

TABLE OF CONTENTS

PART I HISTORICAL AND THEORETICAL ITINERARY ON 'IUS-DICERE'

CHAPTER 1

The model of ordinary jurisdiction enshrined in the Italian Constitution and its development

1. Introduction to the study of the 'paralegislative' function of the judge 3
2. The Continental Judge. The separation between Common law and Civil law from the 'Romano-Germanic' perspective 8
 - 2.1. The traits of Civil law judicial power in the age of absolutism 9
 - 2.2. The French Revolution and the characters of the emerging paradigm of jurisdiction: the (myth of the) judge as "bouche de la loi" 13
3. Innovations of Germanic theory between the 19th and 20th centuries and the Italian constitutional model of jurisdiction 27
 - 3.1. Kelsen's doctrine as a divide and founding moment of the constitutional model of jurisdiction transposed into the Italian Constitution of 1948 29
 - 3.2. The Italian constitutional model: jurisdiction since the 'Statuto albertino' to the 1948 Constitution 38
 - 3.3. From the Constituent Assembly to the Constitution: the model of judiciary body and judicial function implemented in Italy 43

CHAPTER 2

The other possible model: the judge in the Common law

1. The birth of the Common law and its peculiarities 55
2. Some elements of the development of the English Common law in the modern age and the 19th century 60
3. The judge in the English Common law 65
4. The judge in the United States Common law 76
5. Considerations on the function of the judge in the contemporary Common law 84

CHAPTER 3

The Judicial interpretation in the Italian legal system

- | | | |
|------|---|-----|
| 1. | The Judicial interpretation. The evolution of theories of judicial interpretation | 93 |
| 1.1. | The so-called ‘enlightenment’ or ‘cognitive’ or ‘formalistic’ theory | 96 |
| 1.2. | The so-called ‘skeptical-realistic’ doctrines | 98 |
| 1.3. | The so-called ‘hermeneutic’ theories | 102 |
| 1.4. | The so-called theory of persuasion | 110 |
| 2. | The boundary between interpretation and application of the legislative disposition | 113 |
| 3. | The representative-democratic consequences of the evolution of the judge’s function | 117 |
| 4. | The importance of the practical case and its possible overestimation | 124 |
| 5. | The disposition-norm distinction as a concurrent element in the development of the judge’s function | 129 |

PART II

JURISPRUDENTIAL CASES.

PROBLEMATIC ASPECTS OF THE JURISDICTIONAL DYNAMIC

CHAPTER 4

Some emblematic conflicting cases between law and politics

- | | | |
|------|---|-----|
| 1. | The so-called ‘anonymous childbirth’ | 147 |
| 1.1. | The framework of the intervening legislation and case law | 147 |
| 1.2. | The appeal to the Court of Cassation | 151 |
| 1.3. | The decision of the United Sections and the interpretation of the principle-additive ruling | 154 |
| 1.4. | An example of legislative omission | 155 |
| 1.5. | The question of the cogency of the principle-additive ruling where it carries a clause of ‘reservation to the staturoy-law’ | 157 |
| 2. | The so-called ‘stepchild adoption’ | 163 |
| 2.1. | The framework of intervening legislation and case law | 163 |
| 2.2. | The appeal to the Supreme Court by the Attorney General | 166 |
| 2.3. | The decision of the Court of Cassation | 167 |
| 2.4. | The “institutional” issue of the attempted appeal to the United Sections (and the parliamentary background) | 169 |
| 2.5. | The interpretation of the legislation by omission | 174 |
| 3. | The so-called ‘punitive damages’ | 175 |
| 3.1. | The framework of the relevant legislation and case law | 175 |

3.2. Compliance with the public order clause and with the European integration principle	181
3.3. The reference to values	182
3.4. The necessitated and necessary operational rules	184
4. The so-called ‘surrogacy’	186
4.1. The relevant issues of the case	186
4.2. The appeal by the Attorney General and by the Ministry of the Interior	189
4.3. Public order, the Constitution and the legislature	190
4.4. The systemic scope of the notion of public policy chosen by the judgment	192
4.5. The uncertainties arising from the Supreme Court ruling	195
5. The right to be forgotten	198
5.1. A necessary premise on the qualification of the right to be forgotten	198
5.2. The case decided in ruling No. 6919 of 2018	201
5.3. Some considerations regarding to the <i>modus operandi</i> of the Court of Cassation	205
5.4. (Continued) consequences of this <i>modus operandi</i> . The case of Court of Cassation, United Civil Sections, judgment No. 19681 of 2019	207

CHAPTER 5

**Additional problematic cases of criminal law,
on compensation damages and new technologies**

1. The so-called ‘impeditive seizure’ against legal persons	211
1.1. The Supreme Court decision and the system of liability of entities	211
1.2. The decision of the Supreme Court	214
1.3. A triple doubt	217
2. The question of causation in the assessment of liability medical liability and damages	220
2.1. The issue of medical liability	220
2.2. Law August 7, 2017, No. 24 and the choice of the legislature	222
2.3. The decision of the Court of Cassation, Civil Sec. III, judgment 26 July 2017, no. 18392	223
3. Compensation for damages between the right to health and the right to self-determination	226
3.1. The case of delayed diagnosis	226
3.2. The relevance of the decision	229
4. Compensation for non-pecuniary damage the so-called ‘decalogue’	230
4.1. The framework of the relevant legislation and case law	230
4.2. The Court’s reasoning	233

4.3. The so-called ‘decalogue’	234
4.4. Some reflections on the so-called ‘decalogue’ and its systemic relevance	236
5. Algorithms, Social Networks and Fundamental Rights	239
5.1. Algorithms and their knowability: Court of Cassation, Sec. I Civil, Order of May 25, 2021 No. 14381 and Council of State, Sec. VI, ruling of February 4, 2020, no. 881 229	239
5.2 Social media, political consensus, and freedom of manifestation of thought. Towards a new jurisdiction?	248

PART III

ANALYSIS OF THE DYNAMICS OF THE JUDGE’S FUNCTION. THE ‘PARALEGISLATIVE’ FUNCTION OF THE JUDGE

CHAPTER 6

Analysis of the contemporary dynamics of the judicial function

1. Some inferable elements from the cases analyzed	271
1.1. The “statute-judge” relationship as the “judge-Constitution-Supranational charters” relationship	272
1.2. The judge-made decision of the case as an opportunity to regulate an institution or legal field	277
1.3. The “anticipated” balancing of rights in the common jurisdiction	280
1.4 The “nomofilachia”	284
1.5. Some evolutions of the nomophilactic model of the Supreme Court	292
1.6. Constitutionally compliant interpretation: a tool more fascinating than useful	297
2. Attempt to use the theoretical framework of the “excess of jurisdictional power”	298
2.1. The different hypotheses of excess of jurisdictional power	298
2.2. The genetics of excess of jurisdictional power: the abuse of right	301
2.3. Configurability and consequences of abuse of right	304
2.4. The excess of power as a public case of abuse of the right	308
2.5. The traditional dogmatic of excess of jurisdictional power	312
3. Recent case law on the subject of excess of jurisdictional power	314
3.1. The latest decisions of the Supreme Court	314
3.2. The jurisprudence of the Constitutional Court on excess of jurisdictional power	318
4. Final considerations on the risks of the configuration of excess of jurisdictional power as an abuse of right	321

- 4.1. The Prevention: the legislative moment, especially the connecting mechanisms provided by the House of Deputies and the Senates' Regulations 322
- 4.2. The conflict between powers and excess of jurisdictional powers 331
- 4.3. The professional liability of the magistrate-public servant as both a preventive and repressive containment of excess jurisdictional power 334

CHAPTER 7

Conclusions.**The three factors in the development of the paralegislative function of the court Italian, in the convergence of Common law and Civil law**

- 1. The crisis of the law as the first factor of misalignment between constitutional theoretical model and constitutional functions exercised in practice 346
 - 2. The European Union and the circuit of Euro-Union law as the second impetus to the evolution of the judge's function in Italy 354
 - 3. The political-institutional crisis of the 1990s and the evolutions of the form of government and the form of state: a new context for the paralegislative judge 360
 - 4. The Cappato case as a paradigm of a new model? 363
 - 4.1. The institutional significance of the constitutional judgment provocation 365
 - 4.2. The Ordinance No. 207 of 2018 367
 - 4.3. The Judgment No. 242 of 2019: a new decisional paradigm? 371
 - 5. Overcoming Common law and Civil law models: Toward a leveling out of divergences in the paralegislative function of the ordinary judge 376
- Abstract* 398