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RULE OF LAW BETWEEN FAIR TRIAL AND EUROPEAN RIGHTS

SUMMARY: *1. Introduction. – 2. Rule of law and ECHR Jurisprudence. – 3. Law's Crisis. – 4. Public Power and European Rule of Law. – 5. Fair Trial and European Law. – 6. Conclusion.*

1. – The Italian procedural system, in particular the ordinary codes of substantive and procedural law (civil and criminal), don't follow a logical coherence. The Constitutional Court has repeatedly stressed the respect of the principles of orality and immediacy, urging the legislator. The European Court of Human Rights (ECHR) has condemned Italy several times for the countless violations on the reasonable duration of the trial despite the intent of the legislator to remedy such violations through the introduction of special rites [1]. A constitutional principle has thus generated violations of other constitutional and community principles generating a paralysis of the justice system. At light of the complex systemic framework envisaged, the methodology adopted has as its point of reference the refutation of the thesis that doctrine and jurisprudence have developed so far through a dialectic humanistic and scientific approach [2]. The internal comparison (between the different jurisdictions and their regulations) and external (with the mechanisms of the legal system of European law) is necessary to understand the key elements and cohesion between the Italian and European Union legal systems in order to find a suitable and universal model applicable in accordance with the rules and principles of due process [3]. Systematics delves primarily into the shortcomings of the current Italian codes of Law through the refutation of the reform proposals of the doctrine. The interpretation of the jurisprudential orientations of legitimacy will be fundamental to understanding the evolution of the rule of law in this paper. The first objective to be achieved therefore is the discovery of the rules of judgment common to the procedural systems. The second objective is the understanding of the possible evolutionary keys for a proper balance of rights and public and private interests opposed in civil law trials in order to respect the universal principles of due process [4].

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[1] F. GIUNCHEDI, *Linee evolutive del giusto processo europeo*, in A. GAITO, *Procedura penale e garanzie europee,* Giappichelli, Torino, 2006, M. BOVE. Il *principio della ragionevole durata del processo nella giurisprudenza della Corte di cassazione*, Napoli, 2010, P CHERUBINI, *Processi cognitivi e ragionamento giudiziario*, in P. CHERUBINI *et al*. (a cura di), *Psicologia e società. Diritto*, Firenze, Milano, 2011.

[2] E.T. FETERIS, *Rationality in Legal Discussion. A Pragma-Dialectical Perspective*, in *Informal Logic*, 1993, A. LAMAS, *Dialectica y derecho*, in *Circa humana philosophia*, 1998.

[3] M. CECCHETTI, *Riforma dell'art. 111 della Costituzione e giurisprudenza costituzionale: analisi e bilancio del primo triennio*, in AA.VV., *Diritti, nuove tecnologie, trasformazioni sociali. Scritti in memoria di Paolo Barile,* Padova, Cedam, 2003.

[4] R. BIN, *Diritti e argomenti Il bilanciamento degli interessi*, Milano, 1992.

2. – The principle of legality and the concept of "law" in criminal matters can be found in Article 7 of the ECHR and in the judgment Zaja c. Croatia [5]. ECHR's jurisprudence is based on the centrality of fundamental rights in the European legal system [6]. ECHR provides that the law indicates the authority competent to perform the interference, on the other hand, which establishes the mode of operation. The exercise of power must be authorised by law and therefore based on a rule conferring jurisdiction on a given authority [7]. Researching the law is the starting point of the Court for predictability with a view to the protection of fundamental rights [8]. One of the founding principles of the ECHR system is that of the effectiveness of rights, which has a priority scope compared to dogmatic, value, institutional considerations. To examine the legislative text independently of its interpretation and application would be to refer the notion of predictability to predictability in the abstract [9]. The role of clarifying and interpreting the provisions of national law lies primarily with the national authorities [10]. However, while the Court is not in a position to substitute its own judgment for that of the national courts and its power to review compliance with domestic law is limited; it is the Court's function to review the reasoning adduced by domestic judicial authorities from the point of view of the Convention. [11] The object of the Court's review at this stage is not the conformity of the interference with national law, but the decision of the courts which are responsible for carrying out such examination. This point shows that national authorities have an additional procedural obligation to provide for a mechanism to monitor the compliance of the interference with the principle of legality [12]. This aspect may, conceptually, overlap, at least in part, with the right to a domestic remedy, within the meaning of Article 13 of the ECHR. However, the Court prefers to analyse it in order to assess the existence of the legal basis. As well as the "law" and the jurisprudence, also the control of conformity must possess a certain "quality". In fact, in order to protect a person against arbitrariness, it is not sufficient to provide a formal possibility of bringing adversarial proceedings to contest the application of a legal provision to his or her case. Domestic courts must undertake a meaningful review of the authorities' actions affecting rights under the European Convention in order to comply with the lawfulness requirement [13]. The national courts must therefore verify, in turn, that the interference by the national authorities

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[5] See L. TRUCCO, *Carta dei diritti fondamentali e costituzionalizzazione dell'Unione Europea*, Torino Giappichelli, 2013; A. TIZZANO, *Les Cours européennes et l'adhésion de l'Union à la CEDH*, in *Il Diritto dell'Unione Europea*, 2011, 38 ss. A. BARBERA, *La Carta europea dei diritti: una fonte di ri-cognizione?,* in *Il Diritto dell'Unione Europea*, 2001, 241 ss.; A. VITORINO, *La Charte des droits fondamentaux de Union européenne*, in *Revue du droit de l'Union européenne*, 2001, 27 ss.; U. VILLANI, *I diritti fondamentali tra Carta di Nizza, Convenzione europea dei diritti dell'uomo e progetto di Costituzione europea*, in *Il Diritto dell'Unione Europea*, 2004, 72 ss.

[6] See G. STROZZI, *Il sistema integrato di tutela dei diritti fondamentali dopo Lisbona, attualità e prospettive*, in Il Diritto dell'Unione Europea, 2011, 837 ss., N. NAPOLETANO, *La nozione di 'campo di applicazione del diritto comunitario' nell'ambito delle competenze della Corte di giustizia in tema di tutela dei diritti fondamentali*, in *Il Diritto dell'Unione Europea*, 2004, 679 ss.; ID., *L'evoluzione della tutela dei diritti fondamentali nell'Unione europea, in La tutela dei diritti umani in Europa tra sovranità statale e ordinamenti sovranazionali*, a cura di A. CALIGIURI, G. CATALDI, N. NAPOLETANO, Padova, Cedam, 2010, 3 ss.; K. LENAERTS, *Exploring the Limits of the EU Charter of Fundamental European*, in *Constitutional Law Review*, 2012, 375 ss.

[7] B. PASTORE *Decisioni e controlli tra potere e ragione. Materiali per un corso di filosofia del diritto*, Torino, Giappichelli., 2013.p. 27 ss.

[8] G. PINO. *Il costituzionalismo dei diritti. Struttura e limiti del costituzionalismo contemporaneo*, Bologna, il Mulino, 2017, 53 ss.

[9] E. DICIOTTI, *Interpretazione legge e discorso razionale*, Torino, 1999, 32 ss.

[10] G. UBERTIS, *Diritti fondamentali e dialogo tra le Corti: fantascienza giuridica?,* in *Riv. it. dir. proc. pen*., 2014, 1726 ss., G. ROLLA *Il sistema europeo di protezione dei diritti fondamentali e i rapporti tra le giurisdizioni*, Milano, Giuffrè, 2010; 89 ss.

[11] J.H.H. WEILER, S.C. FRIES, *Une politique des droits de l'homme pour la communauté et l'union européenne: la question des compétences, in L'Union Européenne et les Droits de l'Homme*, a cura di P. ALSTON, Bruylant, Bruxelles 2011, 157 ss.

[12] O. DI GIOVINE, *L'interpretazione nel diritto penale tra creatività e vincolo alla legge*, Milano, 2006, 75 ss.

is in compliance with the principle of conventional legality [14]. This implies that the courts not only ascertain the "formal" conformity of the interference, but also that of its predictability in practice. The absence of such a check obliges the European Court to analyse the conformity of the interference at first instance without the "filter" of the national judge and to therefore play the role of judge of first instance also in relation to national law [15]. Where national judges verify compliance with the principle of European legality, the control of the European Court will be much more limited: as regards the "formal" compliance of the interference, it will be limited to "sanction" manifestly arbitrary or unreasonable internal decisions [16]. The principle of the reservation of law, provides only partial protection of fundamental rights. Indeed, if it is considered that case law is not the source of the law for the purposes of assessing the predictability of the criminal response, the only element to be checked is the legislative provision. The predictability in abstract is accepted in the national law such as predictability in concrete [17]. This is a notion which, precisely because it is not based on a specific theory of sources, makes it possible to be integrated and enriched by additional elements of guarantee which are accepted at national level, such as the reservation of law in criminal matters; this, provided that such elements are not interpreted in such a way as to render ineffective the heart of the guarantees of the principle of legality [18]. In order to reconstruct the different scope of European legality it is necessary to understand the ratio of legality in the conventional system and then derive its "form". The examination of the finding of infringement of an article of the ECHR consists of two phases. In a first stage, which can be defined as the stage of applicability of the Convention, it is necessary to verify, inter alia, whether the individual has been interfered in the enjoyment of one of the rights provided for in the European Convention [19]. The second can be defined as the "justification" stage: according to the Convention, any interference in order to be legitimate must be justified [20]. This means that whenever the

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[13] S. Morano-Foadi, S. Andreadakis, *Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights*, in *European Law Journal*, 2011, 595 ss.; G. Martinico, O. Pollicino, *The Interaction between Europe's Legal Systems. Judicial Dialogue and the Creation of Supranational Laws, E. Elgar,* Cheltenham-Northampton, 2012., 112 ss.

[14] See U. Villani, *La cooperazione tra i giudici nazionali, la Corte di giustizia dell'Unione europea e la Corte europea dei diritti dell'uomo, in La cooperazione fra Corti in Europa nella tutela dei diritti dell'uomo,* a cura di M. Fragola (Atti del Convegno interinale Sidi), Editoriale Scientifica, Napoli 2012, 1 ss.; E. Cannizzaro, *La cooperazione fra Corti in Europa nella tutela dei diritti dell'uomo, in La cooperazione fra Corti in Europa nella tutela dei diritti dell'uomo*, a cura di M. Fragola, cit., 39 ss.; U. Villani, *Valori comuni e rilevanza delle identità nazionali e locali nel processo di integrazione europea*, Jovene, Napoli 2011, 72.

[15] M. O'Boyle, *The future of the European Court of Human Rights*, in *German Law Journal*, 2011, 1862 ss., 1865 ss.

[16] I. Viarengo, *I diritti fondamentali tra Corte di giustizia, Corte europea dei diritti dell'uomo e Corti costituzionali*, *in Il Trattato che adotta una Costituzione per l'Europa: quali limitazioni all'esercizio dei poteri sovrani degli Stati*, a cura di G. Adinolfi, A. Lang, Giuffrè, Milano 2006, 135 ss.

[17] G. Contento, *Principio di legalità e diritto penale giurisprudenziale*, in *Foro it*., 1988, 484. L. Carlassare, *voce Legge (riserva di)*, in *Enc. Giur. Treccani*, 1990.

[18] C. Schmitt, *Legge e giudizio. Uno studio sul problema della prassi giudiziale*, a cura di E. Castrucci, Milano, Giuffrè, 2016 (ed. or. *Gesetz und Urteil. Eine Untersuchung zum Problem der Rechtspraxis*, München, Beck, 1912), V. Velluzzi, *Le preleggi e l'interpretazione. Un'introduzione critica*, Pisa, ETS, 2013, 15 ss.

[19] See A. Von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union,* in *Common Market Law Review*, 2000, 1307 ss.; K. Lenaerts, *Fundamental Rights in the European Union*, in *European Law Review*, 2000, 575 ss.; J. Liisberg, *Does the EU Charter of Fundamental Rights threaten the supremacy of the Supremacy of Community Law?*, in *Common Market Law Review*, 2001, 1171 ss.

[20] See G. De Burca, *The Drafting of the European Union Charter of Fundamental Rights*, in *European Law Review*, 2001, 126 ss.; M. Lugato, *La rilevanza giuridica della Carta dei diritti fondamentali dell'Unione europea*, in *Rivista di diritto internazionale*, 2001, 1009 ss.; K. Lenaerts, E. De Smijter, *A 'Bill of Rights'for the European Union*, in *Common Market Law Review*, 2001, 273 ss.; R. Bifulco, M. Cartabia, A. Celotto, *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, Bologna, Il Mulino, 2001; A. Manzella, *Riscrivere i diritti in Europa. La Carta dei diritti fondamentali dell'Unione europea*,

State restricts the enjoyment of rights, it bears the burden of justifying such choices. In other words, the State violates the Convention if it fails to produce valid reasons to justify interference or lack of protection. One can therefore speak of a real "right to justification" in order to legitimize interference under the Convention, the State must prove that such limitation is "provided by law", that is, it has a legal basis; it pursues a legitimate purpose; shall be proportionate to that purpose [21]. The absence of even one of these parameters automatically leads to a breach of the Convention. The notion of legal basis expresses the principle of legality [22]. Therefore, the principle of legality recalls the idea that a public authority is subject to the law and that therefore it performs its functions in accordance with it. In the context of the ECHR, however, this principle, so defined, would limit the competence of the European Court to the mere verification of the correct application of national law by national authorities. However, such an approach would lead the principle of conventional legality to be, on the one hand, substantially superfluous, since it would not add any additional guarantees in relation to those to be invoked before national courts, since, by its nature, the role of the national court is to interpret and correctly apply national law and, in so doing, to assess the compliance of acts by national authorities with the principle of legality; on the other hand, it would potentially conflict with the principle of subsidiarity, as it would encourage the European Court to exercise the role of fourth instance judge on matters of mere interpretation and application of national law [23].

3. – Procedural legality has matured through the imposition of substantive legality, as if the duty to punish and repress criminal conduct was a priority with respect to the observance of procedural law [24]. The rules of the Italian Criminal procedure Code relating to the regulation of evidentiary acquisitions of evidence for litigation, identified the criminal judge with the so-called punitive power, introducing an interpretative criterion of subjection to the law that makes it essential the subordination of the judge to the duty to ascertain the truth (identified as the purpose of the trial). The procedural rule, is declared illegitimate when it is unreasonably placed as an obstacle to such an investigation [25]. Similarly, in relation to the preliminary phase, the procedural rules and the discipline of the activity of the public prosecutor, are deemed in contrast with art. 112 Cost., as if they are a hindrance to the effective conduct of the investigation plan and in opposition to the principle of independence of the prosecution body. In this way the latter's independence in accordance to the

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Bologna, Il Mulino, 2001; C. Di Turi, *La prassi giudiziaria relativa all'applicazione della Carta di Nizza*, in *Il Diritto dell'Unione Europea*, 2002, 671.

[21] M. Cartabia, *I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana*, disponibile in *https://www.cortecostituzionale.it/*, 2013., M. Cartabia, *Fundamental Rights and the Relationship among the Court of Justice, the National Supreme Courts and the Strasbourg Court, in 50th Anniversary of the Judgment in Van Gend en Loos, 1963-2013*, a cura di A. Tizzano, J. Kokott, S. Prechal, cit., 155 ss., A. Barak *Proportionality. Constitutional Rights and their Limitations*, Cambridge, Cambridge University Press. 2012.

[22] G. Ruggiero *Gli elementi normativi della fattispecie penale*, Napoli, Jovene, 1965. A. Punzi. *L'insostenibile pluralità della giurisprudenza. Il giovane Schmitt e la certezza del diritto*, in *Rivista internazionale di filosofia del diritto*, 1, 2018, 27 ss.

[23] N.S. Marek, *Between Mangold and Omega: Fundamental Rights versus Constitutional Identity*, in *Il Diritto dell'Unione Europea*, 2012, 437 ss.; A. Von Bogdandy, S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, in *Common Market Law Review*, 2011, 1417 ss.

[24] M. Ronco *Legalità penale e legalità processuale*, in *Archivio Penale*, 2/2017.

[25] M. Daniele, *Regole di esclusione e regole di valutazione della prova*, Torino, Giappichelli, 2009: G. Ubertis, *Prova, II) teoria generale del processo penale*, in *Enc. giur. Treccani*, Agg. Xvii, 2009, 2., F. Cordero, *Il procedimento probatorio*, in *Tre studi sulle prove penali*, Milano, 1963, 4, P. Tonini, C. Conti, *Il diritto delle prove penali*, Milano, Giuffrè, 2012. G. Tuzet, *Filosofia della prova giuridica, 2 ed.*, Torino, Giappichelli 2016.

law is envisaged [26]. The crisis of procedural legality is also an ideological disguise. The ideological disguise is precisely the need to comply with the punitive power (and the duty to proceed) deriving from criminal law. On the other hand, procedural legality is necessary in relation to the judge's ruling on the application of the incriminating rules [27]. The reference of legality to procedural rules is explicit in art. 111 Cost. In so far as the provision requires every process to be governed by the law, article 111 of the Italian Constitution underlines fair trial regulated by law: for the first time the procedural legality is introduced in the Constitution [28]. The principle of legality now applies to the criminal process. This has certain consequences: for example, that it is not possible to establish rights and duties in the process except through the law, that the criminal process is based on the rigidity of forms [29]. The statement that due process must be «regulated by law», is now intended to affect the relationship between the law and the judiciary and therefore to exclude that the procedural matter could be governed by provisions not respecting the principle of legality [30].

4. – If reservation of law means obligation of the legislator to regulate a given matter, it also means obligation of discipline accomplished, and exclusion of the hypothesis that the legislator may assign to the judge the task of filling a case left unfinished [31]. For the constitutionalist, as for the philosopher of law, it is an undisputed fact that the reservation is violated not only by the attribution of regulatory powers to sources other than the law, but also by the hypothesis that the law governs the reserved regulatory sector 'limited to general indications or the conferral of discretionary powers [32]. The need to distinguish and place on different levels the consequences and the logical derivations of the reservation of law (in terms of the sources of legislation, administrative acts and finally of the judicial acts) It is precisely what led the criminal doctrine to *enucleare* the principle of the imperative and/or *determinatezza* of the criminal case art. 25, paragraph 2, Cost.; in short, they are understood here as the essential nucleus (the specific way of operating) of the law reserve in relation to the concrete acts that constitute the extrinsition of the judicial power. The use of introductory formulas of discretionary powers in the exercise of judicial activity, as well as any procedural discipline that does not fully design the mutual interaction of the powers of the judge and the parties, the principle of legality, summarily intended as a rule of necessary subjection to the law of public authorities [33]; as well as the controllability of the exercise of power *secundum legem* is logically constructed in terms of further effectiveness

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[26] C. VALENTINI *Le forme di controllo sull'esercizio dell'azione penale*, Padova, Cedam, 1997, G. AZZARITI, *Da discrezionalità a potere*, Padova, Cedam, 1989.

[27] G. CONSO, V. GREVI, *Commentario breve al codice di procedura penale,* Padova, Cedam, 2005, 1881.

[28] C. CONTI *Le due anime del contraddittorio nel nuovo art 111 cost.* in *Dir. pen. e proc*., 2000.

[29] F. CORDERO, *Procedura penale*, Milano, Giuffrè, 1987, 237. F. CARRARA, *Programma del corso di diritto criminale. Parte generale,* III, Prato, 1886, § 900, 201. F. CARNELUTTI, *Principi del processo penale, Napoli,* 1960, 165; G. MALINVERNI, *Il nuovo processo penale*, in *Giust.a pen.*, 1992.

[30] M. NOBILI, *Esiti, errori, arbitrii dietro un'illustre formula: gli ultimi trent'anni*, in AA.VV., *Il libero convincimento del giudice penale. Vecchie e nuove esperienze.* Atti del convegno, Siracusa, 6-8 dicembre 2002, Milano, Giuffrè, 2002, 33 ss. M. NOBILI, *Principio di legalità e processo penale (in ricordo di Franco Bricola)*, in *Riv. it. dir. proc. pen.,*1995.

[31] J. ZILLER, *I diritti fondamentali tra tradizioni costituzionali e 'costituzionalizzazione' della Carta dei diritti fondamentali dell'Unione europea*, in *Il Diritto dell'Unione Europea*, 2011, 51 ss.; M. SAFJAN, *Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of Conflict?*, in *EUI Working Papers*, 22, 2012.

[32] B. GUASTAFERRO, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, in *Jean Monnet Working Paper*, 1, 2012.

[33] G. DELLA CANANEA, *Is European Constitutionalism Really 'Multilevel'?*, in *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 2010, 283 ss.

of legality [34]. It does not seem seriously debatable that reserves of law, *determinatezza* and controllability are the three principles now inscribed within the formula of art. 111, paragraph 1, Cost. An account is to decide that the judge must be subject to the law (art. 101, paragraph 2, Cost.) and other is to add that the law, which the judge must submit, has to be determined, for constitutional obligation peacefully arising from the reservation of law [35]. The problem is that if a rule builds a subjective legal position, but does not determine its rules of exercise and the methods of control, the power/right/duty remain without guarantee of effectiveness and, the exercise of the *munus publicum* without control [36]. In short, the principle by which the judge must submit to the law is a clear expression of the idea of legality of the conduct of all public authorities, but the principle itself, without the guarantee of the legal reservation in the substantive and procedural rules to be applied by the court, is intended to be ineffective. The legality of the action of the public authority means, on the one hand, the legality of the action of the executive, on the other the legality of judicial activity, while, then, the principle of legality of legislative action can be spoken only with reference to the c.d. material legality, or the constraints arising from the Constitution. Legality means a condition of validity for acts of attachment of the principle of legality in general to art. 101, paragraph 2, Cost. it seems very convincing together with the idea that the subjection of the Judge to the law is the heart of the concept of legality, since exactly the Judge is entrusted with the task of judging the observance of the legal system by the affiliates and, on the other hand, he must (indeed) do so, remaining subject to the law. The law is the linchpin of the argument as the foundation of the rule of law is constitutional legitimacy. The principle of legality is therefore the compass that must guide the process and the consequent transformation of abstract prediction into concrete prediction through the final phase, the executive phase [37].The law is born from the will and the intention of the institutions to unite the fragmented, to look to the future of the civil cohabitation and to consolidate the foundation of the fundamental rights [38]. The value of the Constitution lies in this. In short, while the field of substantive criminal law appears covered by art. 25, paragraph 2, Cost., it was not simple to provide a constitutional referent with the principle of legality as understood above, or as the dutiful legality of the action of all public authorities. The first condition of the effectiveness of the legality of the action of the public authorities is that the law (not only confers, but) governs the rules for the exercise of the same power. The second condition of the effectiveness of the principle of legality lies, then, in the existence of validity/legality checks on the acts of the public authorities, in the absence of which «the violation of the law would remain without sanctions or remedies». It is, then, quite clear that the first "condition of effectiveness" of legality (the discipline of the rules of the exercise of power) is expressed precisely in that peculiar character of the reservation of law, according to which it does not impose only a certain relationship between sources, but also an obligation on the legislator (in confidential matters) to fully regulate the matter «leaving no room for

[34] A. MANNA *Il difficile dialogo tra corti europee e corti nazionali nel diritto penale: analisi di due casi problematici (Taricco e Contrada)*, in *Dir. pen. della globalizzazione*, 2017, 2, 41 ss.; anche in *Arch. pen.* (web), 2016, 3; cfr. altresì ID., *La sentenza Contrada ed i suoi effetti sull'ordinamento italiano: doppio vulnus alla legalità penale?*, in *www.penalecontemporaneo.it.*

[35] G. PINO, *Teoria analitica del diritto I. La norma giuridica*, Pisa, ETS, 2016, 24 ss.

[36] C. LUZZATI, *La vaghezza delle norme, un'analisi del linguaggio normativo*, Milano, 1990 L. FERRAJOLI, *Diritto e ragione. Teoria del garantismo penale*, Bari 1990, 43., R. ORESTANO, *Azione in generale: a) storia del problema*, in *Enc. dir*., IV, Milano, 1959, 812.

[37] M. CHIAVARIO, *Diritto ad un processo equo*, Padova, Cedam, 2001, M. NOBILI, *Giusto processo e indagini verso nuova procedura penale?*, in *Dir. pen. proc*., 2001/5.

[38] J. KOKOTT, C. SOBOTTA, *The Charter of Fundamental Rights of the European Union after Lisbon*, in *EUI Working Papers*, 6, 2010; O. POLLICINO, V. SCIARABBA, *La Carta di Nizza oggi, tra 'sdoganamento giurisprudenziale' e Trattato di Lisbona*, in *Diritto pubblico comparato ed europeo*, 2008, 101 ss.

others to intervene». The legality of the action of all public authorities is marked by art. 101, paragraph 2, Cost.; the effectiveness of legality is governed by the action of the public authorities, so that, in matters covered by the reservation of law, the legislature is required to lay down provisions which take account of the fact that the strict rules governing public authority are directly linked to the guarantee of the rights of individuals: maximum in the case of bound discipline; minimum in the case of discretionary discipline [39]. This reasoning culminates with the affirmation of the reservation of law in procedural matters referred to in art. 111 Cost. in the well-known decision n. 88 of 1991, we read references to a «legality of proceeding» due to the principle of criminal legality as its «necessary concretization»; as well as to «subjugation of the public prosecutor to the principle of procedural legality» speaks also the ordinance n. 178 of 2003, both pronouncements regarding mandatory prosecution. The Constitutional Court has approached the argument in the recent ordinance n. 24 of 2017 issued as a result of the Taricco affair where it has had the opportunity to observe that if the limitation period is deemed to be of a procedural nature, likewise the principle would remain that the activity of the judge called upon to apply it must depend on sufficiently determined legal provisions. It is difficult to erase the idea that this resounding lack is not the result of the will to impose a system governed and entrusted to the dominance and power of the magistrate» where the law, especially that of procedure, is viewed as a treacherous product, suspect, of lower rank, a useless obstacle placed on the road that separates the authority coming from the cognitive result and tendentially punitive. According to the Convention, it is now common ground that the State has positive obligations to criminalise acts originating from State authorities or third parties which infringe the most fundamental legal assets, such as physical and psychological integrity (Articles 2, 3, 4 and 5 ECHR).

5. – The European Court of Human Rights [40] has consistently underlined that all criminal trials must be characterised by the implementation of the adversarial procedure and ensure equality of arms between prosecution and defense, since this "is one of the fundamental aspects of the right to a fair trial [41]. The right to an adversarial criminal trial implies, for the prosecution as for the defense, the power to take cognisance of the observations or evidence produced by the other party [42]. Article 6 par. 1 of the EDU Convention requires the defense authorities to supply all relevant evidence in their possession, whether at the expense of the defense [43].The right to disseminate relevant evidence is not absolute, as in a given criminal trial there may be competing interests such as national security or the need to protect witnesses who risk reprisals, or to keep

[39] The law cannot limit itself to conferring a power on a public subject without regulating at all the «operating rules» of a substantive and procedural nature, because it would be an arbitrary and uncontrollable power C. VALENTINI *Motivazione della pronuncia e controlli sul giudizio per le misure di prevenzione*, Padova, Cedam 2008, 73, D. CANALE, G. TUZET *La giustificazione della decisione giudiziale*, Torino, Giappichelli, 2019, A. BARAK *La discrezionalità del giudice*, Milano, Giuffrè 1995, 64 ss.

[40] ECHR, Grand Chamber, 17.09.2009 *Scoppola c Italia*., ECHR, 13.06.2019, *Viola c. Italia.* ECHR, 14. 07. 2015, *Contrada c. Italia*, ECHR, 12.07.2013, *Allen c. Regno Unito,* ECHR, 04.03.2014, *Grande Stevens c. Italia.*

[41] E. AMODIO, *Giusto processo, procès équitable e fair trial: la riscoperta del giusnaturalismo processuale in Europa, in Processo penale, diritto europeo e common law, dal rito inquisitorio al giusto processo*, Milano, Giuffrè, 2003, F. TRAPELLA, *Equo processo e inutilizzabilità tra Codice e C.E.D.U.*, in *Arch. pen*., 2020, 3, 761 ss. F. CAPRIOLI, *Verità e giustificazione nel processo penale*, in *Riv. it. dir. proc. pen*., 2013, 609.

[42] M. TARUFFO, *La prova dei fatti giuridici. Nozioni generali*, Milano, Giuffrè, 1992, p.166 ss., 199 ss. C. VALENTINI, *Contraddittorio, immediatezza, oralità nella giurisprudenza della Corte E.D.U.*, in *www.archiviopenale.it.*

[43] M. CHIAVARIO, *Commento all'art. 6 C.e.d.u*., in *Commentario alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, a cura di BARTOLE, CONFORTI, RAIMONDI, Padova, Cedam 2001, 190. M. PISANI, *Il "processo penale europeo": problemi e prospettive*, in *Riv. dir. proc*., 2004, 653.

secret the crime-seeking police methods which must be balanced against the rights of the accused [44]. Thus, in some cases it may be necessary to conceal some evidence from the defense in order to preserve the fundamental rights of another individual or to safeguard an important public interest. However, with respect to art. 6 par 1 ECHR are legitimate only measures that limit the rights of the defense that are absolutely necessary [45]. If a fair trial is to be granted to the accused, all difficulties caused to the defense by a restriction of his rights must be sufficiently compensated by the procedure before the judicial authorities [46]. It was, therefore, conclusively recognized that there was a right of the lawyer to acquaint himself with the acts which formed the basis both of the validation judgment and of the decision on the possible application of the protective measure against of the arrested or detained person [47]. If the exercise of this right has been prevented, the result will be a general nullity of an intermediate regime both of the interrogation and of the validation decision, which, moreover, must be deducted within the period provided for by art. 182, comma 2, cod. proc. pen. [48]. Moreover, the ECHR's jurisprudence [49] also leads to this conclusion, which, in interpreting article 6 of the EDU Convention laid down principles in which the national court, within the limits of the regulatory scope of State law, must, in the application of the relevant conditions, aim to frame, and to which it must standardize, the precepts to which it is called to apply, otherwise exposing the precepts themselves to the suspicion of unconstitutionality for contrast with international obligations (art. 117 Cost.)" [50]. Regarding the correct interpretation of the rule in question, the principle enshrined in art. 6, first paragraph, and third paragraph, lett. d), of the EDU Convention, according to which, in particular, every accused person has the right, inter alia, to question or have questioned witnesses against him: the principle which derives from the relevant European jurisprudence [51], "and that can well integrate the interpretative approaches in the matter of evaluation of evidence pursuant to art. 192 cod. proc. pen., is that according to which the accusation of the offended person, acquired outside the actual trial phase and in the absence of the present or future possibility of contesting the same means in contradiction with the defense, to support the accusatory implant must find comfort in further elements that the judge, with the due critical examination that is required by the rules of rite, individuals in emergencies of the case [52]. The national court has the obligation to give, if possible, to the do-

[44] P. Ferrua, *Il "giusto processo"*, 3 ed., Bologna, Zanichelli, 2012.

[45] G. Centamore, *L'applicazione dei principi dell'art. 6 C.E.D.U. in materia di riqualificazione giuridica del fatto: fra orientamenti tradizionali e "nuove" prospettive*, in *www.penalecontemporaneo.it*, M.L. Di Bitonto *Libertà personale dell'imputato e "giusto processo"*, in *Riv. it. dir. proc. pen*., 2007, 867.

[46] B. Nascimbene, *La centralità della persona e la tutela dei suoi diritti*, in *Studi sull'integrazione europea*, 2013, 9 ss., P. Gianniti, *I diritti fondamentali nell'Unione europea. La Carta di Nizza dopo il Trattato di Lisbona*, Bologna, Zanichelli, 2013; A. Di Stasi, *La tutela dei diritti fondamentali nell'Unione europea con particolare riferimento alla Carta, in Spazio europeo e diritti di giustizia. Il Capo VI della Carta dei diritti fondamentali nell'applicazione giurisprudenziale*, Padova, Cedam 2014, 55 ss.

[47] M. Daniele, *La triangolazione delle garanzie processuali fra diritto dell'Unione Europea, CEDU e sistemi nazionali*, in *www.penalecontemporaneo.it.*

[48] F. Cordero, *Procedura penale*, Milano, Giuffrè 2006.

[49] ECHR, 24.05.2011, *Konstas c. Grecia*, *ECHR* 30.06.2011, *Klouvi c. Francia*, ECHR, 11.12.2007, *Drassich c. Italia*, ECHR, 18.10.2006, *Hermi c. Italia*, ECHR 28.08.2018, *Vizgirda c. Slovenia*., ECHR, 24. 02. 2009, *Protopapa c. Turchia*, ECHR, 27.11.2018, *Soytemiz c. Turchia* ECHR 30.07.2019, *Urek c. Turchia*, ECHR, 17.10 2019, *Oddone e Pecci c. San Marino*.

[50] Y. Shany, *Regulating Jurisdictional Relations between National and International Courts*, Oxford 2007; M. Pojares Maduro, *Courts and Pluralism, in Ruling the World? Constitutionalism, International Law, and Global Governance*, a cura di J.L. Dunoff, J.P. Trachtman, Cambridge 2009, 356 ss.

[51] ECHR, *Khodorkovskiy e Lebedev c. Russia*, ECHR., 25.07.2013, *Mirilashvili c. Russia*, ECHR., 19.02.2013, *Gani c. Spagna*, ECHR, 12.01.2017, *Batek e altri c. Repubblica Ceca,* ECHR, 03.05.2012, *Salikhov c. Russia,* ECHR, 29.06.2017 *Lorefice c. Italia.*

[52] N. Parisi, *Funzione e ruolo della Carta dei diritti fondamentali nel sistema delle fonti alla luce del Trattato di Lisbona*, in *Il Diritto dell'Unione Europea*, 2009, 653 ss.; A. Bultrini, *I rapporti fra Carta dei diritti fondamentali e CEDU dopo Lisbona: potenzialità straordinarie per lo sviluppo della tutela dei diritti umani in Europa*, in *Il Diritto dell'Unione Europea*, 2009, 700 ss.

mestic rules an interpretation in accordance with the precepts of the EDU Convention in the judicial exegesis institutionally attributed to the Court of Strasbourg by art. 32 of the Convention itself [53]. Consequently, it must be noted that an interpretation of art. 512 c.p.p. conventionally oriented leads to the conclusion that the principle of adversarial can be waived, in case there is an objective impossibility of formation of the test, with the clarification that a declaratory sentence cannot be based exclusively or significantly on statements of those who have evaded the confrontation with the accused [54].As regards the *ex officio* upgrading of the contested fact, It has been recognised that the guarantee of adversarial proceedings in respect of questions relating to the different legal classification of the fact must be concretely guaranteed to the accused from the substantive stage of the change in the imputation. The scope of art. 6, par. 3, lit. a) and b) of the EDU Convention imposes a broad concept of the contradictory principle, which is not limited to the formation of evidence, but which also projects its effects to the legal assessment of the fact. In essence, the accused must be able to discuss in a contradictory manner every profile of the accusation being made, including the legal classification of the alleged facts. The right to be informed of the accusation and, therefore, of the material facts against it and on which the accusation is based, implies the right of the accused to prepare his defense, so that if the judge has the opportunity to retrain the facts, the defendant must be guaranteed the possibility of exercising his right to a defense in a concrete and effective manner: this presupposes that he is informed, in good time, both of the prosecution and of the legal classification of the facts against him [55]. The jurisprudence of legitimacy [56] had already been able to affirm that the interpretation of art. 6 and the principle of fair trial accepted by the EDU Court, also in so far as it gives the defendant the right to be heard on the legal classification of the facts, is in line with the principle of fair trial outlined by art. 111, second paragraph, of the Constitution, excluding the need for an additive intervention of the Constitutional Court on art. 521, first paragraph, cod. proc. pen., in order to establish that the accused and the lawyer must and may be able to speak on the possibility of a different legal definition of the fact where it amounts to any adverse consequences for the accused so as to constitute a concrete interest in contesting its validity [57]. According to art. 521, first paragraph, cod. proc. pen. in accordance with the provisions of the EDU Court [58], the Court of Cassation, relying on art. 625-bis cod. proc. pen., revoked its previous judgment, which had given a different description to the fact without having allowed the defense the adversarial on the different imputation, ordering a new treatment of the appeal: the same principles must be applied, in so far as it is necessary to ensure that the accused can concretely speak, from the substantive point of view, on the different legal definition of the appropriate fact attributed to him [59]. The defendant was able to chal-

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[53] S.M. CARBONE, *I diritti della persona tra CEDU, diritto dell'Unione europea e ordinamenti nazionali*, in *Il Diritto dell'Unione Europea*, 2013, 1 ss.

[54] G. UBERTIS, *Contraddittorio e difesa nella giurisprudenza della Corte europea dei diritti dell'uomo: riflessi nell'ordinamento italiano*, in *Cass. pen*., 2005, 1091.

[55] C. LUZZATI, *Il contraddittorio penale oltre la distinzione tra regola e principio*, in *Cass. pen*., 2008, 1239, M. MANZIN, F. PUPPO, *Audiatur et altera pars. Il contraddittorio fra principio e regola*, Milano, Giuffrè, 2008. 85 ss.

[56] C. Cost, n. 32/2020, C. Cost., nn. 347 e 348 del 2007, Cass. pen., sez. un., n. 27620/2016, *Dasgupta*, Cass. pen., sez. un., n. 18620/ 2017 *Patalano*.

[57] S. RUGGERI, *Giudicato costituzionale, processo penale e diritti della persona*, in Dir. pen. cont., 2015, 1, 31.

[58] ECHR, Grand Chamber, 11.07.2006, *Jalloh c. Germania* ECHR, 24.01.2019, *Knox c. Italia*, ECHR, Grand Chamber, 07. 11. 2008, *Salduz c. Turchia*, ECHR, Grand Chamber, 12.05.2017, *Simeonov c. Bulgaria*,Corte E.D.U., Grand Chamber, 06.05.2003, *Perna c. Italia*, ECHR, Grand Chamber, 10.03.2009, *Bykov c. Russia*, ECHR Grand Chamber, 15.12.2015, ECHR Grand Chamber, 18.12.2018, *Murtazaliyeva c. Russia*.

[59] See G. MARINUCCI, *L'analogia e la "punibilità svincolata dalla conformità alla fattispecie penale*, in *Riv. it. dir. proc. pen*., 2007, 1254 ss., M. VOGLIOTTI, *Tra fatto e diritto. Oltre la modernità giuridica*, Torino, Giappichelli, 2007, 239. G. HARPAZ, *The Eu-*

lenge for the first time the different legal classification of the fact with the appeal for cassation, thus losing a stage of merit [60].

6. – The right to be heard and defended, including legal questions relating to the classification of the event, must normally be guaranteed at the same stage as the change in the charge, whereas an appeal may not always have an effect equivalent to failure to hear the case. The guarantee of the adversarial procedure with regard to the different legal definition of the fact made by the judge must be considered assured in all cases in which the defendant has in any case had the opportunity to speak on the subject at one of the stages of the procedure. Art. 6 ECHR is clear regarding the breach of the right of defense by the lack of knowledge of the legal qualification given by the courts to the offence [61]. In view of the non-purely formal connotations that must characterize the right to be heard, it was also made clear that the judge of legality has the power to proceed *ex officio* with the legal reclassification of the fact, without the need to allow the defendant to speak on the point, when, in the action brought by the same, this possibility has been expressly taken into account, even if it is to support the difference between the disputed fact and the consequent violation of the obligation to transmit the documents to the public prosecutor. The principles of impartiality of the judge, enshrined in art. 111, second paragraph, of the Constitution, are essential corollary of the principles of «fair trial», and operate through the institution of incompatibility, in reference to the conduct of evaluation and decision-making activities in the context of the same criminal proceedings: if the prejudice which it assumes prejudicial to the impartiality of the judge results from activities carried out by him outside the judgment in which he is called to decide, the different institutions of abstention and objection may apply, They, too, are concerned with safeguarding the role of the judge. In fact the jurisprudence of the ECHR [62] limits the applicability of art. 6 of the Convention to judgments on criminal charges only, with the exclusion of incidental proceedings or sub-proceedings and, as regards art. 111 of the Constitution, it is observed that it transposes in substance the precepts of art 6 that it is the legislator's absolute discretion to choose different forms and levels of adversarial procedure, since the right of defense is always guaranteed. There is therefore a problem of balancing principles, there is a meta-principle of Italian constitutional law "no principle is worth so much as to cancel out the others" (a principle which has been put to the test in turn by the questioned by the epidemic situation caused by Covid-19), but at this stage it isn't possible enunciate a formula of composition of the conflict. The way to go is still far.

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ropean Court of Justice and its Relations with the European Court of Human Rights: The Quest for enhanced Reliance, Coherence and Legitimacy, in *Common Market Law Review*, 2009, 105 ss.

[60] S. FURFARO, *I procedimenti nel processo penale (Concetti, collegamenti, classificazioni)*, Pisa, Pisa University Press, 2018, 29 ss.

[61] P. MAHONEY, *Right to a fair trial in criminal matters under Article 6 ECHR*, in *Judicial Studies Institute Journal* 4, no. 2 (2004): 107-129; P. LEMMENS, *The right to a fair trial and its multiple manifestations. Article 6 (1) ECHR,* (2013): 294-314; B. MORTEN, N. FENGER. *Preliminary References to the Court of Justice of the EU and the Right to a Fair Trial under Article 6 ECHR*, in *European Law Review* 41, no. 4.

[62] ECHR 12 04 2014, *Natsvlishvili e Togonidze v. Georgia* ECHR 27 11 2007 *Popovici c. Moldavia*, ECHR 21 09 2010 *Marcos Barrios c. Spagna*, n. 17122/07, ECHR 05 07 2011 *Dan c. Moldavia,* ECHR 05 07 2016 *Lazu c. Repubblica di Moldavia*, ECHR 04 06 2013 *Hanu c. Romania*, ECHR 28 02 2017, *Manoli c. Repubblica di Moldavia.*