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EFFECTIVENESS AND CURRENT RELEVANCE OF THE LEGISLATION. CONFLICT AS AN INSTRUMENT TO MEASURE LEGALITY

SOMMARIO: 1. The effectiveness of the law at the time of the Europeanization of the legal system – 2. Evaluation of effectiveness in European jurisprudence – 3. The regulatory assessment in national legislation – 4. Effectiveness and the difference between statutory law and the law as it is effectively applied in the phenomenological dimension of law – 5. Conflict as a tool for measuring law – 6. Quantitative measurement by the jurisprudence – 7. Living law and recoding.

1. *The effectiveness of the law at the time of the Europeanization of the legal system*

The term effectiveness is notoriously polysemic and it could be interpreted by a variety of meanings, even if it generically indicates the ability to produce the desired or hoped for results or, better still, the ability to fully produce the desired effect[1]. Contextualizing this notion with the question at hand, it is easy to understand that the assessment of effectiveness should lead, using this notion, to verify the achievement of the effectiveness desired or hoped for by the legislator with regard to certain regulatory provisions[2].

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[1] See the entry *Efficàcia*, in *Il vocabolario Treccani*, Roma, 1997, 229.

[2] So understood the notion of effectiveness relevant to the purposes that concern us, this, although having a significant affinity with the conception of legal effectiveness as

Such a meaning of effectiveness is typical of the modern way of acting of the legislator, especially the European legislator[3], which - in particular in the Interinstitutional Agreement on «Better Law-Making» of 13 April 2016 between the European Parliament, the Council of the European Union and the European Commission[4] - has given specific relevance to the *ex post* evaluation of existing legislation, stating that «The three Institutions confirm the importance of the greatest possible consistency and coherence in organizing their work to evaluate the effectiveness of Union legislation, including related public and stakeholder consultations» (§ 20)[5].

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an expression of law in the sense of objective value (on the point, for all, the masterful reconstruction of A. FALZEA, *Efficacia giuridica*, in *Enc. dir.*, 14, Milano, 1965, 432 ff., and now in ID., *Ricerche di teoria generale del diritto e di dogmatica giuridica*, II. *Dogmatica giuridica*, Milano, 1997, 5 ff., on which see P. SIRENA, *La teoria dell'efficacia giuridica nel pensiero di Angelo Falzea*, in *Riv. dir. civ.*, 2017, LXIII, 999 ff.), in the moment in which it is posed in perspective of the social response of the statutes and, therefore, in the expected-real relationship, it differs from the reconstruction in word that in broader perspective outlines the juridical phenomenon in organic terms, thus not having as object the evaluation of effectiveness of the single statute.

[3] This prospect of the European legislator is evident bearing in mind the COM 2016/615 fin. of 16 September 2016 provision, which at the beginning states that «Legislation is not an end to itself – it is a means to deliver tangible benefits for European citizens and address the common challenges Europe faces».

[4] In Official Journal of the European Union L-123 of 13 May 2016.

[5] The following § 22 of the Interinstitutional Agreement in question also states that «In the context of the legislative cycle, evaluations of existing legislation and policy, based on efficiency, effectiveness, relevance, coherence and value added, should provide the basis for impact assessments of options for further action. To support these processes, the three Institutions agree to, as appropriate, establish reporting, monitoring and evaluation requirements in legislation, while avoiding overregulation and administrative burdens, in particular on Member States. Where appropriate, such requirements can include measurable indicators as a basis on which to collect evidence of the effects of legislation on the ground».

In this perspective, the questions that reflect the assessment of the effectiveness of the legislation are varied, including the extent to which the effects of the legislation correspond to the objectives that led to its issuance, the extent to which the objectives were achieved and - if the expectations were not met - the identification of the factors that hindered their achievement[6].

This is an assessment that is not surprising if it falls within the perspective of European legislation, especially if we consider the aspiration of finalism it has formed and which still today constitutes the basis for the creation of European law. Indeed, in the European perspective, effectiveness is a necessary condition for the realization of the European project as conceived and envisaged by the founding fathers.

Such an acceptance of effectiveness seems to be even more relevant in the light of the principle of subsidiarity and the competition among rules, given that on the basis of effectiveness the principle of subsidiarity assigns the regulatory powers from one level to another, which, at the time of the pluralism of the sources, it is certainly a profile which should not be overlooked.

2. *Evaluation of effectiveness in European jurisprudence*

Remaining in the European perspective, the relevance of the assessment of effectiveness of the legislation is not limited only to those of direct supranational derivation, but also affects the national standards issued in implementation of those European or in any case related to those cases in which, for example, the European framework is integrated with the general framework of

[6] These questions can be found within the concept of «effectiveness» in the *Evalutation and fitness check (FC) Roadmap* of Directive 2011/83/UE on consumer rights (http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_just_001_crd_evaluation_en.pdf).

the individual Member State. Moreover, this also leaves wide discretionary space to national legislators who, upon transposition, are authorized to identify a preferable solution.

To this end, the Court of Justice, by means of assessment of effectiveness, aimed at ensuring the effectiveness of European law, including with regard to civil law and in particular with reference to contract law, that is to say with regard to the system of protection and remedies[7] in which the European legislation general does not refer to, except in specific cases, but rather prefers to leave the regulation of these elements to the national laws of Member States.

In this context, by changing the expression used in other regulatory frameworks, the Court of Justice has stated, the last time it expressed itself with regard to consumer credit rules, that «the penalties are effective, proportionate and dissuasive»[8], subjecting in particular the national regulations implementing Directive 2008/48/EC to the assessment of compliance with these parameters.

In the argumentative claim of the European judges, in order to guarantee the useful effect of European law, it is required that the remedial system adopted by the Member States permits the achievement of the scope underlying European legislation[9].

The approach in question, which gives rise to an intense and particularly important academic debate, placed in the perspective of the difference between statutory law and the law as it is

[7] On the topic, in general terms, see P. SIRENA - Y. ADAR, *La prospettiva dei rimedi nel diritto privato europeo*, in *Riv. dir. civ.*, 2012, LVIII.1, 359 ff.

[8] The reference is found in ECJ, Fourth Chamber, 27 March 2014, C-565/12, LCL *Le Crédit Lyonnais SA* vs. *Fesih Kalhan*, ECLI:EU:C:2014:190, and lastly ECJ, Third Chamber, 9 November 2016, C-42/15, *Home Credit Slovakia a.s.* vs. *Klára Bíróová*, ECLI:EU:C:2016:842.

[9] In this perspective see N. LIPARI, *Il problema dell'effettività del diritto comunitario*, in *Riv. trim. dir. proc. civ.*, 2009, LXIII, 896.

effectively applied of protection, which is largely outside the scope of the present analysis[10], becomes relevant here because it allows us to point out that the finalistic assessment of the rules does not only concern the activity of the European legislator, but also that of the national legislator and even of the national judge, who are required to operate within their competences in order to promote the achievement of the objective that the European Union legislator wanted to achieve by specific legislation.

3. *The regulatory assessment in national legislation*

Looking at things more closely, even at national level, although less vigorously than the European dimension, there have been initiatives aimed at setting up control and evaluation of legislation.

In addition to the tools to analyze regulatory impact, which are found in various regulatory texts[11], and that aim to define a path of preventative assessment that must be followed in order to determine the expected impact of the options of the proposed laws that will hopefully be approved, reference can be made to other

[10] On the topic, see G. VETTORI, entry *Effettività delle tutele (diritto civile)*, in *Enc. dir.*, Annali X, Milano, 2017, 393 ff.; ID., *Il diritto ad un rimedio effettivo nel diritto privato europeo*, in *Riv. dir. civ.*, 2017, LXIII, 666 ff.; S. PAGLIANTINI, *Effettività della tutela giurisdizionale,* consumer welfare *e diritto europeo dei contratti nel canone interpretativo della Corte di Giustizia: traccia per uno sguardo d'insieme*, in *Nuove leggi civili commentate*, 2014, XXXVII, 804 ff.; C. CAMARDI, *Certezza e incertezza nel diritto privato contemporaneo*, Torino, 2017, 100 ff.; C. CASTRONOVO, *Eclissi del diritto civile*, Milano, 2015, 235.

[11] The discipline of regulatory impact analysis is mainly found in Art. 14 of the l. 28 novembre 2005, No. 246 and in the Decreto del Presidente del Consiglio dei Ministri of 11 settembre 2008, No. 170, in G.U. No. 257 of 3 November 2008, concerning the «Regolamento recante disciplina attuativa dell'analisi dell'impatto della regolamentazione (AIR)».

documents, such as the "*Carta di Matera*"[12], approved on 25th and 26th June 2007, with which the Legislative Assemblies of the Regions and the Autonomous Provincial Authorities undertook to promote the use of tools specifically designed to the control the implementation of laws and the evaluation of the effects of the policies.

According to the document in question, in continuity with what has been so far seen, the commitment made by the Legislative Assemblies aims at a dual purpose: on the one hand, the real implementation of rules and the reasons for any discrepancy with respect to the initial objectives is evaluated through the «control on the implementation of laws» and, on the other hand, by means of the «evaluation of the effects of policies» attention is drawn to the ability of the policy to positively influence a given social phenomenon.

However, beyond the objectives and appreciable intentions that the document cited above was intended to achieve, it does not seem that the measures subsequently undertaken have assumed a reality comparable to that of the European institutions, rather having to recognize that this document, full of vague programmatic statements, constitutes an embryonic element of the culture of the evaluation of the statutes, certainly not comparable to that consolidated at European level, where there is a specific relevance of the evaluation of the effectiveness of the statutes, which are seen as yardstick for the achievement of the objectives that led the legislator to enact a specific regulation.

[12] A reference to the point is found in A. GAMBARO, *Misurare il diritto?*, in *Annuario di diritto comparato*, 2012, 21.

4. *Effectiveness and the difference between statutory law and the law as it is effectively applied in the phenomenological dimension of law*

Returning to our topic, and in particular to the evaluation of the effectiveness of the rules, we can determine that what has been said up to now brings out a concept of effectiveness of the rules which expresses their finalistic vocation in a sort of teleological orientation of the legislative provisions that permeates them so as to affect the whole system of ordinance in which they are inserted.

Seen in this light , effectiveness assumes a central importance, so much so to be understood as a real legal imperative, which according to widespread opinion should even lead to rethinking the methods of how law is produced[13] as well as the exercise of administrative action[14].

Different conclusions seem possible to be reached with regard to the rules of the civil code, whose provisions are intended to regulate the relationships between individuals who, although certainly having an end, can be conventionally and generically identify in social justice, seem to escape a properly finalistic assessment.

Moreover, beyond the above importance, it is undoubted that the evaluation of effectiveness, implies at least a knowledge of the fundamental reference data, that is to say the desired or hoped for results. These results should then be checked against the results that were obtained by applying the law in reality.

This seems to bring us to the conclusion that such an acceptance of effectiveness results leads to, with regard to the provisions of the Civil Code, scarcely usable as an immediate

[13] Says S. PATTI, *Ragionevolezza e clausole generali*, Milano, 2013, 104, that the modern regulations of private law [...] have a *determined purpose* to be realized.

[14] In this regard it is interesting to note that the Swiss Constitution of 1999, in Art. 170, expressly refers to the assessment of effectiveness.

result, having to have, on the one hand, a certain degree of agreement on the result and, on the other, a comparison of the objective content of the concrete application of the individual rules by the interpreters.

In the face of these difficulties, the usefulness of the evaluation of the effectiveness of the law seems however to be recoverable through a different conception of this, which finds its basis in the reconstructions that especially in other cultural contexts, much more than in the Italian one, have questioned the meaning of effectiveness.

Effectiveness has in fact been conceived as part of a broader concept that includes, although remaining partially separate from it[15], the difference between statutory law and the law as it is effectively applied[16] on the hard to question assumption that a non-effective legislation can not be considered effective.

Indeed, it has been found that the difference between statutory law and the law as it is effectively applied measures the difference between the law which is in force and the social reality that it should give order to. It is an evaluation concept of the transposition and implementation of legal statutes[17], integrating effectiveness in the strict sense.

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[15] See N. LIPARI, *Il problema*, cit., 893 f. Otherwise, it was considered that the concept of "*efficacia*" and "*effettività*" are similar enough to be used as synonyms (in this sense, see A. CATANIA, *Manuale di teoria generale del diritto*, Bari, 2010, 108; A. ARGIROFFI, *Teorie del diritto e principio di effettività: esempio di* fictio juris*?*, in *RIFD*, 2005, 483).

[16] See G. GAVAZZI, entry *Effettività (principio di)*, in *Enc. giur. Treccani*, XII, Roma, 1989, 1.

[17] P. LASCOUMES, entry *Effectivitè*, in *Dictionnaire encyclopédique de théorie et de sociologie du droit*[2], directed by A.-J. Arnaud, Paris, 1993, 217, which states that the *effectivité* «mesure les écarts existants entre le droit en vigueur et la réalité sociale qu'il est censé ordonner. C'est un concept évalutatif de la réception et de la mise en œuvre des normes juridiques».

Being able certainly to agree with the finding according to which the difference between statutory law and the law as it is effectively applied is different from contiguous expressions such as effectiveness with effectiveness being expressive of the facts, while effectiveness is the ability to produce something[18] and it seems equally undeniable that the difference between statutory law and the law as it is effectively applied and effectiveness share both on the actual plane, being able to say that the difference between statutory law and the law as it is effectively applied is part of effectiveness, being united by the actual perspective but distinct from the finalistic vocation that only characterizes effectiveness.

In this sense, the difference between statutory law and the law as it is effectively applied implies and evaluates conformation to legislation by its recipients[19], which requires a comparison between the content of the statute and the actual behavior of the recipients of the legislation, thus being able to say that with this conception one accesses a problematic effectiveness due to the phenomenology of law[20].

This way of understanding the difference between statutory law and the law as it is effectively applied exceeds the traditional approach, based on the search for rules actually in force, placing itself in line with the most recent conception of the difference between statutory law and the law as it is effectively applied in the sense that it is advocated as starting from the second half of the last century, of the relationship between fact and law[21].

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[18] N. IRTI, *Significato giuridico dell'effettività*, Napoli, 2009, 7 f.

[19] In this sense, in particular, N. BOBBIO, *Teoria generale del diritto*, Torino, 1993, 25, which states that the problem of the effectiveness of a statute is the problem of whether that statue is followed by the persons to whom it is directed (the so-called recipients of the legislation) and, if it is violated, is made valid with the coercive means of the authority that has placed it.

[20] N. BOBBIO, *Teoria*, cit., 25.

[21] See G. VETTORI, *Il diritto*, cit., 691; ID., *Effettività*, cit., 401.

Actuality is linked to the problem of the difference between statutory law and the law as it is effectively applied, valid not only as an expression of legislative power but as effectively existing in the legal system[22], allowing concreteness of the legislative data in the social reality in which it is applied.

In this way it is possible to access a different notion of effectiveness, no longer an expression of that finalistic vocation which should concern the system of regulations and the single statutes, but rather inspired by the ascertainment of the real being of statutes in the legislative system.

5. *Conflict as a tool for measuring law*

Starting from this conception we see that the effectiveness can be declined, for our purposes, as effective application of the statue or, moreover, as the current relevance of the statute taken from time to time, thereby implementing this concept with that of the difference between statutory law and the law as it is effectively applied, where this latter - however more specific to the effectiveness - completes its meaning as its constitutive element.

In this sense, effectiveness and the difference between statutory law and the law as it is effectively applied are based on a common idea, in some respects also related to efficiency, namely the evaluation of the law and more generally of law through a systematic consideration of the effects. Effectiveness, so intended, implies in fact the observation of the effects of the law in the reality of its implementation by the recipients, meaning both the subjects to which the law applies as well as those that apply the law.

[22] P. PIOVANI, entry *Effettività (principio di)*, in *Enc. dir.,* XIV, Milano 1965, 425.

This approach focuses on the conflict[23], that is to say one of the applicative moments of the statutory disposition, which is summarized and made concrete in judicial decisions[24], in a certainly more general perspective of added value of the factuality[25].

On the other hand, it is precisely case law that seems to satisfactorily combine the two areas of recipients as identified before, that is to say those subjects to whom the law applies and those subjects who apply the law[26], on the assumption that the judge does not evaluate the effectiveness but in principle contributes significantly to making the provision effective or ineffective[27].

In this regard, it has been effectively affirmed that the decision is not a simple interpretation but has delegated power to formulate, through rational arguments, enrichment and

[23] On the topic, recently, see N. LIPARI, *Il diritto civile tra legge e giudizio*, Milano, 2017, 44, where the concurrent role of jurisprudence and scholar's opinion on the formation of the juridical rule is emphasized.

[24] See C.M. BIANCA, *Il principio di effettività come fondamento della norma di diritto positivo: un problema di metodo della dottrina privatistica*, in *Estudios de derechocivil en honor de CastánTobeñas*, II, Pamplona, 1969, 69, which states that jurisdiction is a moment in which the state system expresses its ultimate guarantee of appeal to the law. In this perspective, therefore, it is at this moment that effectiveness of juridical rule can be verified, that is to say in the meaning and in the content in which it can concretely be relied upon.

[25] In this regard, even in different perspectives, the observations of M. GRONDONA, *La responsabilità civile tra libertà individuale e responsabilità sociale. Contributo al dibattito sui «risarcimenti punitivi»*, Napoli, 2017, 30 f.

[26] On these profiles, a suggestive reading of the problems connected with the jurisprudential moment is that of P. RESCIGNO - S. PATTI, *La genesi della sentenza*, Bologna, 2016, where through the investigation of the jurisprudential application of statutes highlights the correlation between law and society, thus enhancing the social function that the law plays.

[27] See M. ORLANDI, in *Il diritto civile, e gli altri*, edited by V. Roppo and P. Sirena, Milano, 2013, 448, which, even in the critical view of the phenomenon under examination, affirms the central role of the decision as an appropriate instrument to give certainty.

improvement of the positive statements[28], so as to be considered the *ius dicere* of jurisprudence and as an indispensable parameter of evaluation of the legal status of the statute.

In truth not all the judicial dispositions can be evaluated and measured, as to the effectiveness, according to their legal application, given that some statutes are certainly effective and object of constant application without finding a significant moment in case law because, for example, they are spontaneously applied by the recipients. It must therefore be recognized that according to the standard taken into consideration there are variables that do not allow the same result to be attributed to the result obtained.

Taking settled law as of the indexes representing a statute, it is possible to identify for which statutory provisions this constitutes a significant and even measurable reference parameter, as well as to determine the value the degree of conflict of the statute, in terms of size on the basis of a numerical scale or a unit of conventional measurement, and therefore the degree of relevance of the moment it was applied.

In this perspective, the effectiveness and the relative measurement that is obtained through case law are placed in the logic of subsequent evaluations (*ex post*), with the objective of evaluating the representativeness of the settled law with regard to statutes that have already been enacted by the legislator.

6. *Quantitative measurement by the jurisprudence*

The results of such research can have different uses and they

[28] A. CATANIA, *Manuale*, cit., 110.

can be cleared of the critical aspects that other systems of law measurement seem to present.

Regarding this last point, the debate that the measuring system that the World Bank generated in the Doing Business report[29], which in some ways constitutes the concrete application of the law and finance method, is very well known. This method is based on a comparative measurement of the performance of the various systems as perceived by the operators and as a result of this of the individual legislation, but without taking into account the legislative declamations[30].

However, this method, beyond the various perplexities which it has raised from the point of view of its suitability to constitute a valid instrument for assessing a particular legal system, lends itself to a more general consideration, in some ways inherent in the methodology it inspires, since this approach, despite being characterized by objectivity that derives from being the expression of a mathematical method, can not however be considered objective because this characteristic is not attributable to the model that is it is being applied to, since the latter is always an evaluation tool and therefore discretionary by definition.

A measurement system that instead takes conflict and the application of the statute as a benchmark seems to be more useful for our purposes, where, in the first instance, it allows one to determine whether with regard to a single statutory provision the

[29] On the theme compare. B. DU MARAIS, *Mesurer le droit? Ouplutot l'évaluer? Quelques réflexions sur les limites méthodologiques des rapports 'Doing Business'*, in *RDAI*, 2006, V, 675 ff.; F. DENOZZA, *È possibile una misurazione delle prestazioni dei sistemi giuridici?*, in *Annuario di diritto comparato*, 2012, 73 ff.; and the book *Les droits de tradition civiliste en question. À propos des rapports 'Doing Business'*, Paris, 2006.

[30] A. GAMBARO, *Misurare*, cit., 36.

case law may or may not constitute a useful reference to evaluate the relevance of the single statute[31].

If the answer to this question is positive, that is to say that the jurisprudence can constitute a parameter of relevance for the evaluation of the effectiveness of the standard with regard to a single statutory provision, it is possible to use the research results for a purpose which will certainly be more ambitious and complex, but most certainly be more useful.

In fact, moving from purely quantitative measurement to the comparative comparison between legislative text and court applications of the single provisions it is possible to put in place that finding which constitutes the essential moment of the interpreter's activity and which is reflected precisely in the effectiveness and the difference between statutory law and the law as it is effectively applied[32].

This leads to is another way of understanding measurement, of accepting the authoritatively offered meaning, according to which the principle of the difference between statutory law and the law as it is effectively applied has now become a measure of legality[33].

Every statutory disposition can be interpreted in various ways, but among these interpretations the one that finds application under the principle of the difference between statutory

[31] C.M. BIANCA, *Il principio,* cit., 69, notes that the court's decision allows however to check whether and to what extent the order imposes the application of the statute as a principle of order.

[32] In enhancing the moment of implementation of the law, it should not be forgotten that some institutions are fully elaborated by jurisprudence, since it is now an established fact that even in private law some rules are formed by legal practice (for the origins of this phenomenon, with regard to German experience, see G. BOEHMER, *Grundlagen der bürgerlichen Rechtsordnung*, Tübinger, 1950-1952).

[33] P. GROSSI, *Un impegno per il giurista di oggi: ripensare le fonti del diritto*, Napoli, 2008, 67.

law and the law as it is effectively applied, in day-to-day enforcement, has a particular importance by virtue of such application[34].

7. *Living law and recoding*

Without adhering to conceptions that enhance legal realism, what has been said so far is based, on the consideration that case law plays a central role in the construction of living law where effective law is an unavoidable parameter of the single regulatory provision, given that once it has acquired operative force in case law applications any interpretation becomes the legislation of the order[35].

This assumption does not seem to meet the criticisms that have recently been made in substance in relation to the difference between statutory law and the law as it is effectively applied, from which would generate a *vulnus* of calculability in favor of subjection to the authoritative will of the judge[36], as if it is certainly true that through the principle of the difference between statutory law and the law as it is effectively applied a decisive role to the judicial application is given; conversely, an elasticity is acquired that allows us to provide protection to interests that emerge in social reality[37],

[34] See G. SICCHIERO, *Il principio di effettività e il diritto vivente*, in *Giur. it*., 1995, IV, 271, which also recognizes relevance to other competing interpretations that are not applied, in a given historical moment, to application, since, given the changeable nature of living law, alternative models may in time become everyday reality.

[35] C.M. BIANCA, *L'autonomia dell'interprete: a proposito del problema della responsabilità contrattuale*, in *Riv. dir. civ.*, 1964, I, 491.

[36] Thus G. VETTORI, *Effettività*, cit., 403.

[37] On the point see C.M. BIANCA, *Il diritto tra universalismo e particolarismo: categorie privatistiche e istanze di giustizia*, Napoli, 2012, 151.

thereby aspiring to form the spirit that the law must be oriented towards, or rather, the satisfaction of the need for justice[38].

On the other hand, it seems opportune to remember that the justification of the statute resides in ethical principles long before it does in legal acts from which it derives only formal foundations, such as freedom, equality and, indeed, justice, in the absence of which the statute is not able to legitimize itself[39].

From another point of view, the role of living law and its scope in the light of the difference between statutory law and the law as it is effectively applied to the statute can not be said to be in contrast with the principle of legality because, as noted in by legal scholars, it is understood to be the «principle of difference between statutory law and the law as it is effectively applied as a mechanism suitable to curb the process of subordination of the law to politics», but rather it should now be assumed that the validity of laws can not be measured on the sole basis of formal indexes, because it is deemed necessary «that the regulatory system in general and its legislative component in particular find the root and the ultimate foundation in a given social reality»[40].

This approach does not seem to be able to lead to a renunciation of the legal dimension and indeed any result of the sort ought to be refused, because it is not able to affirm an exclusive factuality of the law, but needs to recognize a constructive role to social reality[41], which together with the statutory reality, inspires the result of justice to which every legislative model must tend.

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38 See F. SANTORO - PASSARELLI, *Il codice e il mantenimento dei valori essenziali*, in ID., *Ordinamento e diritto civile. Ultimi saggi*, Napoli, 1988, 40.

39 See C. DELL'ACQUA, *Principio di effettività e analisi preventiva delle norme*, in *Dimensione dell'effettività. Tra teoria generale e politica del diritto*, edited by A. Catania, Milano, 2005, 379.

40 N. LIPARI, *Le fondi del diritto*, Milano, 2008, 13 f. Before see F. SANTORO - PASSARELLI, *'Quid ius'?*, in ID., *Ordinamento*, cit., 26

41 See A. CATANIA, *Effettività e modelli di diritto*, in *Dimensioni*, cit., 46.

It is therefore confirmed that the case law, or rather, that a constant judicial interpretation confers on the legislative precept its real value in the life of relationship[42], thereby giving substance to the legislative precept, which becomes legislation[43] or, if you prefer, thereby maintaining a certain adherence to the legalistic conception, which is a constitutive element of positive law[44].

In this sense one can undoubtedly appreciate the importance when seeing things on the social side, according to which order is the product of that competition represented by an inter-individual conflict that discovers in a trial, and especially in judgment, a possibility of composition, and, considering things from the strictly juridical side, of the competition that discovers in the argumentative techniques the tools that allow the implementation of that hermeneutic of the factuality which is what allows constant adaptation of what can be continued to be called the legal system[45].

Given this, the central role that must be attributed to living law must not, however, lead to the prospect of a reform of the civil code that is discussed in the current legal-law landscape[46], to

[42] Thus C. Cost. 15 aprile 1956, n. 3, in *Giur. cost*., 1956, XXI, 568 ff., which goes on to state that the statutes are not what appear to be proposed in the abstract, but which are applied in the daily work of the judge, intended to make them concrete and effective.

[43] It is the well-known setting of V. CRISAFULLI, entry *Disposizione (e norme)*, in *Enc. dir.*, 13, Milano, 1994, 448 ff.

[44] This seems to be the opinion of F. ROSELLI, *Il principio di effettività e la giurisprudenza come fonte del diritto*, in *Riv. dir. civ.*, 1998, II, 23 ff., which recalls the setting of Hans Kelsen.

[45] M. GRONDONA, *La responsabilità*, cit., 38.

[46] It must also be borne in mind that the opportunity for a reform of the civil code, or a re-codification, is not at all undisputed in doctrine. In fact, in the face of the favor expressed by some about a reformist intervention on the civil code (see G. ALPA, *Verso la riforma del codice civile*, in *Riv. crit. dir. priv.*, 2018, XXXVI, 3 ff., and C. SALVI, *Le ragioni di una moderna cultura critica del diritto privato*, in *Riv. crit. dir. priv.*, 2018, XXXVI, 7 ff.), do not lack different opinions that call for greater prudence (see M.R. MARELLA, *Tre snodi strategici per ripensare lo statuto del diritto privato*, in *Riv. crit. dir. priv.*, 2018, XXXVI, 9 ff.,

consider the opportunity to acknowledge uncritically and slavishly the jurisprudential solutions in legislative texts, thus following the recent example of the French reform of the law of obligations and contracts, appropriately defined as (re)codification of constant jurisprudence[47], precisely to represent that the legislator, rather than innovating the existing discipline, is largely limited to incorporating the jurisprudential interpretations on the individual legal provisions, transferring the former to legislative data.

As noted, the centrality and social relevance that must be attributed to the civil codes require to prefer solutions that with regard to their possible[48] modernization have as unavoidable objective that of developing an accentuated reformist potential, thus actively promoting a change in private law that is not only a codification of jurisprudential rules but is an instrument which is capable of changing private law[49]. Furthermore, it should not be

which believes that before thinking of a re-encoding, we must provide a response to questions of method; as well as L. NIVARRA, *Editoriale*, in *Riv. crit. dir. priv.*, 2018, XXXVI, 325 f., which, although hoping for a sectorial intervention, in particular in civil liability law, believes that we should avoid the risk that the hypothetical new code turns out to be more a collection than a system) .

[47] The expression, although readapted, is borrowed from S. RODOTÀ, *Aspettando un codice?*, in *Riv. crit. dir. priv.*, 1998, XVI, alredy in ID., *Critica del diritto privato. Editoriali e saggi della Rivista Critica del Diritto Privato* edited by G. Alpa and M.R. Marella, Napoli, 2017, 12, which, precisely with reference to the work to amend the *Code civil*, launched in 1996 with the establishment of the *Commission Supérieure de codification*, spoke of «codification à droit constant». On the theme see N. MOLFESSIS, *Les illusions de la codification à droit constant et la sécurité juridique*, in *Revue trimestrielle de droit civil*, 2000, 186 ff.

[48] As it is not necessarily necessary to support the revision of the code, given that the centrality of this requires to carefully assess the need, which must really be such, to systematically intervene on an important regulatory complex such as the civil code. In this sense, the speech made concerns the method of evaluating this necessity which does not imply the idea of an uncritical need for reform of the civil code.

[49] See P. SIRENA, *Verso una ricodificazione del diritto privato italiano? Il modello del nuovo* Code Napoléon, in '*Liber Amicorum*' *Pietro Rescigno*, II, Napoli, 2017, 1885.

forgotten that if codification is always a dynamic process, designed to affect the previously defined equilibria[50], re-coding has an additional meaning with respect to codification[51], in so far as it implies the idea of providing a new discipline to the interests of individuals by having an impact *on* (and not *in*) the system.

In this context, once the meaning of the effective legal dimension of the law in its social reality has been understood, it seems possible to recognize a non-secondary relevance to the legislative measurement of the rules in the evaluation process of the provisions of the Civil Code, certainly capable of constituting an unavoidable instrument available to those wishing to verify the adequacy of the regulatory framework in question, with the awareness that if today, more than yesterday, the legislative moment is the essence of living law, this entails that the jurist needs to play the role he or she is attributed in the sign of the persuasiveness of the argumentation, linked to the rationality of the solution rather than to the authority of the source[52].

ABSTRACT

Nell'attuale momento storico è sempre più diffusa l'idea che il codice civile richieda una riforma, sulla scia di quanto già avvenuto in Germania e in Francia. Nella prospettiva del metodo cui è necessario fare riferimento per valutare l'opportunità di un

[50] See S. RODOTÀ, *Il Codice civile e il processo costituente europeo*, già in *Riv. crit. dir. priv.*, 1998, XVI, and now in ID., *Critica*, cit., 333.
[51] On the point see F. SANTORO - PASSARELLI, *Il codice*, cit., 33.
[52] N. LIPARI, *A partire da "L'invenzione del diritto" di Paolo Grossi*, in *Riv. dir. civ.*, 2018, LXIV, 352.

intervento legislativo di tale importanza, il saggio indaga e approfondisce il concetto di efficacia normativa attribuendo una rilevanza centrale al momento applicativo della norma giuridica, tramite una imprescindibile valorizzazione del precedente giurisprudenziale.

In the current historical moment the idea that the civil code requires a reform, in the wake of what has already happened in Germany and France, is increasingly widespread. From the point of view of the method to which reference must be made in order to assess the appropriateness of a legislative intervention of such importance, the essay investigates and deepens the concept of regulatory effectiveness by attributing a central relevance to the moment of application of the legislation, through an essential enhancement of the previous jurisprudence

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