PRIVATE AND PUBLIC LAW

INTRODUCTION TO ITALIAN PUBLIC LAW

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CHAPTER 1.

FORMS OF STATE. FORMS OF GOVERNMENT

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1. THE MAIN FEATURES OF STATE

The essential features of the State are as follows:

1) originality (independency) of its legitimacy/source of power;
2) territoriality: the laws and regulations issued by the State apply (and relate) to the interests of the community established within the boundaries of the territory of the State;
3) preeminence: the State must be supported by an apparatus enabling to enforce laws and regulations and to make them applicable irrespective of the citizens' will;
4) general aims pursued by the State.

2 THE FORMS OF STATE

As mentioned, the State has general features (see above). However, it may have different forms or shapes, depending on the historical context. In particular, depending on the form of State which is considered, the forms of participation by citizens in public administration may be different. Below are summarized some of the main forms of State which appeared during the historical evolution of State.

- FEUDAL STATE -> there is no clear distinction between public and private law (which are still unknown figures, in their technical meaning); the territory is "owned" by the sovereign (and the various feudal entities). The authority holding the sovereign power does not consider public interest as the ground for its own legitimacy and does not feel to be required to take care of the interests of the community. The political power is scattered and fragmented among various local "authorities", which do not necessarily have a connection with one another.
- ABSOLUTISM -> the monarch has absolute power over people and territory, and has monopole over sovereignty. This form of State arose in order to "react" to the fragmentation of powers which took place during feudalism.
- POLICE STATE -> the State exercises repressive control of political, economic and social life, usually by an arbitrary exercise of power by means of the police, rather than by the regular operation of administrative and judicial procedures. On the other hand, the State holds a "paternalistic" behavior and assumes to be under the duty to take care of citizens' individual wealth and welfare.

- MODERN STATE -> at the end of the 18th century, the middle class rises to power. The modern State is based on formal equality and the duty to protect fundamental rights and freedoms. The authority is based on the consent of citizens and said principles are set out in written constitutions or charters.
- SOCIALIST STATE -> developed after world war I, this form of State is based on the Marxist-Leninist doctrine and is based on the State ownership of the means of production. This ends up with a significant limitation of individual ownership rights (and, more generally, of the freedom of trade). Historical examples of such form of State are the People's Republic of China, the Soviet Union and North Korea.
- AUTHORITARIAN STATE -> on the one hand, this form of State attaches great importance to national identity and, on the other hand, it considers the community as politically unable to govern itself: charismatic leaders are then deemed as necessary to represent and guide the political community.
- WELFARE STATE -> world war II marks the transition from the modern State to the welfare State. The latter is based on the importance attached to the action of public authorities, promoting the citizens' well-being through a widespread participation to economic and social activities and in the field of social protection. Unlike the police State, the welfare State tends to solicit the participation and consent by the members of the community. Its primary purpose is to ensure a more equitable distribution of income.

3. CENTRALIZED AND DECENTRALIZED FORMS OF STATE

Although there is no "golden rule", since it depends on historical and political factors, centralised States (*i.e.*, a typical form of State during the nineteenth century and the first decades of the twentieth century), in which the fundamental powers are exercised by organs of the State (as opposed to peripheral entities), tend to evolve into decentralized States, in which pre-existing local authorities are guaranteed and recognized, and, furthermore, a more intense form of decentralisation is implemented, by granting legislative and administrative powers to local or territorial entities in certain fields (on the other hand, the dispute-settlement function still tends to be included within the exclusive competence of the central State). Decentralisation can have several degrees of intensity, from a maximum (federal States) to a minimum (States granting restricted fields of autonomy to local authorities).

It is also important to highlight the following definitions:

- institutional decentralisation: administrative functions are distributed among central and peripheral authorities (*i.e.*, from a public entity to another). Local or territorial entities are only granted with administrative functions as well as with decision-making power on policy areas impacting on the local communities;
- bureaucratic decentralisation: part of the sovereign functions and the related decision-making powers are transferred within the scope of one single entity (*e.g.* from a branch to another branch of the same entity);
- self-government: peripheral authorities are comprised of representatives elected by members of the local communities.

4. DECENTRALIZATION IN THE ITALIAN CONSTITUTION

One the one hand, the Italian Constitution declares and confirms the unity of State (see Article 5), while, on the other, it requires the legislator (*i.e.*, the ensemble of entities and bodies entitled to exercise the legislative power, namely the Parliament, the Government and, to a certain extent, the Regions) not only to recognize and

promote local autonomies (*i.e*. institutional decentralisation), but also to implement, in the context of the public-interest services, an administrative decentralisation (*i.e.*, bureaucratic decentralization). Significant obstacles have been raised to the implementation of this provision. In 2001, a new legal system was created to recognize and govern the powers granted to territorial entities (in particular, Regions).

5. UNIONS OF STATES AND CONFEDERATIONS

A plurality of States may create a Union, by giving rise to structures and bodies entitled to exercise functions and powers *vis-à-vis* the members. In such case, States may want to retain part of their sovereign powers, but significant powers may be also afforded to the bodies representing the Union. Such powers may be specifically held as legally binding on member States (in other words, the legal order of each member should not allow for any conflict with decisions made at the Union level).

Typical examples of unions of States are, amongst others, the UNO and the Council of Europe. These are supranational organizations, contemplating a partial limitation of sovereignty of the member States. Such limitations may also entail the direct effect of certain acts issued by the bodies representing the organizations within the domestic legal systems (without the need, for member States, to implement the decisions issued by the supranational bodies). In particular, it is worth mentioning, by way of example, the following provisions of the UNO Charter:

- Art. 41 - *The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations*

- Art. 42 - *Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations*

As far as the European Union is concerned, please note the following. An international organization is commonly defined as "*a body that promotes voluntary cooperation and coordination between or among its members*". There are many types of international organizations, but one way of categorizing them is to distinguish between *intergovernmental organizations* and *supranational organizations*. The European Union is partly an intergovernmental organization and partly a supranational organization. With respect to supranational elements, many aspects of the EU policy involve economic and political integration policy (but also social policy, immigration policy and education): as far as these aspects are concerned, the policies adopted by each member State automatically conforms to the principles enacted at the EU level. On the other hand, with respect to the intergovernmental elements of the EU, all Member States typically co-operate to formulate common foreign policy and security policy: in these areas, Members States retain their authority and autonomy and, dissenting States may choose to pursue its own policy (even in conflict with the line adopted by the majority).

Confederations of States are a particular kind of Union, created by virtue of an international treaty. Most frequently, neighbouring States which retain their sovereignty. The phenomenon giving rise to a confederation may be either "*upstream*" or "*downstream*", depending on the initiative to create the Confederation being taken by the States (getting together and creating the supranational structure) or by the central State (allowing for an increasing decentralization, leading to the creation of independent member States, although belonging to the Confederation: in such case, a unitary State evolves into a Confederation). Typically, States take part in a Confederation in order to better ensure the means for their own military defence and to ensure an appropriate degree of freedom of trade. Confederations usually contemplate common institutions and bodies, the most important of which is the Federal Assembly (comprised of representatives of the various member States) exercising legislative powers within the limits and under the conditions set forth by the treaty.

6. THE CONSTITUTIONAL ELEMENTS OF STATES

States (in order to be recognized as such) must meet three fundamental conditions. They must have the following main elements:

1. TERRITORY -> this is generally held as a piece of land which is recognized as belonging to a community or people, in particular. Territory is a particular type of land that is identified, mapped and organized in a particular way by the government, so that sovereignty can be exercised over it. Territory may be important to establish the application scope of laws and regulations enacted by the State. For example, as far as Italian law is concerned, according to the Italian Banking Act, Italian law regulating banking activities apply to all such activities performed within the Italian territory.
2. PEOPLE -> this relates to the (legal) relationship between the State and the citizens who are resident or domiciled on the territory. The State is fundamentally comprised of a permanent population over which it exercises its unlimited authority. The nature of the State depends upon the quality and quantity of its population.
3. SOVEREIGNTY -> it implies that the State is independent from external interference, as well as can maintain integrity within itself.

1) TERRITORY

The first essential element of States is a territory or land upon which the State exercises its authority. The territory of a State includes the surface of the land, the soil beneath the surface, lakes and rivers within the State borders, waters connected to boundary rivers, air space falling within the surface of the State and the maritime area of the territorial sea. State boundaries can be both natural and artificial, depending on the availability of any natural elements aiding to identify the territorial borders. Borders, however, are mostly connected to historical and political factors.

The Italian Criminal Code and international law confirm the essentiality of the territory as an element of the State. In particular, Article 241 of the Italian Criminal Code includes, among the crimes against the State, the "*use of force against its territorial integrity*". In addition, a principle of international law states that, in case of total or partial military occupation of territory by the enemy, the State still continues to exist (as a legal entity) as long as the war is ongoing. Such principles further confirm that territory is generally held as a fundamental element of States.

In addition, two "figures" are closely linked to the territory: extraterritoriality and immunity.

- Extraterritoriality. On certain conditions, the law of a State may be enforced and applied to acts put in place outside the State territory. Such situations are usually connected, for example, to facts occurring on board of vessels or airplanes (irrespective of the place where they are, at the time when the act is done). In particular, according to article 4, paragraph 2 of the Italian criminal law, Italian vessels, ships and airplanes are always subject to Italian law, irrespective of the place where they are localized, unless they are subject to another jurisdiction, in the light of a particular rule of international law.

- Territorial immunity. On certain conditions, acts put in place on the State territory are exempt from local laws/jurisdiction. Territorial immunity is a general exemption from the local jurisdiction (including the application of criminal law), as usually granted to diplomatic missions. Territorial immunities may be applied to actions or behaviors put in place in specific areas, such as embassies, military bases of foreign countries, or to specific individuals (*e.g.*, offices of the United Nations).

"Colonies" are generally not part of the State territory. Due to historical reasons, in case that the "motherland" loses control (and "sovereign" powers) over colonies, this does not affect the "motherland" territory.

The State's rights over its territory does not fall under the category "*ad rem*" rights (such as ownership rights, as regulated by the Civil Code). *Ad rem* rights assume that the object of the right is something legally separate from the holder. As far as the State territory is concerned, the territory is one of the fundamental elements of State, therefore no distinction may be drawn between the "holder" of the right and its "object".

The territory may also be an essential element for entities other than the (central) State. According to Article 114 of the Italian Constitution, "*the Republic is comprised of Municipalities, Provinces, Metropolitan Cities, Regions […]*". These are also commonly defined as "*territorial entities*": unlike non-territorial entities (such as Chambers of Commerce, government-owned companies, etc.), territory is a fundamental element of such entities, since their functions and authorities may be only exercised within the limits of the relevant territory.

The State may own assets (*e.g.*, pieces of land, immovable assets, real estate units, buildings incorporated to the land, etc.). The Italian Civil Code provides that beaches, bays, rivers, lakes and other public waters must belong to the State and are subject to a special legal regime. The State, in particular, is not entitled to dispose of those assets (by either selling those to private individuals, or creating rights over them).

2) PEOPLE

The people is identified as the community of all those to whom the legal state assigns the status of citizen. From this status derive several legal implications. Generally speaking, certain cultural values and interests lie behind the idea of citizenship. A "people" is held as existing as long as the citizens share associative ties ("*idem sentire de re pubblica*"), *i.e.*, citizens generally feel to be a part of the same community, which is based on common principles, rules and interests. Under Italian law, Article 1 of Law 91/1992 provides that citizenship can be automatically acquired:

a) by birth to an Italian parent, in line with the principle of *jus sanguinis*;
b) by birth in Italy to stateless parents, to unknown parents, or to parents who cannot transmit their nationality to their children: this is in line with the principle of *jus soli*.

The legislation on citizenship also regulates the status of foreigners (*i.e.*, citizens of another State) and stateless persons. Stateless persons are those who do not have the citizenship of any State (*e.g.*, the foreign child adopted by an Italian citizen, the foreign or stateless spouse of an Italian citizen); these are subject to the laws of the State where they are based, in particular as regards the exercise of civil rights.

The law in question also contemplates situations in which citizenship may be denied, lost or waived. As a general rule, pursuant to article 22 of the Italian Constitution, no one may be deprived, for political reasons, of his/her capacity to be subject to rights and obligations, as well as of his/her name and citizenship. On the other hand, any citizen may voluntarily waive his/her citizenship, if the relevant place of residence is fixed abroad. In addition, citizenship may be lost in case that public office is taken in a foreign country (or in an international organization to which Italy does not adhere): in case that the Italian government formally requests a citizen to interrupt his/her office and the latter refuses to give his/her consent, citizenship may be lost.

Conversely, under certain conditions, the President of the Republic may grant the Italian citizenship to foreigners or stateless persons. Persons so acquiring the status of citizens are subject to the laws of the State (in particular, with regard to the right of entry and stay).

The idea of "people" is not necessarily a synonym of "nation". The idea of "nation" is related to the existence of an *ethnic and social community*, identified by common language, culture, habits, traditions and interests. "Nation" is, therefore, a cultural (rather than legal or Constitution-related) concept, representing a sociological ground of the State. A "multinational State" is a sovereign State which is viewed as comprising two or more nations (*e.g.*, the former USSR is an example of historical multinational states, given that it used to encompass a large group of local communities, which could each identified as a "nation", due to its specific territorial, social and cultural features).

3) SOVEREIGNTY

This idea of sovereignty may be interpreted in the light of two different meanings. In a first meaning, sovereignty is the element allowing a State to be regarded as original and independent. On the other hand, sovereignty may be also identified as the supremacy of the State legal system over all other "authorities".

Sovereignty materializes into a series of acts adopted by the State bodies, exercising administrative, legislative and dispute-settlement powers. There is a number of theories about sovereignty, aimed at identifying which subject is actually entitled to exercise and "hold" sovereign powers and to determine its source of legitimacy. Article 1 of the Italian Constitution states that "*sovereignty belongs to the people and is exercised in the manner and within the limits set out in the Constitution*".

The State may also agree to limitations to its sovereign powers as a result of its participation to international organizations (*e.g.*, the EU or UNO). Such limitations, however, must be agreed on a reciprocity basis and provided that said organizations are aimed at "*ensuring peace and justice among Nations*". As mentioned, organizations may be granted with powers and functions interfering with the State domestic powers (see art. 11 of the Italian Constitution).

7. FORMS OF GOVERNMENT

The functions of the State may be organized and distributed, among the various constitutional bodies, according to different schemes.

- **Parliamentary form of government** -> democratic governance of a State, originally conceived in the United Kingdom in the XVIII century. The body entitled to exercise administrative functions (*i.e.*, in essence, the Government) is formally separated from the Parliament (which is entitled to the legislative power), in accordance with the principle of segregation of powers. The Government, however, derives its legitimacy from its relationship of trust with the Parliament (the administrative and powers are, thus, interconnected with each other).
  The Chief of State is normally separate from the Prime Minister. States which are based on a parliamentary system may be either constitutional monarchies (where a monarch formally holds the charge as the Chief of State, while the head of Government is often also a member of the Parliament: see, for instance, Sweden and Japan), or parliament-based republics, where the President is also appointed as the Chief of State, while the head of the Government (although appointed by the President of the Republic) is de facto endorsed by the Parliament (Ireland, Germany and Italy).
- **Presidential form of government** -> republican system where the head of Government also acts as the Chief of State. Here again, the subject holding administrative power is separate from the body entitled to legislative power (see, for instance, the USA). The head of the administration (*i.e.*, the President) is formally not responsible to the Parliament, which is not entitled to force the latter to resign (however, in limited circumstances, the Constitution may allow the Parliament to compel the President to resignation).
- **Directorial form of government** -> the State is ruled by an administrative body elected by the parliamentary assembly. One of the few countries resorting to such kind of form of government is Switzerland, where directories rule at all levels of administration, federal, cantonal and municipal. The Swiss Federal Council is elected by the Federal Assembly for 4 years (usually the members of the Federal Council cannot be forced by the Federal Assembly to resign) and is comprised of seven members. There is no relationship of trust between the Federal Assembly and the Federal Council: so, even in case that the political approach changes over time (*e.g.*, due to a political majority being overturned), the Federal Council remains in charge for the full period (*i.e.*, 4 years). The Chief of State is appointed among the members of the Federal Council.

2. THE SOURCES OF LAW

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1. The main features of norms

Before analyzing the contents of any specific legal norm, the main features of norms in general should be first analyzed. First of all, we should ascertain whether legal norms have specific "*addressees*" (and, if so, whether such addressees may be grouped together and belong to specific categories). When we talk about *addressees* we consider the subjects falling under the application scope of a norm, as well as those who may be somewhat affected by the norm or may be requested to apply it.

In broad terms, depending on the specific situation at hand, norms may be "*addressed*" to:

(i) all citizens (*e.g.*, article 24 of the Italian Constitution, regarding fundamental freedoms, with particular reference to the right to sue other subjects before Court); and/or
(ii) some of the members of a group or community (*e.g.*, article 38 of the Italian Constitution, regulating rights attached to disabled or handicapped persons, or persons unable to perform any work activity); and/or
(iii) individuals (*e.g.*, decrees or administrative decisions targeting individual persons); and/or
(iv) bodies, entities, authorities or the like (*e.g.*, article 74 of the Italian Constitution, regulating relationships between the President of the Republic and the Chambers of the Parliament).

Norms may also have no addressee at all (*e.g.*, article 13 of the Italian Constitution, simply highlighting general principle on individual freedoms).

The main features of norms may be described as follows:

1. The norm must be in force and effect ("*positività*")
   The norm must be able to express an interest/value, which is felt as existing ("alive") by the members of the community, or it must set up conditions (procedures, deadlines, competent bodies, etc.) to ensure that the relevant rule is actually applied. By contrast, if the norm is generally unobserved, this may lead to believe that it does not express a real interest/value of the community.
   The norm has to be *effective*, meaning that it must create (binding) legal effects.
   In order to assess whether a legal norm is in force and effect, we should analyse the text of the norm. Any potential conflict between the literal content of the norm and the "actual" content of the rule might be identified: a judge may have to depart from a merely literal interpretation of norm, in order to capture the "genuine" content of the rule (which may have to be interpreted beyond the literal text of the norm).

2. The norm must be enforceable ("*coattività*")
   The norm has to be applied irrespective of the individual's will or intentions. To that end, the legislator usually provides for sanctions or fines, which may be applied in case that anyone acts in breach of the norm.
   Italian law contemplates several examples of norms meeting such requirement. For instance, reference may be made to article 1516 of the Italian Civil Code (regulating the rights of the purchaser in the typical sale and purchase transaction), or to article 624 of the Italian Criminal Code, providing for the sanctions applicable to theft.
   On the other hand, there are also exceptions: in particular, some norms are not "supported" by sanctions, fines or other penalties (reference may be made, for instance, to norms which only set forth the ultimate aim to be pursued, without establishing any sanction or fine, or provide for a general principle to be applied). For example, article 4 of the Italian Constitution (regulating the right to work) does not lay down any specific sanction or fine, in case that it is not "applied" (for example, the Italian Parliament or the Government could be held liable in case that they do not implement article 4 of the Constitution and no "sanction" may be imposed on them on that scenario). Other examples are article 1 of the Italian Constitution and article 769 of the Italian Civil Code (definition of "*donation*" and "*gift*"). This does not mean that norms belonging to the category in question are not "effective": Citizens (or, more generally, addressees of the norms) are anyway requested to conform to the rule (although this is expressed by a general principle or a rule without a specific sanction).

3. The norm must be inherent to social life ("*esteriorità*"). The norm must be inherent to social life (*i.e.*, relationships among individuals or entities), in contrast with rules regarding each private individual (or affecting each individual conscience or behaviour) only – *e.g.*, moral or religious norms.

4. The norm must be general in content, and not linked to specific situations or individuals ("*generalità e astrattezza*").

   Some examples of such principle are article 53 of the Italian Constitution (stating the general duty to contribute to the State expenses), article 575 of the Italian Criminal Code (regulating homicide), article 922 of the Italian Civil Code (containing the legal definition of ownership rights and of the ways to acquire them) and article 18 of the Italian Code of Civil Procedure (regulating the procedure to be followed to identify the competent Court/judge).

   On the other hand, there are also exceptions. In particular, we may come across with the following categories of norm:

   - "special" norms: norms which affect individuals belonging to a specific category of subjects, rather than to the generality of the community members.
   - "exceptional" norms: norms deviating or departing from a rule which is held to be "general" (*e.g.*, the rule providing for the suspension of all delays relating to judicial proceedings from 1 August to 15 September of each year).
   - "*legge-provvedimento*": norms which are addressed to specific individuals and which, therefore, are not truly *general*, or have not a general content. It is generally held that "*leggi provvedimento*" do not fall under the definition of legal norms (which are supposed to be always of a general nature). Such kind of "decisions" may be embedded to administrative orders or in ordinary laws.

For instance, "*espropriazione"* (a compulsory purchase of assets belonging to an individual) may be ordered either *(i)* by operation of law or *(ii)* by means of an administrative decision. When *espropriazione* comes into play, practical implications may arise from the choice of the scheme which is used to purchase the asset at hand. In particular, different regimes concerning challenges are applicable: in case that expropriation is ordered *by an ordinary law*, the latter may be only challenged before the Constitutional Court (the affected person may file a complaint about formal defects or mistakes made by the legislator in the merits); by contrast, should expropriation be included *in an administrative order*, the latter may be challenged before the competent administrative Courts (*Tribunale Amministrativo Regionale*), without the need to file any claim before the Constitutional Court.

2. "*Sources of production*" and "*sources on production*"

Sources of law may be sorted by category, depending on their capacity to create norms. In particular, scholars usually talk about "*sources of production*" when they want to refer to sources creating (or otherwise giving rise to) new norms. We talk about "*sources on production*" to define sources which do not give rise (as such) to new rules, but simply describe *procedures* and methods to create norms (*e.g*., they regulate who is competent to legislate, and by which procedure new norms may be created). In a nutshell, "*sources of production*" provide answers to the question" *what?*", while "*sources on production*" provide answers to the question "*how?*". Examples of "*sources on production*" are the following:

- Article 70 of the Italian Constitution, establishing that both Chambers of the Parliament are entitled to participate to the proceeding creating (ordinary) laws;
- Article 72 of the Italian Constitution, setting out the main rules governing the proceeding to create new laws.

In both cases, we are not dealing with norms which represent "*sources of production*", since they do not directly entail the creation of new norms and only envisage procedural aspects (these are "*sources on production*").

3. "*Institutional*" sources and "*factual*" sources

Scholars usually refer to "*institutional*" sources to describe the process of creating new norms by means of a formal *expression of will* by the competent authorities. In other words, when new norms are created by virtue of a formal decision, intention, act or expression of will by the competent bodies, the relevant source falls under the definition of "*institutional*" sources (*e.g*., a decree issued by the Government). By contrast, new norms may be also created as a result of a factual circumstance, *e.g*. by virtue of custom or other sources other than an authority's act or decision.

Quite surprisingly, norms resulting from the implementation of international treaties into the Italian legal order are usually considered as a "*factual*" source of law (even though this may be regarded as an expression of will by the relevant parties): international treaties derive their legitimacy from outside the scope of the domestic order. From a domestic law standpoint, the existence of an international treaty is regarded as a *factual* circumstance (which should be acknowledged by the domestic authorities entrusted with its implementation into national law).

The above distinction triggers important consequences from a legal point of view, since the Constitutional Court is entitled to review and issue judgements on matters involving "*institutional*" matters (while it is not competent where a "*factual*" source comes into play). As a consequence, subjects intending to claim invalidity of a legal act or claiming that a given source was improperly applied, may bring such claim before the Constitutional Court only if the relevant sources is "*institutional*".

4. Direct and indirect sources

Direct sources encompass sources which form part of the Italian domestic legal order, while indirect sources are those which derive their legitimacy from elements which are outside the scope of the domestic order (*e.g.*, an international convention or treaty which is made applicable at a domestic level by virtue of a domestic order or implementation law).

5. Summary of the system of sources

Under Italian law, the Constitution is not formally mentioned among the sources of law. However, it undoubtedly forms part of the system of sources. The Constitution is ranked above all other sources of law (which, in turn, derive their legitimacy from the Constitution). There could be no conflict between the Constitution and one of the subordinated sources (any such conflict would be settled in favor of the Constitution).

Some sources are regulated by an "external" source: *e.g.*, the internal regulation of the Constitutional Court. This regulates the internal functioning of the Court. Although this is based on article 137, paragraph 2 of the Constitution, it is adopted by an act of the Court itself. So, in a nutshell, the first-level source is adopted by the Court, while the second-level source is the Constitution itself (which, as mentioned, represents an "external" source, which has to supplement the rules contained in the Constitution).

Some sources are not expressly contemplated by the Constitution (*e.g.*, military orders, EU-law sources, by-laws of non-territorial entities). This does not mean that they are not based on the Constitution (or that they do not derive their legitimacy from the Constitution). The latter remains the primary source of legitimacy for all sources of law.

The Constitution does not contemplate custom ("*consuetudine"*) and mechanisms enabling implementation of foreign laws into Italian law. Although Article 10 of the Constitution recognize the "*generally recognized principles of international law*", custom (both at a domestic and international level) is not expressly recognized. However, according to scholars (and based on several decisions of Italian Courts), custom forms part of the Italian system of sources of law.

6. Other sources of law

- "Unclear" sources (sources which are not clearly identifiable among the Italian sources of law):

Regional laws

Referendums repealing existing norms ("*referendum abrogativo*")

Decrees issued by the President of the Republic implementing the by-laws of certain specific Regions

- Examples of regulations relating to the internal functioning of public bodies

Each Chamber of the Parliament

Supreme Council of Magistrates

The Constitutional Court

National Council on Labour and Economy

The President of the Republic

- Custom ("*consuetudine*")

As mentioned, the Italian Constitution contains a list of sources of law. Although custom is not included in such list, it is generally held that custom is a source of law. On the other hand, custom is explicitly mentioned as a source of law in the "*Preliminary provisions on law in general*" (articles 1 and 8), which are embedded to the Civil Code. In essence, custom may be defined as a "factual" source of law.

Custom may be defined as:

- "*contra legem*" if it is in conflict with an existing legal norm;

- "*secundum legem*" if it further confirms (and is essentially in line with) an existing rule of law;

- "*praeter legem*" if it purports to set out a new rule, on a subject matter which is not yet regulated by any norm (or supplementing an existing norm).

The main features of "custom" may be summarized as follows. In order for custom to be held as existing (and as a valid source of law), it must materialize a uniform and constantly repeated behavior, held by the generality of members of the community. In other words, custom is spontaneously created by the members of the community, without the intervention of the public authorities, nor with the adoption of any formal act or regulation. In addition, all members of the community must see such behavior as somewhat compulsory and legally binding, and conforming to an existing principle of law (although it is not embedded in a formal norm): this is commonly known as "*opinio iuris ac necessitatis*". Should people contravene to such customary rules, a reaction of the "community" is expected to arise, since the norm in questions is "felt" as binding and effective.

Customary rules are usually gathered in "registries" (*e.g.*, those held by the local Chambers of Commerce), which, however, do not have any formal authority and do not represent, as such, a source of law. While custom is a source of law, registries are a mere tool to gather and collect customary rules and to make access to such rules easier to interpreters (by definition, custom is a non-written source of law). Therefore, in case that a dispute arises with respect to customary rules (and it is questioned whether a given custom actually exists), registry may be validly claimed as a basis to establish that such rules exist and are legally binding.

Constitutional custom. In specific circumstances, custom may also affect the Constitution (or the way it is interpreted). In such case, however, custom has specific features, which differ from those applicable to "general" custom: constitutional custom involves a limited number of subjects (rather than the generality of the members of the community), since it only involves public bodies/authorities (it may be possibly involve one single subject); the "underlying behavior" may be relevant even though it was repeated a few times; constitutional custom may be also "*contra constitutionem*" (if it gives rise to a rule which is in conflict with the Constitution, or supplements the contents of a rule contained in the Constitution). By way of example, we may refer to the creation of Ministries without power of expenditure or of Vice-President of the Council of Ministers (none of them is contemplated by the Constitution).

- Case law

In broad terms, the Italian legal system only contemplates "codified" sources of law, therefore factual or "self-created" law is generally irrelevant as a source of law (with the exception of custom). However, case-law (although this belongs to "factual" sources of law) is extremely important, since the Courts' decisions represent the actual application of law to practical situations.

In particular, on certain scenarios, norms need to be interpreted and "oriented", in order to make sure that they are applicable to the situation at hand. For instance, article 923 Civil Code regulates possession of abandoned goods: such norm may be only applied if "good", "abandoned" and "possession" are properly defined, identified and interpreted. To that purpose, Courts play their roles in interpreting and applying norms (specifying definitions, concepts and principles lying behind them).

Thus, the activity carried out by Courts essentially relate to interpretation of norms. In particular:

- if more than one norm seems applicable, Courts are in a position to identify the prevailing norm (or source of law). As explained in paragraph 7 below, Courts select the prevailing norm, *e.g.* according to the relevant date of entry into force, or its hierarchical position in the legal order.
- interpretation may be affected by subjective or variable factors, such as political, social or generally recognized cultural views, in a broad sense (these may change from time to time, or depending on the geographical region which comes into play). In addition, interpretation may entail the need to define general concepts, such as "*diligence*", "*public order*", "*social benefit*", etc. The Courts are required to focus their attention on the specific situation submitted to them and, at the same time, to apply (and interpret/specify) the general concepts contemplate by the applicable norms.

In the light of the above, in a technical sense, case law is not a source of law, since Courts are not entitled to *create* new law. However, it may still be regarded as a source of law (in a broad sense), to the extent that we consider said undertaking to define/better specify the general concepts contained in the norms.

The Courts' decisions do not create *binding* precedents (such as in common law systems). Each Court remains free to adopt the solution it retains as appropriate to settle the dispute, irrespective of the conclusions stated in decisions made by other Courts (even in similar cases), and irrespective of the hierarchical position of the Court issuing the prior decision. Pursuant to article 2909 Civil Code, the Court decisions bind all parties, their successor and assigns, as well as any third party (but it does not bind any other subject, including the other Courts, which may deal with similar cases).

By way of exception, pursuant to article 65 of the law regulating the Italian Court system, the Supreme Court plays a special role in "*ensuring unity and uniformity in the application of law*". Although its decisions do not represent legally "*binding precedents*", territorial Courts generally tend to consider (and possibly follow) the trends emerging from the Supreme Court's decisions (although they are not compelled to).

Last, under articles 113 and 114 of the Italian Code of Civil Procedure, the Courts may base their decisions on **"*equità*"** (*i.e.*, they may decide the merits of a dispute in the light of a general principle of reasonableness and justice), to the extent that: (a) the parties involved in a dispute so request and the dispute relates to disposable rights (*i.e.*, the dispute does not involve fundamental rights or freedoms of the individual, which are generally held as undisposable rights); (b) the value of the dispute is lower than a threshold established by the law; (c) in the reasonable opinion of the judge, the dispute could be not fairly and reasonably solved by simply applying the available set of norms. If so, the judge may somewhat "create" law, since the applicable rule may be created by the judge (in the light of said principle of reasonableness and justice) to solve the dispute at hand.

- National labor agreements

According to article 39 of the Constitution, agreements entered into by "registered" Trade Union associations **bind all persons belonging to the relevant category/sector**.

By contrast, individual labor agreements bind the relevant parties only.

National agreements **may not be in contrast** with laws or general regulations (which, in turn, may not regulate matters covered by such agreements in details). **However, in certain matters, the intervention of the legislator is essential** (as stated by the Constitutional Court: *e.g.*, minimum wages).

- The opinion of scholars ("doctrine")

Scholars often provide their contributions to the evolution of law. In particular, such contribution often materializes in comments, remarks, criticisms, expression of expectations, suggestions or hints for the purpose of applying law. All of such comments is commonly known as "doctrine".

From a technical point of view, doctrine may not be regarded as a source of law. However, it may strongly influence the views taken by Courts and by other "players" (such phenomenon may be regarded as an "indirect" application of law).

7. Interaction among sources of law

Sources of law may interact with one another and conflicts might arise among them. Scholars identified the following criteria to solve conflicts:

- Hierarchy: according to the principle of hierarchy, a given source of law takes priority over another, which is subordinated or ranked below the former. So, if a conflict arises between multiple acts, the norms deriving from the "higher" source of law prevails over the other.

- Chronology: if a conflict arises between two acts (one of which entered into force after the other), the one which entered into force first takes priority.

- Segregation of powers: if a conflict arises between two acts regulating the same subject matter, the one which is issued by the "competent" Authority prevails. For instance, if a subject matter falls within the scope of competence of the legislative power, and there is a conflict between an act of the Parliament and a Government regulation, the former may be held as prevailing (such conclusion, however, is subject to a scrutiny of the factual background, on a case-by-case basis, given that the Government is also entitled to exercise legislative powers, to the extent allowed by the Constitution).

8. Deregulation

The analysis on the sources of law should be also contemplate a phenomenon which is commonly known as "deregulation". By virtue of second-level "deregulation" acts, previous norms are repealed, supplemented, replaced, integrated, restated or otherwise amended (possibly, by specifying the relevant date of entry into force). Deregulation acts (regulations) are usually issued by the Government (although they affect acts adopted by the Parliament). More generally, deregulation may take place by any of the following acts (most of which are regulated by the Law no. 400/1988):

1.- Regulations repealing existing norms. Such regulations are issued by the President of the Republic, upon initiative of the Government, and in consultation with the Council of State (*Consiglio di Stato*). The regulations in discussion may not be adopted within the scope of the Parliament reserved matters. These may repeal ordinary laws adopted by the Parliament, but may not be issued unless the Parliament enacts a "framework law", authorizing the Government to repeal (by virtue of a formal act of the President of the Republic) obsolete norms and to enact new norms.

2.- Regulations setting forth rules regarding the internal organization of single branches of the Government (*Ministeri*). Regulating the Ministries' internal functioning is held as a "reserved matter" of the Government (in other words, the Parliament may not regulate such matters on its own initiative, in conflict with a Government regulation). Such regulations may depart from ordinary laws.

3.- Annual deregulation acts. By 31 January of each year, the Government is usually required to submit a draft law to the Parliament, highlighting norms to be repealed. Such norms must be related to the exercise of central and peripheral administrative powers. To that effect, a formal opinion of the Council of State and of the competent Parliament commissions must be acquired by the Government. The Parliament then votes on the Government proposal.

4.- Regulations implementing EU law into Italian legislation. Implementation of EU law into Italian law may take place by virtue of Government regulations (rather than by Parliament acts).

For the sake of completeness, with respect to the economic activities, the following distinction should be also taken into consideration:

DEREGULATION: as mentioned, public bodies generally (and voluntarily) withdraw from the duty to regulate economic activities, leaving such task to private players. The overall "volume" of acts and regulations issued by public powers is reduced and private players are induced to take the initiative and self-regulate.

PRIVATIZATION: State dismisses its stake in a company, entity or economic activity (which is no longer held as strategic or involved on public-interest policies) in favor of another subject (which is usually a company). The relevant activity, therefore, will be subject to the common rules regulating free market.

DEBUREAUCRATIZATION: public powers reduce the "volume" of formalities and actions to be accomplished by citizens and private players with respect to economic activities.

3 - INTERNATIONAL LAW. THE RELATIONSHIPS BETWEEN THE INTERNATIONAL LEGAL ORDER AND DOMESTIC LEGAL ORDER

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1	Introduction
2	International custom
3	International treaties
4	The role played by Regions in the international legal order
5	The international liability of States

1. INTRODUCTION

Constitutions traditionally include references to foreign affairs and international law. Classic examples are constitutional provisions regulating the State powers in foreign affairs, especially with regard to international treaties. However, in recent decades, constitutional provisions relating to international law and international institutions were significantly redefined. Constitutions usually provide for the binding effect of international law within the domestic legal order and often recognize the principle of supremacy of international law over domestic law. Many Constitutions contain references to international organizations and/or to other supranational forms of association, which are declared as constitutionally legitimate (upon certain conditions being met). More particularly, the Constitutions of several EU Member States refer to (or allow) the transfer of sovereign powers to the European Union or the pooling of sovereignty within the EU. More recently, specific provisions regarding the International Criminal Court (in particular, defining the scope of jurisdiction), have also been included in some Constitutions.

As far as the Italian Constitution is concerned, in respect of the implementation of international law into domestic legislation, article 10, paragraph 1 of the Constitution states that "*the Italian legal system conforms to the generally recognized rules of international law*". Moreover, the Italian Constitution contains provisions on State and regional legislative power, providing that European and international law limit domestic governmental powers: according to article 11 of the Italian Constitution, "*Italy consents, on a reciprocity basis with other States, to limitations to sovereignty for the purpose of ensuring peace and justice among Nations; it promotes international organizations devoted to that purpose*"; in addition, pursuant to art. 117 of the Italian Constitution, "*the legislative power is exercised by the State and the Regions, within the limits set out by the Constitution, the EU law and the international legal order*".

When it comes to the mechanism to adapt domestic law to the international legal order, a voluntary decision of the Italian Authorities to implement international law is needed only in case that *international treaties, conventions or agreements* come into play. By contrast, when international *custom* is at stake, there is no need for any transposition act, since this happens automatically, by virtue of article 10 of the Constitution.

As concerns international treaties, typical transposition proceedings are:

- "***ordinary***" proceedings: under these proceedings, international norms are "reworded" according to Italian law, so that Italian norms "replace" international norms. In other words, the Italian legislator adopts an ordinary law (or other kind of domestic legislation) containing the full text of the international norms.
- "***special***" proceeding: by virtue of these proceedings, an "order" is issued by an Italian Authority (*e.g.*, the Parliament or the Government), declaring the international norm as binding in Italy. The "order"

only refers to the international law source, without rewording the full text of the international norms (such implementation technique is also commonly defined as "incorporation by reference").

In Italy, international law may have a different ranking (within the system of sources of law), depending on the status (and ranking) of the domestic law by which the international treaty is transposed into Italian law ("*legge di esecuzione"*). In particular:

- If the implementing norm is a provision contained in the Constitution, the norm has constitutional ranking: for instance, as mentioned, under article 10 of the Constitution, international custom is automatically applicable in Italy: so, by virtue of a provision contained in the Constitution, custom is held as having constitutional ranking;
- if an international law norm is implemented by virtue of an ordinary law, the ranking of that international norm is equal to that of ordinary laws;
- similarly, international norms will have administrative ranking if they are transposed by virtue of an administrative decision.

2. INTERNATIONAL CUSTOM

International custom is a source of international law.
In order to ascertain whether an international customary rule exists, the following requirements should be met:

(i) repetition: a behavior should be constantly repeated by multiple States, giving rise to a common practice;
(ii) the members of the community should hold such behavior as legally binding, although not confirmed by a written source of law (*opinio juris ac necessitatis*).

As mentioned, article 10.1 of the Constitution states that "*the Italian legal system conforms to the generally recognized rules of international law*". Implementation of international custom in Italian domestic legal system is, thus, automatic and permanent.

International custom prevails over ordinary laws, since it has constitutional ranking. But what if a conflict arises between an international customary rule and the Constitution? In such scenario (which is rather unlikely to happen), Italy would be under an obligation to conform to international custom (and, thus, to amend the Constitution, according to the applicable proceedings). However, it is generally held that the "domestic fundamental principles" (such as the citizens' fundamental freedoms) may not be overturned.

3. INTERNATIONAL TREATIES

Article 87 of the Italian Constitution provides that the President of the Republic ratifies treaties, unless the authorization of the Chambers is required (by virtue of Article 80, in specific cases, transposition of international treaties is reserved to the Parliament). However, ratification of an international treaty is merely a formal act of the President; as a matter of fact, his participation in the conclusion of international treaties requires a specific initiative by the Government.

In contrast with Article 10 of the Constitution, regulating international custom, the Italian Constitution does not provide for any obligation or automatism, to adhere to or implement international treaties.

International treaties may contain either 'self-executing' norms or ‘non self-executing’ norms (to the extent that they may require implementing legislation, so a change in domestic law, to ensure application of the treaties at a domestic level).

Ratification of international treaties may also involve a handing over of sovereignty to an international body. Some treaties establish a committee, which receives reports and monitors the implementation of obligations flowing from the treaty by Member States. Treaties may define the scope of a State's action, and treaties which Italy ratifies may influence the way in which the latter behaves, both internationally and domestically. Implicit, however, in any Italian decision to ratify a treaty is a judgment that any limitations on the range of possible actions which may result are outweighed by the benefits which flow from the existence of a widely endorsed international agreement. Italy also retains the right to withdraw from the treaty if it judges that the latter no longer serves Italy's national and international interests.

4. The role played by Regions in the international legal order

Regions are also entitled to implement international norms. Article 117 of the Constitution states that:

(i) the central State is entitled to issue norms regarding foreign policy and its relationships with the EU.
(ii) Regions, on the other hand, are entitled to issue norms, in cooperation with the central State, regulating the Regions’ relationships with the EU and with the international legal order, including international trade law.

All “implementation orders” are generally issued by the central State: any Regional laws conflicting with such orders may be declared as void and unconstitutional. Regions, instead, are entitled to issue detailed regulations, to ensure that international norms are adequately applied in their respective territories. According to the Constitutional Court, the central State may at any time replace the Regions when the need to ensure compliance with international obligations comes into play.

5. The international liability of States

The term “international responsibility” covers the legal relationships arising under international law from internationally wrongful acts of a State (or an international organization). The United Nations Commission on International Law generally identifies the general conditions for a State to be considered responsible, and the legal implications flowing from any such liability.

There is an internationally wrongful act of a State when a conduct (consisting of either an action or omission) is attributable to a State under international law and constitutes a breach of an international obligation.

The attribution of a liability to a State is a question of international law. Before a State is held responsible for any action, it is necessary to prove a link of causation between the damage and an act or omission attributable to the State (which is alleged to be in breach of its obligations). The State is responsible for all actions of its officials and bodies, even if the body or official is formally independent from the central State and even if the body or official is acting beyond the scope of its powers and competences. Persons or entities not classified as “*bodies of the State*” may still be liable, when they are otherwise empowered to exercise governmental powers. Persons or entities not performing public functions may be equally liable, if they acted under the direction or control of the central State.

4 - THE EUROPEAN INTEGRATION PROCESS AND THE EUROPEAN LEGAL ORDER (OVERVIEW)

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1	On which conditions is the European Union entitled to legislate?
2	The monitoring of the principle of subsidiarity

1. ON WHICH CONDITIONS IS THE EU ENTITLED TO LEGISLATE?

Article 5 of the Treaty on the Functioning of European Union defines the share of competences between the European Union and the Member States. The main principles governing the scope of powers granted to the European Union are as follows:

- according to the PRINCIPLE OF CONFERRAL, the Union has only those competences that are conferred upon it by the Treaties. Any policy area which is not explicitly contemplated by the Treaties (as falling under the scope of powers of the EU) remains within the domain of the Member States. More specifically, powers conferred on the Union may be either exclusive (*i.e.*, the Union is the only subject entitled to exercise those powers) or "shared" (*i.e.*, the relevant competences are shared between the Union and Member States).

- according to PRINCIPLE OF SUBSIDIARITY, *in areas regarding "shared" competences*, the Union may take action only if the objectives of the proposed action (*e.g.*, regulating a certain matter or policy area) cannot be sufficiently achieved by the Member States and would be better achieved by the Union. In other words, the principle of subsidiarity is "satisfied" (and the Union is entitled to legislate) if an action at the EU-level may provide some "added value" (as opposed to the action which Member States would be able to take).

  The principle of subsidiarity does not apply to exclusive competences of the Union (as far as those powers are concerned, there is no need to evaluate whether the Member States could take adequate steps to meet their purposes, since, under the Treaties, the Union is the only subject entitled to act).

- by virtue of the PRINCIPLE OF PROPORTIONALITY, the means used by the EU in order to meet the objectives set out by the Treaties cannot go beyond what is necessary to achieve the relevant purpose or goal. In particular, in establishing whether the EU may legislate by virtue of a regulation or a directive, the most appropriate type of legislation will have to be identified, provided that the latter could not exceed what is necessary to meet the purpose set out by the Treaties. Therefore, it the purpose of the EU legislation is only to harmonize the Member States' legislations, a directive will be sufficient (unless specific aspects lead to believe that a direct-effect instrument, such as regulations, is needed).

The *Protocol (No.2) on the application of the principles of subsidiarity and proportionality* lays down three criteria, aimed at establishing when the intervention at the EU-level may be held as "appropriate". In essence, under the Protocol, an answer should be given to each of the following questions:

1) Does the action have transnational aspects that cannot be resolved by Member States?
2) Would national action (or an absence of action) be contrary to the requirements of the Treaty?
3) Does action at EU-level have clear advantages?

The principle of subsidiarity also aims at bringing the EU and its citizens closer to one another, by guaranteeing that action is taken at local level, where it proves to be necessary (however, the principle of subsidiarity does not mean that action must always be taken at the level that is closest to the citizen).

2. THE MONITORING OF THE PRINCIPLE OF SUBSIDIARITY

The Protocol on the principles of subsidiarity and proportionality also puts in place mechanisms to monitor such principles. Under the Protocol, before proposing the adoption of new acts at the European level, the European Commission must arrange consultations, in order to collect opinions from national and local institutions (namely Parliaments) on the proposal at hand, in particular, in order to make sure that the the principle of subsidiarity is complied with.

The Treaty of Lisbon reformed the above Protocol in order to improve and reinforce monitoring of the application of the principle of subsidiarity by national Parliaments. National Parliaments are now entitled to exercise twofold monitoring functions:

- they have a right to object when EU legislation is submitted as a draft (but not yet formally adopted). They can dismiss a legislative proposal before the European Commission if they consider that the principle of subsidiarity has not been duly observed.

  Any national Parliament or any Chamber of a national Parliament may, within eight weeks from the date of transmission of a draft EU act, send an opinion to the Presidents of the European Parliament, of the Council and of the European Commission, explaining why the draft act should be considered as being in breach of the principle of subsidiarity.

  Each national Parliament is entitled to cast two votes. Where such (unfavorable) opinions represent at least one third (1/3) of all votes allocated to national Parliaments, the draft *must* be reviewed by the EU institutions before adoption. After such review, the European Commission or, where appropriate, the Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft act belongs to their respective scope of powers, may decide to maintain, amend or withdraw the act. Any such decision must be supported by specific grounds.

  Furthermore, the proposed act must be also reviewed in case that, under the ordinary legislative procedure, said opinions (highlighting a breach of the principle of subsidiary) represent at least the simple majority of votes attributed to the national Parliaments.

- they may challenge an act before the European Court of Justice if they consider that the principle of subsidiarity has not been observed. Such claim may be formally filed with the European Court of Justice by the relevant Member State Government. Similarly, the Committee of Regions (which is a body created within the framework of the EU legal order) may also challenge an EU act before the European Court of Justice, claiming that it does not comply with the principle of subsidiarity.

5. THE PRINCIPLES OF THE ITALIAN CONSTITUTIONAL ORDER: THE ECONOMIC RELATIONSHIPS

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1	Ownership in general. Private property
2	Public property

1. OWNERSHIP IN GENERAL. PRIVATE PROPERTY

The right of ownership is regulated by both the Constitution and the Civil Code. In broad terms, according to article 42 of the Constitution:

- property may be either public or private. "*Economic goods*" belong to the State, to public entities or to private individuals. Private property is recognized and guaranteed by the law, which determines the ways it is acquired and enjoyed, as well as the relevant limitations, in order to ensure its social functions and to make it accessible to all;

- owned goods may be expropriated, in the situations provided for by the law, for reasons of general interest, provided that appropriate compensation is granted to the owner;

- the legislator is required to regulate (by virtue of ordinary laws) the scope and limits of legitimate and testamentary inheritance and the rights of the State in matters of inheritance.

In the light of the above, if may be inferred that:

- ordinary laws may not limit or affect individuals' ownership rights, but they may only regulate/limit the ways it is acquired and enjoyed;

- expropriation may not occur to deprive an individual of his/her ownership rights and to grant those to another individual: expropriation may be only aimed at ensuring achievement of public goals (public interest).

As regards the regulation contained in the Civil Code, the following norms should be taken into consideration.

ownership: art. 832 of the Civil Code

The owner has the right to enjoy and dispose of the owned goods fully and exclusively, within the limits and in compliance with the obligations set out by the law.

ownership: art. 834 of the Civil Code

No one may be deprived of ownership rights unless for public interest reasons, provided that: (i) such reasons are ascertained and acknowledged in accordance with the law; and (ii) adequate compensation is paid to the person who is subject to expropriation.

In the light of the above (and of the other applicable provisions on private property), it should be noted that:

- ideally, ownership is regarded as a "tool" to promote / increase social welfare, not as something which is enjoyed by the owner only;

- owned goods should be dynamically "oriented" to production and trade, they should not be just statically held by the owner;

- soil and natural resources should be exploited for production purposes in accordance with the social needs and public interest;

- production should be organized in accordance with the need to harmonize social relationships;

- minor undertakings should be encouraged: special care is taken for agricultural businesses (in particular those managing small pieces of land). Limitations may be imposed to the extension of land owned.

2. PUBLIC PROPERTY

Articles 41 to 47 of the Italian Constitution set out general principles regulating public property. In addition, important rules are also set out by articles 822 and following of the Civil Code. In general terms, depending on each case, public property may be owned by the State, a Region, a Municipality or another public entity. The general category of "public property" encompasses "*beni demaniali*" and "*beni patrimoniali*".

- "*Beni demaniali*" are properties which are held as directly connected to a general or public interest or need of the community (*e.g.*, beaches, rivers, works connected to national security and defense, roads, highways, real estate properties with a national historical or archeological relevance, etc.). Save for a few exceptions, "*beni demaniali*" may not be owned by private individuals. In certain cases (*e.g.*, beaches and rivers), public properties may be only owned by the State (in other words, in such cases, they may be neither owned by private individuals, nor by any public entity other than the State). In general terms, irrespective of the identity of the relevant owner, "*beni demaniali*" may not be disposed of by the relevant owner and may not form the object of any *ad rem* rights in favor of any third parties, unless in accordance with the rules set out by ordinary laws in force.

- "*Beni patrimoniali*" are properties which, by nature, are owned by public entities, but are not directly subjected to a general-interest limitation or constraint (for instance, real estate properties hosting public offices). "*Beni patrimoniali*" may be either "*indisponibili*" (in such case, the relevant owner may not dispose of such properties, nor create any rights over them in favor of third parties) or "*disponibili*" (if no such limitation is in place: in such case, the applicable legal regime tends to overlap with the one applicable to private property).

All of them are generally set to meet a public/general need or interest and may not be diverted from their public usage or destination. As mentioned, in certain cases, public property may not be disposed of ("*beni patrimoniali indisponibili*").

It should be also noted that, under article 9 of the Constitution, *"The Republic promotes development of culture and scientific and technical research. It safeguards the natural landscape and the historical and art heritage of the nation".* This is an additional source of constraints to which public properties may be subject.

6. THE INDEPENDENT AUTHORITIES

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5	Liabilities which may be incurred by the Independent Authorities

1. THE INDEPENDENT AUTHORITIES: THE MAIN FEATURES

There is no specific norm clarifying the identity and common features of Independent Authorities. However, the main features of such Authorities may be somewhat inferred from the scattered pieces of legislation which have been enacted to regulate their activities. The Authorities are not regulated by any specific act (or set of norms), except for the Law no. 59/1997 and the Law no. 205/2000: such laws, however, do not define Independent Authorities as such and only regulate specific procedural aspects. In particular, according to the Law 59/1997, the State is expressly prevented from granting Regions, Municipalities or other peripheral entities with "*supervisory and regulatory powers which are afforded to Independent Authorities by virtue of an ordinary law*".

As mentioned, existing norms do not contain a list or description of the Authorities' general features. As a consequence, in the light of the existing legislation, there is no absolute certainty about the common features and elements distinguishing the Independent Authorities from other public entities or bodies. On the other hand, based on the existing norms and Courts' decision, scholars have attempted at defining the common features of Independent Authorities.

In general terms, Independent Authorities act in specific technical matters and policy areas. Typically, such areas are held to be particularly sensitive, especially when conflicting (public and/or private) interests come into play. Independent Authorities are typically created when there is a need for a neutral and technical "entity", especially in areas in which strong private interests affect social life and wide economic activities. In such situations, highly sophisticated issues usually need to be solved and dealt with, and the degree of technical knowledge and skill which is commonly owned by ordinary officers is held as insufficient to meet the purpose. This is why a higher degree of skill and technical competence (such as that expected from Independent Authorities) is required.

In a broad sense, the "phenomenon" of the Independent Authorities highlights:

(i) a change in the State approach to the market. The State tends to withdraw from direct management of economic activities and to let Independent Authorities to lead the way, even granting those with the power to issue binding regulations and to settle dispute; in other words, the State acknowledges that it has proven to be sometimes unable to face strong private interests and to fulfill its tasks properly, due to the lack, *inter alia*, of adequate skills and technical knowledge;

(ii) the Courts' failure to cause remedy to a confused legislation. In particular, the Courts have sometimes shown their inability to act as genuine third-party "referees", especially when dealing with disputes between strong public and private interests;

(iii) a shift from a "pyramidal" to a "polycentric" model: the classical organization of the State, comprised of the Government (on top of the "administration"), the Parliament and the judicial power, tends to be replaced by a different organizational model, based on multiple elements (including, as mentioned, the Independent Authorities), which do not form part of the typical threefold system of powers.

Independent Authorities are entitled to a high degree of independence (depending on the case at hand) from the Government and other administrative and politically-liable entities. From a theoretical point of view, such independence may be assimilated to that which is granted to Courts, by virtue of article 101 of the Constitution. In other words, Independent Authorities (although these are not expressly contemplated by the Constitution) benefit of almost the same degree of independence which is granted to Courts and to the judicial power in general.

This being said, how should "*independence*" be interpreted? In essence, Independent Authorities are independent from the Government and do not fall within the scope of the principle of political responsibility (please see article 95 of the Constitution: in other words, Independent Authorities are not politically liable for actions done or omitted to be done in accordance with applicable law). However, when it comes to the technical contents of *independence*, there are conflicting opinions. In particular:

(A) according to a restrictive approach, although Independent Authorities must be regarded as *independent*, these should be held liable, in some cases, *vis-à-vis* the public powers. In particular, all Authorities are under an obligation to disclose information regarding all acts and decisions (and the relevant reasons/legal grounds) to the public. If they fail to do so, they may incur legal liabilities *vis-à-vis* the public powers. In addition, the Government may be held liable for "*culpa in eligendo*", in case that the members (or the Chairman) of an Independent Authority (if appointed by the Government) turns out to be inadequate to meet the relevant tasks (according to this view, although the Government does not hold a higher rank in the hierarchical order, it would be entitled to revoke members and the Chairman of an Independent Authority);

(B) the majority of scholars, however, take a different view. Independent Authorities should be regarded as being *absolutely independent* (in analogy with the UK "Independent Commissions"). Authorities are created to tackle abuses of power and overwhelming private interests, therefore their independence should not be affected by any supremacy of State (nor by any power to revoke the Authority members). Authorities should not be regarded as "instrumental entities", since they do not belong to the general "structure" of the State and do not represent a "tool" by which the State may reach its targets: by contrast, Independent Authorities deal with dispute settlement, in view of the composition of conflicting interest (so, they do not represent public powers, as such). In addition, Independent Authorities are not subject to directives or supervision of the State, although it is generally admitted that Authorities are subject to account control by *Corte dei Conti* (this does not entail any form of supervision in the merits).

In the light of the above, in accordance with the view described under paragraph (b), *independence* should be defined as follows: Independent Authorities are not bound by any directive of the Government; the latter may not cancel any decision of the Authorities, nor may it interfere with their powers.

By the way, "*independence*" does not overlap with "*autonomy*", since such latter commonly refers to a relationship between two equal subjects, while, when it comes to Independent Authorities, no relationship is

in place between the Authority and the "addressees" of its powers (or with the Government): in order to preserve its ability to perform its duties, Independent Authorities should not create any "relationship" with any other subject (therefore, *independence* is more appropriate than *autonomy* to describe the activity of Independent Authorities).

Moreover, *independence* is not a synonym of *impartiality*: article 9 of the Constitution states that the administration should be impartial, meaning that, in pursuing public interest, it should avoid creating discriminations or causing prejudice to third entities (unless this is necessary in the light of a prevailing public interest). By contrast, *independence* means that the Authorities must not necessarily act in the light of a specific public interest (since, as mentioned, they may settle disputes between conflicting private and public interests) and, therefore, they must be neutral and equidistant from the interests they are dealing with.

Independent Authorities are generally entitled to exercise the following powers:

- powers which are analogous to ordinary administrative functions (*e.g.*, the power to issue administrative decisions and measure on specific situations submitted to them);

- the power to solve disputes and conflicts. Scholars usually refer to the Authorities' technical-discretionary powers, since they are entitled to settle disputes not only in the light of the applicable legislation, but also in the light of a discretionary evaluation of the factors at stake.

  For instance, CONSOB (the Authority dealing with financial market regulation and supervision) is granted with the power to settle disputes (in specific situations, private investors may resort to CONSOB in order to challenge public orders or administrative decisions affecting securities' market regulation). To a certain extent, CONSOB is expressly entitled to evaluate facts and circumstances submitted to it on a discretionary basis. So, in general terms, the intervention of Independent Authorities may turn out to "anticipate" the decision which will be ultimately made by the Courts, since a dispute may be "pre-settled" at the Independent Authority-level, and, then, if needed, solved by the Court.

- The power to enact regulations and second-level norms (to ensure application of "primary" rules, which are typically included in ordinary laws). Such power may be either embedded in general laws (such as the law creating an Independent Authority) or specifically delegated, from time to time, by the Parliament. For instance, CONSOB was delegated by the Parliament to issue second-level regulations implementing the Italian "Consolidated Finance Act" multiple times.

  The power in discussion, however, has often been debated among scholars. Originally, some authors took the view that Independent Authorities should not be held as allowed to issue binding norms, since they would not be politically responsible *vis-à-vis* the Government (which would not be entitled to intervene to suspend or revoke decisions of the Independent Authorities); the latter, in turn, would not be in a position to report to the Parliament on the matters dealt with by the Independent Authorities (since, as mentioned, these would not be politically responsible), and article 95 of the Constitution (requiring the Government to be fully liable *vis-à-vis* the Parliament and to electors in general) would be breached. In other words, a substantial part of the administrative activity would be exempt from the duty to supervise and control, hence from the democratic mechanisms envisaged by the Constitution. The Independent Authorities do not report to (and are not liable *vis-à-vis*) the Government or the Parliament: according to the view taken by said scholars, should Authorities be granted with the power to issue *binding regulations*, this would give rise to a breach of the Constitution.

This opinion, however, was rejected by the Council of State multiple times. First, in its opinion no. 11603 of 25 February 2005, the Council of State expressly affirmed that ISVAP (the Authority in charge of regulation and supervision of the insurance sector) should be held as entitled to issue regulations. Then, according to the opinion of 6 February 2006, the Council of State further confirmed (although the opinion was only related to the Supervisory Authority on Public Works) that Independent Authorities are entitled to the power in question: the Authorities' powers would be based on the possibility, for citizens and individuals affected by their decisions, to participate to the decision-making powers (and possibly to attack their decisions before Court). In other words, the Authorities' power to issue regulations would be counterbalanced by procedural guarantees for all citizens (which would be somewhat involved in the decisional process, although in a form other than the "traditional" one). Last, the Law no. 262/2005 expressly provides for the power of some Authorities (CONSOB, ISVAP and *Banca d'Italia*) to issue regulations. The law also sets out the procedural norms and guarantees which must be complied with. In particular, Independent Authorities are required to provide a description of the grounds on which each decision is based (this is also aimed at procuring citizens with a tool to supervise and control their activity). Although the same rules are not expressly provided with respect to the other Authorities, it is arguable that all of them are subject to the same legal regime. So, the Independent Authorities must ensure that the individuals concerned or affected by their decisions are in a position to participate to the proceeding and to raise any counter-interest.

- supervisory powers.
- power to impose sanctions and fines.

Independent Authorities do not necessarily have legal personality. For instance, CONSOB, which is held to be one of the most important Authorities within the Italian legal order, was deprived of the legal personality from its creation (in 1974) until 1985. In case that an Independent Authority has no legal personality, as such, it may not hold rights and obligations (which shall be referred to another legal entity, possibly holding such rights and obligations in the name and on behalf of the Authority). However, the overwhelming majority of Independent Authorities in Italy do have legal personality.

Decisions issued by Independent Authorities may be challenged before Administrative Courts (and before the President of the Republic), for breach of law.

Some examples of Independent Authorities are:

- *CONSOB*

- *IVASS (formerly, ISVAP)*

- *Autorità Garante della concorrenza e del mercato*

- *Garante per la tutela dei dati personali*

- *Autorità sulla vigilanza dei lavori pubblici*

- *Consiglio di Stato* and *Corte dei Conti*

- *Difensore civico ("Ombudsman")*

- *Autorità di vigilanza sulle ONLUS*

- Banca d'Italia

2. THE CONSTITUTIONAL COVERAGE

As mentioned, although Independent Authorities are entitled to enact binding regulations and to settle disputes, they are not bound to report to the Government and, therefore, are not politically liable. In addition, their ability to solve disputes may turn out to be in conflict with the principles regulating the independence of Courts (which are primarily entrusted with judicial powers. We should then clarify whether Independent Authorities may be legitimate from a constitutional point of view and, if so, in the light of which norm / principle they may be held as legitimate. The main constitutional norms which may be relevant are the following:

- According to Art. 95, each Minister is responsible for acts done within the scope of its competences, while all members of the Council of Ministries are jointly responsible for acts connected to the latter. As regards the activity of Independent Authorities, Ministries could not be held "responsible" for acts done by those, since Ministries have no power to supervise or revoke acts issued by the Independent Authorities.

  According to the view taken by some scholars, article 95 of the Constitution should be held as breached by the provisions regulating powers of Independent Authorities, since these would carry out administrative actions, which would, in turn, be exempt from the appropriate liability regime (which is connected to Ministries). However, article 95 should be only applied to actions which are subordinate (or anyhow conditioned) to an act of the Government: as mentioned, deeds and acts done by Independent Authorities are not subordinate, nor ranked below the acts of the Government (which has no hierarchical supremacy over the Authorities).

- According to Art. 97 of the Constitution, "*Public offices are organized according to the provisions of the law, in order to ensure the proper conduct and impartiality of administration*". One may wonder whether "impartiality" should have the same meaning as "independence" (if so, article 97 of the Constitution would be distorted, since Authorities falling outside the scope of the "Government" would not necessarily be "impartial", although they perform "administrative" duties). In other words, article 97 would be disregarded, by granting "administrative" powers to entities other than the Government, and which are exempt from the guarantees set out by the Constitution (impartiality does not necessarily match with independence: see paragraph 1 above). However, according to the majority of scholars, such "exemption" of Independent Authorities from the scope of article 97 would be counterbalanced by their institutional duty to serve the interests of the community.

- By virtue of Art. 101 of the Constitution, the Courts are granted with the highest degree of independence from the Government and the legislative powers. One may wonder whether Courts are entitled to a sort of "monopoly" of independence, or other entities or bodies (*i.e.*, the Independent Authorities) may be granted with a similar degree of independence. May "independence" be only referred to Courts? Most scholars hold that "independence" may be legitimately referred to Independent Authorities, without giving rise to any breach of article 101 of the Constitution. In particular, there would be no overlapping between the Independent Authorities and Courts, since, when settling disputes, Authorities intervene to "anticipate" a final ruling of the competent Court, possibly enabling the parties to bring a claim before Court.

In a nutshell, the above norms of the Constitution are not affected by the "phenomenon" of Independent Authorities. Such conclusion, however, is subject to the following conditions being met:

- Any decision made by the Independent Authority should be challenged before Court. In other words, any counter-interested party may anytime sue an Independent Authority to claim invalidity of a decision issued by the latter and, possibly, to request for restoration of damages. Independent Authorities are granted with the power to enact binding regulations, which may, in turn, affect individual positions and rights. Affected subjects should be in a position to react to any illegitimate attack of their own rights. This directly arises from articles 24, 103 and 113 of the Constitution;

- The activity done by Independent Authorities should be always open to inspection and check by any interested party (see paragraph 3 below);

- Should an Independent Authority perform "pure" administrative functions, such as decisions or measures affecting specific situations, or imposing sanctions (rather than dispute settlement or enactment of binding regulations), the full liability regime (pursuant to article 95 of the Constitution) should apply to them. In such cases, the Independent Authorities generally act as public entities (pursuing public interest, which appear as "prevailing" over other conflicting interests).

Last, it is worth noting that, in 2002 the Supreme Court issued a decision on the nature and functions of one of the main Independent Authorities, "*Garante Privacy*". According to such decision:

- There is no "third option" between the legislative power and the Courts' entitlement to solve disputes. Independent Authorities fall under the general category of "administration" and may not be assimilated to the judicial power;

- Independent Authorities are entitled to solve disputes, but they do not represent "new special judges" (otherwise they would be in conflict with the Constitution, according to which no "special judge", other than the "natural" one, may be created);

- The decisions made by Independent Authorities may be challenged anytime before Court (or before the President of the Republic, depending on the factual background). Independent Authorities may be validly sued before Court and are fully entitled to take part in the trial.

3. THE CITIZENS' RIGHT TO HAVE ACCESS TO AUTHORITIES' DOCUMENTS AND FILES, AND TO PARTICIPATE TO THE PROCEEDINGS

As underlined in paragraph 2 above, citizens must be entitled to have access to acts, deeds and files of Independent Authorities. They may also inspect and ascertain the legal basis and factual backgrounds / reasons on which decisions are based; they may also ascertain whether procedural rules were complied with. More specifically, article 23 of Law no. 241/90 expressly refers to "*supervisory and guarantee authorities*" as entities to which substantially all procedural norms apply.

4. THE INDEPENDENT AUTHORITIES AND THEIR INTERACTION WITH REGIONS

Regions may create Independent Authorities, within the scope of their functions. In particular, Regions may set up Authorities within the scope of their exclusive powers, to the extent that such Authorities do not cross over into the central State's powers and functions. The central State and Regions also have shared competences: "regional" Independent Authorities may be also created within those areas, but the central State is also held as entitled to create "central" Authorities, ensuring that appropriate minimum service levels are granted to citizens and the "*economic and legal unity of the State*" is not jeopardized (as required by article 120 of the Constitution). To that purpose, the central State is entitled to create Independent Authorities even within the scope of exclusive powers of the Regions. Of course, the central State has no limitations or constraints when creating Independent Authorities falling within its own exclusive competences.

5. LIABILITIES WHICH MAY BE INCURRED BY THE INDEPENDENT AUTHORITIES

According to the decision no. 500/1999 of the Supreme Court, the Independent Authorities may be held liable for damages *vis-à-vis* individuals, in case that acts or decisions are issued in breach of applicable laws. By contrast, no restoration of damages may be allowed in case that the damages arise from omission / failure to act.

Original approach of the Courts: individuals are not entitled to enforce any rights (neither a "*diritto soggettivo*", nor a "*interesse legittimo*")

2001 decision of the Supreme Court: Consob was held liable for failing to supervise. Individual is entitled to claim restoration of damages suffered as a consequence thereof ("*diritto soggettivo*")

2003 decision of the Supreme Court: confirmed the 2001 decision

2005 decision of the Supreme Court: confirmed the 2001 and 2003 decisions

The latest Supreme Court decisions have been criticized, since:

- the individual claims that a "receivable" has to be paid by Consob. His restoration right, however, does not appear as something analogous to a "receivable". The activity in discussion relates to the use of *Authority (=> interesse legittimo*, rather than *diritto soggettivo)*

- the Court draws a distinction between "**addressees**" of Consob regulations (i.e., the financial intermediaries) and the "**beneficiaries**" of such legislation. Such distinction, however, appears unsatisfactory

- the administrative Court (rather than the ordinary Court) should be competent to solve the dispute

- the decisions in discussion do not clarify to what extent the judge should check or inspect the use of power by the Authority (technical discretion)

The burden of proof must cover the following:

- negligence on the Authority's part;

- damage suffered by the claimant;

- link of causation.

<u>Within the scope of EU law</u>: the European Court of Justice explicitly allowed for restoration of damages claimed <u>against the European Commission</u> (illegitimate antitrust decisions issued against companies).