights to be contrary in whole or in part to the Convention or to one of its protocols, and it is not possible to remove the

26 In fact, the need for a general instrument for *restitutio in integrum* has arisen in other European systems as well: initially, in criminal trials, where the tendency is certainly to let respect for the Strasbourg Court's judgment prevail over national *res judicata*; more recently, and with diversified solutions, in the civil and administrative proceedings. For example, while the German, Swiss and Spanish laws allow the revision of civil and administrative judgments contrary to the ECHR, in the United Kingdom such a possibility is not granted, since the need to protect the winning party in the domestic trial is deemed to prevail; in France the solution is still different, since the reopening of the trial has been introduced only in matters of the status of persons, and nothing is provided for with reference to administrative proceedings.
For a more extensive review of European Countries remedies and practices in both criminal and civil/administrative proceedings, see Pilkov, Kostiantyn, *Reopening Cases Following Judgments of The European Court of Human Rights: Room For A European Consensus?, Access to Justice in Eastern Europe,* 2022, 7 ff.

27 See Corte cost., April 30th, 2008, n. 129.

28 See Corte cost., April 7th, 2011, n. 113.
The Court, however, emphasized that the choice to affect article 630 c.p.p. did not imply a prejudicial option of this Court in favor of the preexisting remedy of revision, being justified only by the inexistence of other and more suitable remedies to be implemented. Hence the invitation to the legislature to exercise its discretion in the possible choice both of a different mechanism and of the limits and ways in which, if necessary, to enhance the indications of Recommendation R(2000)2 of the Committee of Ministers of the Council of Europe. Notwithstanding this, even in criminal matters the intervention of the legislature has been delayed: it was only with Legislative Decree no. 150/2022 that article 628-*bis* c.p.p. (which regulates the «Request for the elimination of the prejudicial effects of decisions adopted in violation of the Convention for the Protection of Human Rights and Fundamental Freedoms or Additional Protocols») was introduced.

29 See Corte cost., May 26th, 2017, n. 123 and Corte cost., April 27th, 2018, n. 93.

30 The introduction of an instrument of *restitutio in integrum* to remedy ECHR violations, in fact, while suggested in the past (see Bills no. 3354 of March 22nd, 2005 and no. 3362 of March 23rd, 2005, that never materialized), had not been proposed by the Luiso Commission.

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violation through protection by equivalent». The delegation Law was translated into law by means of the newly introduced article 391-*quater* c.p.c., which makes the so-called Europen revocation[31] available against «decisions of ordinary judges which have become final [...] when their content has been declared by the European Court of Human Rights to be contrary to the Convention or one of its Protocols» (article 362, § 3, c.p.c.).

The evaluation of the new remedy should be tempered, however, because both of its underlying objectives (to restore human rights violations and to avoid automatic monetary compensation) appear to be only partially achievable in light of the regulations of article 391-*quater* c.p.c., given its (over)limited scope.

3.1. Admissibility criteria

The remedy may be exercised by the party who successfully applied to the European Court of Human Rights or by the Italian Public Prosecutor at the Court of Cassation (article 397, § 2, c.p.c.)[32], exclusively against judgments that have become *res judicata* (articles 362, § 3, and 391-*quater*, § 1, c.p.c.)[33]. The provision thus excludes both the case in which the Strasbourg Court has exceptionally admitted the appeal regardless of the rule of prior exhaustion of domestic remedies (article 35 ECHR), as well as the case provided by article 37 of the Convention (namely, the striking out of the application following the unilateral recognition of the violation by the State)[34].

However, the one just mentioned is not the only limitation on the scope of the remedy, which is further restricted by two additional (and cumulative) requirements: it

31 See Romani, Elisabetta, *Il processo amministrativo e l'esecuzione delle sentenze della Corte europea dei diritti dell'uomo: l'istituto della revocazione «convenzionale» prefigurato dalla l. 26 novembre 2021, n. 206*, available at *www.federalismi.it,* 2022, n. 16, 220 ff.; Grassi, Michele, *Revocazione della sentenza civile per contrasto con la Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali, Rivista di diritto internazionale privato e processuale,* 2022, 919 ff.; D'Alessandro, Elena, *Revocazione per contrarietà alla Convenzione europea dei diritti dell'uomo, Giurisprudenza italiana,* 2023, 479 ff.; Zuffi, Beatrice, *CEDU e giudizio di legittimità: il nuovo rimedio revocatorio esperibile ai sensi dell'art. 391-quater c.p.c., Il Giusto processo civile*, 2023, 115 ff.

32 According to article 15, § 1-*bis*, Law Decree no. 113/2018, converted by Law no. 132/2018, as modified by article 15, § 4, Legislative Decree no. 149/2022, «[t]he Government Agent shall inform all parties to the trial which gave rise to the judgment of the Italian court submitted to the European Court, as well as the Public Prosecutor at the Court of Cassation, of the pendency of the proceedings brought before the European Court itself»; the provision is certainly useful, but not sufficient to ensure frequent use of the extraordinary appeal power granted to the prosecutor, who is also not expected to be notified of the EDU Court's decision.

33 The application, to be made within 60 days from the communication or, failing that, from the publication of the judgment (article 391-*quater*, § 2, c.p.c.), must be addressed in any case to the Court of Cassation, even where the decision that has become final was not issued by a first instance or an appellate judge; however, the Court, in eventually granting the appeal, will decide on the merits only if «no further findings of fact are necessary»; otherwise, the case will be sent back «to the judge who pronounced the judgment set aside» (see article 391-*quater*, § 2, which refers to Article 391-*ter*, § 2).

34 What is most striking is that both cases are instead included by article 628-*bis* c.p.p.: the latter expressly, the former implicitly (since the provision does not make the remedy subject to the condition that the judgment have already become irrevocable).

is, in fact, necessary, first, that «the violation established by the European Court [has] adversely affected a state right of the person» and, second, that «any equitable relief granted by the European Court under article 41 of the Convention [is] not [adequate] to compensate for the consequences of the violation» (article 391-*quater*, § 1, c.p.c.).

Both requirements raise perplexity.

As for the latter requirement, Scholars have already observed that the provision seems to misrepresent the meaning of article 41 ECHR, «as if in the system of the Convention the payment of equitable satisfaction in lieu of the restitutory remedy were the rule and not the exception». In fact, «following a finding of a violation of human rights protected by the ECHR, the "losing" State is obliged to take all necessary measures to remove the consequences of the wrongful act and, only residually, article 41 ECHR provides that the injured party may be granted monetary compensation to the extent that the domestic law of that State does not permit reparation. By providing for the prior verification of the unsuitability of protection by equivalent to compensate for the consequences of the tort, the Italian legislator seems, instead, to have reversed the terms of the question»[35].

As to the former, doubts are even greater: on the one hand, the proviso uses the expression «state right of the person», whose meaning is uncertain, since it has no equivalent in Italian Codes or legislation[36]. In fact, the expression appears to be borrowed from the French *procédure de réexamen des décisions civiles rendue en matière d'état des personnes*[37], but Italian legislature seems to have overlooked that such notion is controversial in France too[38].

35 Grassi, Michele, *supra* note 31, 947.

36 See Ufficio Studi e formazione della Giustizia Amministrativa, *Relazione sugli effetti diretti e sulle implicazioni sistematiche che la riforma del processo civile, apprestata dal d.lgs. 10 ottobre 2022, n. 149, reca al processo amministrativo,* available at *www.giustizia-amministrativa.it,* 2022, 48 note 70 ff., and Consiglio Superiore della Magistratura, *Richiesta del Ministro della Giustizia, ai sensi dell'art. 10 della legge 24 marzo 1958, n. 195, di parere sul testo del decreto legislativo, approvato dal Consiglio dei Ministri nella riunione del 28 luglio 2022, concernente: "Schema di decreto legislativo recante attuazione della legge 26 novembre 2021, n. 206 recante delega al governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa alle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonché in materia di esecuzione forzata." (delibera 21 settembre 2022),* available at *www.csm.it*, 2022, 31 ff.
It is true that some Scholars (Luiso, Francesco Paolo, *Il nuovo processo civile. Commentario breve agli articoli riformati del codice di procedura civile,* Milano, Giuffrè, 2023, 231; D'Alessandro, Elena, *supra* note 31, 481 note 16) proposed to read the expression as including all non-pecuniary rights; but such an extensive reading is questionable.

37 See articles L. 452-1 ff. COJ and articles 1031-8 ff. CPC, as introduced by Law no. 2016-1547 of November 18th, 2016 (but see also the implementing decree no. 2017-396 of March 24th, 2017). In French literature, see, at least, Le Bars, Thierry, *Convention européenne des droits de l'homme et état des personnes : instauration d'une procédure de réexamen des décisions de justice en matière civile*, *Droit de la famille,* janv. 2017, 1 ff.; Cadiet, Loïc, *La loi J21 et la Cour de cassation : la réforme avant la réforme ?, Procédures* n° 2, févr. 2017, étude 3, § 9 ; Ferrand, Frédérique, *Le décret du 24 mars 2017 portant diverses dispositions relatives à la Cour de cassation, La Semaine juridique,* 2017, 702 ff., § 4

38 Melin, François, *Action d'état – Généralités*, in *Répertoire de procédure civile*, Janvier 2023.
It is true that the expression, while general, immediately seemed to be primarily aimed at resolving the issue of surrogate motherhood (Chénédé, François, *Réexamen d'une décision civile après condamnation par la*

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On the other hand, the scope of the remedy, in addition to being ambiguous, is still too limited. In essence, the greatest criticality lies in what the article 391-*quater* c.p.c. *does not* provide for: in fact, the legislature's discretion, referred to by the Constitutional Court, could certainly be exercised when the choice between introducing or not introducing the remedy is at stake: but, once a provision is made for the reopening of proceedings in certain cases, that discretion becomes reviewable insofar as it does not provide for cases that would deserve protection similar to those selected. Now, given that the Explanatory Report accompanying the reform (p. 50) implicitly admits that the cases envisaged are not the only ones in which the compensatory remedy is inadequate (so that it is conceivable that others will be acknowledged by practice), it is already possible to identify a series of cases whose exclusion appears to be unreasonable, namely those in which a violation of *procedural rights* – starting with the right of defense – has been recognized by the European Court of Human Rights[39].

First of all, in fact, it is precisely as a result of an episode of conspicuous infringement of the right of defense (albeit in criminal trial) that the so-called European revision has found its way into Italian legal system[40]; nor does it seem to be possible to invoke the widespread belief that differentiated (*rectius*: more intense) guarantees in criminal proceedings would in any case be justified only by reason of the particular nature of the rights at stake (*i.e.*, ultimately, by reason of the potential impact on personal freedom), in order to exclude the need for equal protection in civil proceedings. Indeed, such reasoning would not only disregard article 111, §§ 1 and 2, Const., which identifies a catalog of principles (starting with the *audi et alteram partem* one) which are applicable to all types of trials, but also neglect that the Strasbourg Court has explicitly equated civil and criminal trials in terms of the need to ensure the right of defense, even on the legal qualification of facts[41].

CEDH, AJ famille, 2016, 595 ; Caire, Anne-Blandine*, Vers un réexamen des décisions civiles définitives rendues en matière d'état des personnes après une condamnation de la CEDH ?, Recueil Dalloz,* 2016, 2152; Gouttenoire, Adeline, *Le statut sur mesure des enfants nés de GPA à l'étranger, La Semaine juridique*, 2017, 1691), so that it is not surprising that it is precisely on this matter that the Court of Review (*Cour de réexamen*) first intervened in 2018 (see Cour de réexamen, 16 févr. 2018, n° 001 and Cour de réexamen, 16 févr. 2018, n° 002). It has already been stressed, however, that the expression is so broad that «[i]t is possible to envisage a much wider field of application for this mechanism. To stick to the classic conception of personal status, the re-examination procedure could concern decisions relating to nationality, sex, alliance, filiation, or even the granting and modification of surnames and forenames. The ECHR is particularly sensitive to the possibility for each individual to establish his or her "identity". In the future, "personal status" could be assimilated to all the issues currently subsumed by the ECHR under the "right to respect for private and family life". Only property matters would then be excluded from the "re-examination" procedure»: cf. Chénédé, François, *supra*). As will be discussed, some Italian commentators also come to this conclusion.

39 In addition, according to Zuffi, Beatrice, *supra* note 31, 135, such a limitation would also be unlawful because it goes beyond the provisions of the delegation Law, which did not contain any specifications concerning the subject matter of the dispute.

40 Corte cost., April 7th, 2011, n. 113.

41 ECHR Court, December 11st, 2007, *Drassich c. Italia*.

Secondly, reparation of the violation of procedural rights by monetary equivalent, although not *impossible*, is *extremely difficult*, as the experience of the Strasbourg Court itself shows[42]; and such difficulty calls to mind the scientific elaboration on the notion of «irreparabil[ity]» of the injury which is required for the granting of the provisional measure under article 700 c.p.c.: for, as is well known, not only is the conception that preached this character with exclusive reference to the injury of non-patrimonial rights (which, moreover, certainly include procedural rights) now obsolete, but equally outdated is the idea to restrict the notion to cases of *practical impossibility* of protection by equivalent only[43].

Actually, these considerations do not seem to have been totally disavowed in the course of the work which led to the approval of the reform: to the contrary, it has been reported that «another case of revision had been hypothesized: the violation, ascertained by the European Court, that had decisively prejudiced the exercise of the right of defense of the party proposing the revocation», irrespective to the nature of the right at stake[44]. However, the provision «did not find hospitality in the legislative decree for reasons unknown at present»; with «regrettable consequences», which are not limited to those – obvious – related to the deficit of protection thus maintained[45] and the resulting patrimonial burdens on the State, but, as it will be seen shortly, also extend to the lack of coordination with other provisions (and, in particular, those related to the protection of third parties to supranational judgment)[46].

3.2. The proceedings (before the Court of Cassation and, possibly, before the trial judge)

The application for revision, to be made within sixty days from the communication or, failing that, from the publication of the judgment (§ 2), must be addressed in any case to the Court of Cassation (which will in any case hold a public hearing), even if the national decision infringing the Convention was the one issued by a trial judge[47]. How-

42 See De Santis Di Nicola, Francesco, *L'obbligo di conformarsi alle sentenze della Corte EDU tra problematico ampliamento dei motivi di revocazione e (sostanziale) neutralizzazione del giudicato nazionale non-penale (II), Giusto processo civile,* 2018, 1118 ff.

43 See Panzarola, Andrea - Giordano, Rosaria, Sub *art. 700*, in Id., *Dei provvedimenti d'urgenza. Art. 700-702*, in Chiarloni, Sergio (a cura di), *Commentario del Codice di procedura civile*, Bologna, 2016, pp. 219 ff.

44 Luiso, Francesco Paolo, *supra* note36, 232.

45 These remarks do not prevent from agreeing with Mengali, Andrea, *La revocazione per contrarietà alla Convenzione europea dei diritti dell'uomo,* in Cecchella, Claudio (ed.), *supra* note 3, 408 f., who stresses that the violation of the right of defence can be asserted through European revocation when it has been perpetrated in a case involving a person's state right: in other words, it would be an «indirect» injury to the state right. But, as it is apparent, the proposed interpretation – that the same Author defines as «extensive» – cannot be extended further, given the insurmountable obstacle constituted by the letter of the law.

46 See *infra*, § 3.3.

47 The same was already the case the event of a revocation for error of fact, governed by article 391-*bis* c.p.c. On the other hand, the decision (recognized as) violating to the Convention or its protocols may not be that of the Court of Appeals, but that of the Court of Cassation rejecting the cassation appeal against the former. Thus,

ever, this does not necessarily mean that the proceedings will end before the Supreme Court: the Court, in eventually granting the appeal, will decide on the merits only if «no further findings of fact are necessary» (article 391-*quater*, § 2, which recalls article 391-*ter*, § 2); otherwise, once the cassation phase exhausted, the case will be sent back «to the judge who pronounced the judgment set aside».

3.3. Critical remarks: effectiveness…

Anyway, the winning party in the revocation proceedings is not even assured of obtaining the claimed asset, albeit recognized as unduly denied in the first domestic judgment: indeed, under article 391-*quater*, last paragraph, c.p.c., the granting of the remedy shall not affect «the rights acquired by good faith third parties[48] who did not participate in the proceedings before the European Court».

Regardless of any assessment of the appropriateness of such a provision, it certainly gives rise to tricky problems of coordination with article 2652 c.c., which has been amended in order to provide for the transcriptibility of «applications for revision under article 391-*quater*» – when involving judgments subject to transcription (§ 1, no. 9-*bis*) –, and has always provided, as a general rule, that «the judgment granting the application does not affect the rights acquired by third parties in good faith on the basis of a deed transcribed or registered prior to the transcription of the application» (§ 2).

On the one hand, in fact, it seems very difficult to imagine cases in which the complained violation of a «state right of the person» could give rise to transcribable claims»; but, as noted, the amendment of article 2652 c.c., just like the provision contained in article 391-*quater*, last paragraph, «are nothing more than what remains of the broader text that had been elaborated in the preparatory work»[49]: in essence, it was the prospective opening of the remedy also to the hypothesis of right of defense violations (regardless of the object of the trial)[50] which could have justified a problem of transcriptibility of the application; since the legislature no longer provides for such a scenario, the amendment to the Civil Code remains essentially meaningless.

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even such decisions may be reversed under art. 391-*quater* c.p.c.: D'Alessandro, Elena, *supra* note 31, 480; Luiso, Francesco Paolo, *supra* note 36, 233 ff.; Zuffi, Beatrice, *supra* note 31, 131, who, however, criticises both the appropriateness of the provision (which ends up submitting all revocations to the Supreme Court) and its legitimacy (since such a directive was not literally provided for in the delegation Law).

48 Notwithstanding the basic doubt as to the third parties actually targeted by the provision, which will be discussed immediately below, in the text, it has been observed – moving from the assumption that expression includes the counterparty in the domestic suit – that «where a third party, although duly informed by the Government Agent, has not applied to intervene in Strasbourg, it may be said that s/he is not in good faith […]. | Moreover, good faith will also be excluded where the third party, although invited by the President as a result of his ritually filed request to intervene, does not intervene in the conventional judgment, being unable to complain, even in that case, of any violation of the right of defence under article 24 of the Constitution»: cf. Romani, Elisabetta, *supra* note 31, 245.

49 D'Alessandro, Elena, *supra* note 31, 481.

50 See *supra*, § 3.1.

On the other hand, neither is it certain that article 391-*quater*, last paragraph, c.p.c., and article 2652, § 2, c.c. refer to the same «third parties»: actually, there is a strong doubt that the first article – in line with the Constitutional Court's understanding[51] – refers to the counterparty to the domestic suit (whose intervention before the ECHR is not guaranteed)[52], and the second to the latter's successors in title; but, once again, since «the scope […] of article 391-*quater* c.p.c. , in its final version, was […] limited to ''state rights of the person''» and «it is rare to imagine their acquisition by derivative title», it is really hard to envisage that the provision can be implemented[53].

3.4 … and legitimacy

While exposing the eligibility criteria of the remedy, some profiles of irrationality of the new discipline (namely, the exclusion from the scope of the European revocation of at least a series of hypotheses deserving of *restitutio in integrum* as much as those included) have already been pointed out. Those remarks, however, do not exhaust the doubts of constitutional legitimacy raised by the new mechanisms.

Indeed, as I have already stressed elsewhere[54], the choice of the delegated legislator to introduce a new article, instead of amending article 395 c.p.c., must be considered mandatory, given that any intervention on the pre-existing article[55] would have had the effect of extending the remedy to administrative and tax proceedings as well (given the referral contained, respectively, in articles 106 c.p.a. and 64 Legislative Decree no. 546/1992); and that would have gone beyond the limits of the delegation Law. And yet, the resulting whole system – which admits the *restitutio in integrum* before civil and criminal Courts, but not before administrative and tax Courts – casts doubt on the reasonableness of the exclusions: indeed, in administrative and tax proceedings, just like in criminal proceedings, the State is the claimant's counterparty, albeit in different articulation, both in the domestic and in the conventional process. Moreover, it is hard to see why the balancing made by the legislator with reference to the opposing interests in relation to the civil judgment should give a different result when the violation was committed as a result of tax or administrative proceedings.

51 Cf. Corte cost., May 26th, 2017, n. 123, recalling that, in proceedings before the Strasbourg Court, the intervention of the counterparty in domestic proceedings is left to the discretion of the President of the Court (see article 36, § 2, ECHR)

52 Cf. article 44, § 3(a), Rules of the European Court of Human Rights.

53 D'Alessandro, Elena, *supra* note 31, 483; Zuffi, Beatrice, *supra* note 31, 145.

54 Capasso, Valentina, *Note sul (nuovo?) contraddittorio post d.lgs. 10 ottobre 2022, n. 149, tra apprezzabili conferme e qualche occasione perduta, Il Diritto processuale civile italiano e comparato,* 2023, 97 note 62.

55 As already stressed by some Scholars: De Santis, Angelo Danilo, *Le impugnazioni,* in Costantino, Giorgio (ed.), *La riforma della giustizia civile. Prospettive di attuazione della legge 26 novembre 2021, n. 206,* Bari, Cacucci, 2022, 264, and, most recently, D'Alessandro, Elena, *supra* note 31, 480. For an opposing view, see Zuffi, Beatrice, *supra* note 31, 134.

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4. CONCLUDING REMARKS

It is well known that the importation of procedural instruments is a delicate and risky operation, since a number of factors – of a structural, legal, but also socio-economic nature – can cause what works elsewhere to prove inadequate in the target Country.

With respect to the new mechanisms here examined, the first impression is that the Italian legislator has not well pondered the "degree" of imitation, which was excessive in one case (that of the European revocation, which brought, together with the limitation *ratione materiae*, the same uncertainties that it arouses in France), insufficient in another (that of the "Italian adaptation" of the *saisine pour avis*, whose original advisory value would have been better left unchanged). Whether this impression is correct, only time will tell.

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