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A “revolutionary decision”: Court of Cassation judgment 9878/08 and the notary’s opposing interest
in not working in a competitive system

1. The oddities of case law versus neocon liberalisation? 2. The precedents of the courts’ ruling as to merits slashed.
3. At last, the 18 Brumaire of the notarial profession? 4. Judgment 9878/08 as a revolution against a revolution:
the notarial scale of fees, the interests of the individual notary and the notarial class and their judicial protection.

1. This judgment by the Italian Court of Cassation could be classified as one of the oddities of the law, which is generally not prone to move forward by leaps and bounds but is more accustomed to plodding its methodical way through familiar categories, slowing down the pace of political and social events.

It holds that the work of the notary does not come under the heading of the activities of the liberal professions, the providers of services of the intellect, but rather is a public office and therefore extraneous to the system of competition.

And this affirmation is being made right at the time of an outburst of thoughtless demolition, a time when other State authorities, adopting the principles of a neocon style of government, are pursuing the idea of deconstructing a function and a professional expertise not by using its methods to break down the old contexts and create new ones, but by demolishing it, starting with its financial foundations. Competition on rates in a professional sphere in which tariffs are administered from above can only cause irreversible damage to the system.

This dismantling of those intermediate functions that are the servants of welfare is a procedure typical of the post-Fordist era: it generates not cohesion but social fragmentation by promoting and over-lauding the cognitive abilities of the individual while at the same time punishing excess by the exercise of vertical power, with the aim of destroying individual capacity by its mortification. Such a process relegates groups to the fringes of society, bringing zero-tolerance systems of social control to bear on them by repressing deviant behaviours through administrative and criminal law. There has been no careful analysis of this system, which has been taking the contract – an autonomous act in a

delicately-tuned system of reciprocal control between the parties involved – and gradually bogging it down in the mire. Negotiators of rights will cease to be; there will be bearers of conflicting interests, governed according to standards imposed by law and regulation.

But this is not the place to tackle the issue, even though it is rendering meaningless a function that is apparently being deprived of one of its roles – the role defined by the eminent jurist, Francesco Carnelutti, as acting as a judicator between parties to an agreement. The role now being established is that of mere control, depriving the notarial profession of some of its content besides contributing to its disintegration, given that today its policing function is being administered not by practitioners exercising their functions in the public interest, but through mercenarisation: in other words, through the exercise of control by a proliferation of people, who are not necessarily public officials.

2. It is in this frame that the canvas woven over the past few years to portray the legal professions, the notarial profession in particular, seems to have been skilfully (or irresponsibly?) slashed in the style of the spatialist artist Lucio Fontana. It is a canvas that has also been created by precedents of courts ruling as to merits. I would recall the “crank decision” by the Turin Court of Appeal, no 791 of 11 July 1998, on the intellectual professions and the enterprise. These are the Court’s original ideas: a professional is an entrepreneur, professional scales of charges are anti-competitive agreements, the Italian National Bar Council is an association of enterprises, and the non-application of the legal profession's scale of charges means that articles 2233 and 2234 of the Civil Code are applicable to the professional service rendered. It is an idea also entertained by certain legal scholars. I remember a comment on that judgment that appeared in *Giurisprudenza Commerciale*, in an attempt to justify, in terms of method, the methodological quirkiness of the Turin bench. The argument was that when a judge is called upon to interpret legal concepts he is attributed the power to confer on them “whatever meaning enables him to arrive at what he perceives with his senses to be the fairest and most balanced solutions to concrete problems”. Judicial science reduced to artistic whim! And, in the spirit of that technique, it was affirmed that the distinctions between the concepts of the entrepreneur and the intellectual professional are all derived from dogma, just as the aversion to the possibility of setting up professional partnerships is wholly dogmatic. This fuddy-duddy dogmatic concept is contrasted with the novelty of the concept of the enterprise inherent in the Community model, in terms of competition, to the effect that any natural and legal person taking part in economic life may be regarded virtually as an enterprise. When people start to wield an axe,

there is always someone ready to use it expertly for beheading. The Cassation judgment is also cutting: it cuts canvas, though, not heads, using not an axe but a trimmer.

It places itself in the wake of doctrinaire efforts to reconcile Community and domestic law by preaching the verticality of such an inter-system relationship, leaving it to domestic systems to regulate horizontal relations and therefore private relations, in such a way that European private law and national private law “find their place one beside the other”, as advocated by Hans-W. Micklitz.

The approach adopted by the Court of Turin and by learned commentators on its judgment has ignored this process of mutual integration. The fault lies at the roots: the belief that the relationships between the domestic system and Community law are relationships between differing roots of the same system, immediately followed in the legalistic mentality of the courts by the creation of a hierarchical relationship – with the Community source ranking higher, the domestic source lower – rather than regarding the two as being different systems with equal dignity, whose principles need to be reconciled at the time of interpreting the law.

Quite a lot of water has flowed under the bridge since then: European Court of Justice case law has been refined as regards the legal professions (as evidenced by its judgment of 5 December 2006 in joined cases C-94/04 and C-202/04); Italian Court of Cassation case law has been refined on the subject of interests and their protection at the time of seeking remedies, and therefore in civil law (as evidenced by the judgment of the joint divisions of the Court of Cassation 500/1999); academic commentary is being refined on the subject of individual interests, reflecting the strong pressure exerted by directives to protect class or group interests or individual interests in the consumer field.

On the subject of Community directives, Court of Justice decisions and the intellectual professions (if there have been such decisions), there is no need to refer to the appeal brought by Giorgio Oppo against the “constitutional reservations and the intervention by the Constitutional Courts in defence of reserved and non-coercible legal spaces in which the highest values of our legal civilisation and the human person lie”.

The slashing of the canvas by the Court of Cassation has therefore not come about just by chance; it is the outcome not of a conservative revival but of a revolution against the revolution, and therefore the only possible revolution – to use Jacques Derrida’s provocation by Victor Hugo’s *Les Misérables* on the subject of 1848.

3. There was an outcry in the press about the judgment, as if it were an 18 Brumaire of the notarial profession. Nowadays it is press headlines that dictate how judgments are seen. It is a lesser evil than the principles of law being established by court decisions that so distressed Gino Gorla, something he saw as the worst of the sins of our legal mentality. There is no limit to dumbing down. In the tabloid headlines, as in the legal precepts of judgments, the practices of law are in turmoil. The risk is that they boil down to no more than empty talk. It is really a minor risk, given that it amounts to no more than borrowing the techniques of TV talk shows. The shows that attract audiences and therefore a clientele. Court of Cassation judgment 9878/08 in fact refers indirectly to clientele and to a far less virtual method of attracting a clientele than that of the TV talk show: that of charging substantially lower rates, to the detriment of colleagues. This is a method widely used in the notarial profession to capture the largest number of clients, relying on the fact of operating outside a competitive system, one in which the cost of a service is governed not by the law of the market but by the laws of the State. It is the State that, having regard to the public function exercised, the nature of the service to be provided and its quality standards, sets the cost of notarial services. In such a system of imposed prices, undercutting takes on the significance of an offence against the public economic order, one that can be disciplined by penalties. And the Court of Cassation has upheld the appeal by the Verona Notarial Council against a judgment of the Verona Court that had annulled the imposition of a disciplinary sanction by the district Notarial Council on a notary who had engaged in unlawful competition with his colleagues by repeatedly and continuously reducing his fees and charges. This is the framework for the judgment in question, taken up by those sectors of the press that feature such judgments in their headlines, and this then is the way that the Court of Cassation has slashed the canvas of which we have spoken above. A true 18 Brumaire. It is a victory that restores the notarial profession's position over one of its bugbears, the former liberalising Minister Bersani who, in his Decree Law 223 of 2006, undermined the minimum charges on the notaries' scale by opening up the market to the professions. (And the notarial profession's many bugbears come in a range of different guises, from TV anchormen to journalists and financial commentators, from obscure parliamentarians to managers, unionists and the authorities – one merely needs to glance at the notaries' e-mail lists.)

But this is not exactly how things stand. Because the judgment refers to episodes preceding the date on which Decree Law 223 of 2006 came into force, and therefore does not dictate any legal principle regulating the punishability of undercutting the scale of charges today.

4. As Gino Gorla recommends, one should not place one's trust in the precepts of court judgments (nor, for all the more reason, in newspaper headlines). Which means that it is true that the Cassation judgment is an 18 Brumaire, but not in the way the press would have us believe, i.e. in the traditional acceptance of a coup against a coup, a victory for the notarial profession over Decree-Law 223/2006, but closer to the reading of the event by Karl Marx in his "*Der Geist der Revolution*" (the spirit of the revolution). It is a genuinely revolutionary judgment. Why? First of all, because the Court states that "it cannot be found that the provisions as to the inderogable nature of the notarial scale of charges are in conflict with Community legislation, in particular with Articles 81 and 82 of the EC Treaty (a conflict that would in any case imply its application, given the legitimacy of Community law). Such a statement has its foundation in a legal precedent, a European Court of Justice decision of 5 December 2006 which, on the subject of the legal profession's charges, held that articles 10, 81 and 82 of the EC Treaty do not preclude a Member State from adopting a legislative measure which approves a scale fixing a minimum level of fees from which there can generally be no derogation, where it serves an overriding requirement relating to the public interest; it is a matter for the national court to decide whether the restriction on freedom to provide services introduced by that national legislation fulfils those conditions.

And then, in the light of that decision based on the public nature of the notarial office, the nature of notaries as public officials, their compliance with specific subjective requirements, their nomination following an examination of their fitness, the supervision to which they are subject, together with the stringent rules by which they are governed, the principle is established that "in relation to the notarial activity, it is undoubtedly to be precluded that, in a competitive system, services may be freely rendered by other professionals *from the same country* (the italics are ours) or from other countries in the Community, which would render the inderogability of scales of charges incompatible with the said EC measures". The consideration of the legitimacy of a scale of charges is conducted in terms not of the rights but of the interests of the notarial class and its individual notaries. The Court's reasoning is therefore developed in terms of the principles of the EC Treaty regulating free competition, the same as those on which the provision of Decree Law 233 of 2006 is based. The 18 Brumaire of the Court of Cassation is a revolution in a revolution. The application of the rules that govern free competition and that therefore base notarial activity on interests, not rights (the first revolution) leads to the affirmation that it is in fact from the viewpoint of interests that such activity is excluded from free competition (the second revolution).

The consequence of such a revolutionary pronouncement has not been fully evaluated.

The Court judgment recognises not only the legitimacy of a notarial scale setting minimum fees, since the freedom to provide services does not include the notarial profession, but also an opposing interest of the individual notary or the District Notarial Council, seen as objectively deserving of protection through remedies against acts of competition by one or more notaries.

The foundation for such a judicial claim is judgment 500 of 1999 given by the joint Divisions of the Court of Cassation, concerning not only the relationship between the public and the private interest but also the relations among private individuals or, as Oppo states, between the right and the interest of the private individual.

The judge in the ordinary court may then be called upon to give a decision on remedies for prejudice to the interest of one notary due to the competitive acts of another notary, but cannot find against a district Notarial Council that has failed to ensure that notarial activity within its district is not being conducted in a competitive system; nor can that court decide on matters of compensation for prejudice to the interest of the notarial class, represented by the district Council, against one or more notaries practising in a competitive system.

Failure to comply with the scale of fees, then, will not be so much, or not only, the ground for a possible disciplinary measure (and this is yet to be seen), but it will surely be the subject of a civil judgment on indemnification in the immediate future.

5. The protection of individual cognitive abilities that is jeopardised by the governance of the post-Fordist state has its safeguards in the Community rules governing free competition. On the level of interests, this relies on *homo oeconomicus* as protected by Community legislation.

The key to this revolutionary process lies in the proportionality among conflicting individual interests and between individual and collective interests, and this in itself contains potential that has been sparsely investigated and little explored up to this time.

This creates the journalistic paradox of the victim being protected by the same norms that, in the opinion of the hack journalists, ought to have sacrificed him.

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