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Jurisdiction Without Conflict? Remarks on Non-Adverse Proceedings in Italy
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This essay describes the procedural treatment of non-contentious matters in Italy. After a brief historical recount on the evolution of the concept of 'non-contentious jurisdiction', from Roman law to the law in force, the chapter emphasizes the extreme variety of non-adverse proceedings governed by the Code of civil procedure and special statutes as well. Furthermore, the chapter expands on the 'default rules' of non-adverse proceedings (meaning the rules applicable insofar as the law does not ordain otherwise) provided by the Code of civil procedure. These rules outline a procedure in chambers that is simpler and less time-consuming than the ordinary one: for these reasons, the procedure in chambers has been increasingly adopted for the judicial treatment of a few contentious matters, with mixed results. As far as non-contentious matters, in light of the notorious overload of Italian courts the author believes that they could be handles more efficiently by administrative authorities.

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1. In Italy, non-adverse proceedings are often referred to by resorting to the umbrella-term 'non-contentious jurisdiction' (in Italian, '*giurisdizione volontaria*'). This expression is quite common in the Italian legal jargon: it is used to define a large portion of the legal matters that notaries public are in charge of; it can be read on the doorplates of the offices that are present in every courthouse and that deal with 'Affairs of Non-Contentious Jurisdiction'; it represents the title of many legal treatises and course books that law students are supposed to read and become familiar with. In spite of all that, it is difficult to offer a specific and unequivocal definition of the expression, since it refers to a variety of disparate legal matters and procedures that do not have much in common. Probably the only definition of 'non-contentious jurisdiction' that could make some sense is the intuitive one: it is a form of judicial authority exercised as regards matters or issues that are not in controversy between two or more parties. Since it is well established that Roman law made a distinction between contentious jurisdiction and *iurisdictio voluntaria*,[1] it is reasonable to say that

[1] See, for instance, Fernández de Bujan, Antonio. 1987. Diferencias entre los actos de iurisdictio contenciosa y los actos de la denominada iurisdictio voluntaria en derecho romano. In *Estudios de derecho romano en honor de Alvaro d'Ors*, 1, 427–55. Pamplona: Ediciones Universidad de Navarra; Luzzatto, Giuseppe Ignazio. 1965. *Il problema d'origine del processo extra ordinem*, 1, *Premesse di metodo: i cosiddetti rimedi pretori*. Bologna: Patron, 137–41; Solazzi, Sirio.

the expression travelled from antiquity into modern law remaining unchanged in its form, even though its meaning, necessarily, has changed over the centuries.

If one decided to embark on the venture to summarize how the most prominent Italian scholars define non-contentious jurisdiction, one would have first to mention the many theories followed with a view to describing what the public function called jurisdiction is and which features draw the dividing line between contentious and non-contentious jurisdiction: a task certainly beyond the purpose of this essay, which aims at outlining the Italian law in force, dispensing with any 'Pindaric flights' in the deep blue skies of jurisprudence.[2] Therefore, it seems acceptable to offer a down-to-earth definition of non-contentious jurisdiction: it is a form of judicial intervention that borders on the field of tasks falling, as a rule, within the realm of the executive power, that is, tasks that could (at least in principle) be performed by administrative bodies as well. As far as the reasons why courts are called upon to take care of matters that could easily be dealt with by administrative bodies are concerned, a frequent explanation is that such matters touch upon public interest, and therefore it is appropriate to entrust them to the courts in their capacity as the ultimate defenders of the rule of law. Whether that holds true is disputable, since – as will be clarified below – the contemporary landscape of non-contentious jurisdiction includes matters on which public interest has no bearing at all.

2. The Italian Code of Civil Procedure (adopted in 1940 and in force since 1942) makes no specific reference to non-contentious jurisdiction; the expression was included in a single article of the Code (Article 801, concerning the recognition of foreign judgments and orders) that was repealed in 1995 by the statute reforming the rules governing the Italian system of private international law. Non-contentious jurisdiction is mentioned, without any further specification, in one of the rules enacted for the implementation of the Civil Code: a rule of negligible relevance, since it applies to a family-related matter pre-empted by more recent statutes.

Even though the main source of Italian procedural law apparently seems to ignore non-contentious jurisdiction, one cannot overlook the fact that in reality a whole section of the Code of Civil Procedure (exactly, Book Four of the Code) provides for a variety of special proceedings that are conventionally ascribed to non-contentious jurisdiction: just to mention a few, one may list the procedures for having a person declared incompetent, the procedures for the declaration of absence and presumed death of those who have disappeared from their last known residence for a certain number of years, the many procedures by which the interests of minors and incompetent persons are protected (e.g., the appointment of guardians), and the procedures to be followed for the administration and the settlement of decedents' estates. But quite a number of other non-contentious proceedings are governed by different legal sources, that is, the Civil Code or specific statutes, while Book Four of the Code of Civil Procedure also provides for many contentious proceedings, such as the summary *ex parte* proceeding leading to orders for payment, the eviction proceeding, a wide variety of provisional remedies, divorce proceedings and – last but not least – arbitration. In other words, Book Four of the Code of Civil Procedure is conceived as a legal 'department store',[3] in which one can find the judicial proceeding that fits one's needs: it is as if the legislators, after having abided by strict analytical accuracy in the preparation of the previous three Books of the

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1972. «Iurisdictio contentiosa» e «voluntaria» nelle fonti romane. In *Scritti di diritto romano*, III, 163–97. Napoli: Jovene.

[2] The major Italian academic contributions to the study of non-contentious jurisdiction are the following: Denti, Vittorio. 1987. La giurisdizione volontaria rivisitata. *Rivista trimestrale di diritto e procedura civile*, 325–39; Cerino Canova, Antonio. 1987. Per la chiarezza di idee in tema di procedimento camerale e di giurisdizione volontaria. *Rivista di diritto civile*, I, 431–85; Fazzalari, Elio. 1970. Giurisdizione volontaria (diritto processuale civile). In *Enciclopedia del diritto*, XIX, Milano: Giuffrè Editore, 330–81.

[3] This is the definition of Book Four of the Code given by a prominent Italian scholar, the late Virgilio Andrioli: see Andrioli, Virgilio. 1979. *Diritto processuale civile*, I, Napoli: Jovene, at p. 52.

Code, had given up and decided to toss into Book Four all the leftover proceedings, the ones that could not be properly located anywhere else.

An explanation for the reasons why non-contentious proceedings do not have an autonomous place in the Code of Civil Procedure and are not governed by a single group of uniform rules can be found in the explanatory report accompanying the original text of the Code. In the report, the Ministry of Justice at that time explained that the original idea of the drafters of the Code – that is, to concentrate in a single book all non-contentious proceedings so as to distinguish them from any other special proceedings provided for by the Code – had to be abandoned, due to the difficulty of drawing a clear-cut divide between contentious matters (meaning, matters calling for the adjudication of substantive rights) and non-contentious ones: it is up to scholars and not to legislators, the Ministry wrote, to elaborate further on the distinction.[4] In this regard, the rationale underlying the choice made by the drafters of the Code has its roots in the previous code, that is, the first Code of Civil Procedure of the unified Kingdom of Italy, enacted in 1865. Commenting on the rule stating that 'unless the law provides otherwise, non-contentious matters are assigned to proceedings in chambers' (My translation),[5] scholars acknowledged the vagueness surrounding the concept of non-contentious jurisdiction, emphasizing that legislators could only take note of such vagueness and devise a procedural model adaptable to the matters that, from time to time, would be identified as non-contentious.[6] Such a procedural model was the so-called proceedings in chambers.

Similar to the Code of Civil Procedure of 1865, the Code in force too provides for a set of rules governing proceedings in chambers, rules to be applied unless the law dictates otherwise, but these rules make no explicit reference to matters falling within non-contentious jurisdiction. In spite of that, conventional wisdom tends to identify the procedure in chambers as the archetype of the procedural model according to which courts handle non-contentious matters. In reality, there is more to this than meets the eye, since – as will be described shortly – on the one hand, for several non-contentious matters judicial intervention follows a pattern that does not conform to the procedure in chambers and, on the other hand, for quite a number of contentious matters special statutes provide for proceedings in chambers. Therefore it would be misleading to say that, according to the Italian law in force, an equivalence between non-contentious jurisdiction and the procedure in chambers can be established: a more accurate statement would picture the rules governing proceedings in chambers as 'default rules', that is, rules to be applied absent a specific regulation of the non-contentious matter at stake.

3. A brief description of the rules defined above as 'default rules' is in order.[7] The procedure in chambers is simpler than the ordinary one and, at least supposedly, much faster. The procedure is commenced by filing an application that includes a basic statement of the factual and legal grounds for the relief sought. As far as the subjects having standing to lodge the application are concerned, the law sometimes clearly identifies them, other times entitles every 'interested person' to pray for relief. In exceptional circumstances, standing is granted to the Public Prosecutor as well: more frequently, though, the Public Prosecutor can or sometimes even must make an intervention in the

[4] See 'Relazione alla Maestà del Re Imperatore del Ministro Guardasigilli Grandi, presentata nell'udienza del 28 ottobre 1940-XVIII per l'approvazione del testo del Codice di procedura civile', available at http://www.academia.edu/210011/Relazione_al_re_per_l'approvazione_del_testo_del_codice_di_procedura_civile, at p. 15.

[5] See Article 778 of the Code of Civil Procedure of 1865.

[6] See, for instance, Saredo, Giuseppe. 1874. *Del procedimento in camera di consiglio e specialmente per gli atti di volontaria giurisdizione* (2nd edn.), Napoli: Libreria Nuova, p. 29–31.

[7] Reference is made to Articles 737 – 742 *bis* of the Code of Civil Procedure. The academic literature on proceedings in chambers and the rules governing them is extensive, but since this essay is addressed to foreign readers, who may not be familiar with Italian, the author has chosen to avoid complex bibliographical information. For a general overview of the subject, see Laudisa, Luciana. 2002. Camera di consiglio – I) Procedimenti in camera di consiglio – Diritto processuale civile. In *Enciclopedia Giuridica Treccani*, VI, Roma: Istituto della Enciclopedia Italiana, 1–17; Arieta, Giovanni. 1996. Procedimenti in camera di consiglio. In *Digesto delle discipline privatistiche – Sezione civile*, XIV, Torino: UTET, 435–59; Civinini, Maria Giuliana. 1994. *I procedimenti in camera di consiglio*, I, Torino: UTET.

proceeding once it has been instituted by a private party, as a rule when the matter involves aspects of public interest. In general, the role played by the Public Prosecutor is not a very active one, and it is limited to the filing of short, written opinions.

There is dispute over whether the applicant must be represented by an attorney of his choice. The case law is not consistent on the issue of legal representation in non-contentious proceedings handled in chambers, even though some recent opinions issued by the Italian Supreme Court (the *Corte di cassazione*) with reference to a relatively new procedure for the guardianship of mentally incompetent persons seem to support the thesis according to which in proceedings in chambers applicants can appear before the court in person.[8]

As far as the development of the procedure is concerned, it must be emphasized that, as opposed to the typical allocation of powers between the parties and the court in ordinary proceedings, proceedings in chambers are marked by the extensive inquisitorial powers bestowed upon the judge in charge of the case. As a matter of fact, the judge can call for the production of any kind of evidence *ex officio*, since the wording of the relevant article of the Code is interpreted so as to grant the judge ample discretion as regards the evidence-taking phase of the procedure.

The orders issued by the court take the form of decrees. A special avenue of appeal, known as *reclamo*, is open to the applicant, any interested party and sometimes the Public Prosecutor. In principle, no further appeals are allowed.

Decrees issued in chambers in non-contentious matters have no *res judicata* effects. Upon application lodged by any interested party, a decree can be modified or revoked if the circumstances originally taken into account by the court have changed, provided that the rights acquired in good faith by third parties are safeguarded. According to one school of thought, under specific circumstances a decree issued in non-contentious matters can also be declared null and void by a judgment rendered in an ordinary proceeding.

4. As mentioned above, the 'default rules' are applied to non-contentious matters only insofar as the law does not ordain otherwise. And, as a matter of fact, the law does ordain otherwise in a wide variety of non-contentious matters. Just to offer an example, let us take into consideration one of the proceedings that can be instituted to have a person declared incompetent:[9] it is a proceeding that, although considered 'special', bears a close resemblance to the ordinary proceeding provided for civil actions before the courts of first instance. The rules governing proceedings in chambers (the 'default rules' of non-contentious jurisdiction) do not enter into play at all: in fact, the proceeding ends with a judgment, a real judgment, and not a decree, and such a judgment is able to become final and have *res judicata* effects.

Other examples could be mentioned to give proof of the fact that the deviation from the 'default rules' of non-contentious proceedings is not a rare exception, but the rule in Italian civil procedure. Often, the procedural model is a sort of hybrid that mixes together steps typical of ordinary

[8] See judgment no. 19233 of 2008 and judgment no. 25366 of 2006: on this judgments, see Silvestri, Elisabetta. 2012. Commento all'articolo 720 *bis*. In *Commentario breve al codice di procedura civile* (7th edn.), eds. Carpi, Federico – Taruffo, Michele. 2605–12. Padova: CEDAM. It may be interesting to recall that the general rule in Italian civil procedure is that parties to a judicial proceeding (meaning a contentious one) must always be represented by attorneys: litigants can appear in person only before the justices of the peace, provided that the value of the case is below €1,100 (according to Article 82 of the Code of Civil Procedure).

[9] The Italian legal system provides for three different proceedings for having a person declared incompetent: when the person is mentally ill, senile, or suffering from other disabilities that prevent him from taking care of his own affairs. The choice of the appropriate proceeding depends on the seriousness of the incompetency; to each proceeding corresponds a court order imposing different levels of limitation on the legal capacity of the incompetent person. The matter is governed by Articles 712 – 720 *bis* of the Code of Civil Procedure, rules that must be read in connection with the articles of the Civil Code (Articles 404 – 432) listing the circumstances under which a person can be deprived of his legal capacity and the substantive effects of a declaration of incompetency. For an overview of the subject, see Silvestri, Elisabetta. 2012. Commento agli articoli 712 – 720 *bis*. In (eds.), *Commentario breve al codice di procedura civile* (7th edn.), eds. Carpi, Federico – Taruffo, Michele, 2595–612. Padova: CEDAM.

proceedings and steps borrowed from the procedure in chambers, which is likely to cause practical problems, for instance as regards the appeal that can be brought against the court order, with reference to the form the appeal is supposed to take, as well as its latitude and effects: as an example, problems of this kind are common in the practice of separation and divorce proceedings, which quite a number of scholars still ascribe to non-contentious jurisdiction.[10]

In conclusion, it seems important to emphasize again the lack of consistency in the procedural treatment of matters that rightly or wrongly are deemed to be non-contentious: a lack of consistency that in recent years has brought about a proliferation of multifaceted 'special proceedings' that have turned the administration of Italian civil justice into a maze, causing further problems for a system already in bad shape. At last in 2011 an attempt was made by the legislators to simplify the situation, reducing the number of available special proceedings, but the expected positive results of this reform have yet to be seen.[11]

5. It has previously been mentioned that the 'default rules' of proceedings in chambers outline a procedural pattern that is simpler, less formal, and supposedly faster than the one to which ordinary proceedings conform. For these reasons, the legislators have increasingly turned to proceedings in chambers when they decided to update the judicial treatment of a few contentious matters. In light of the notoriously excessive length of Italian civil cases it is not difficult to understand the appeal of proceedings in chambers. At the same time, it is undeniable that when the adjudication of substantive rights is in question, the fundamental guarantees of due process must be safeguarded to their full extent, which is not always the case in proceedings in chambers since they are conceived for cases in which, at least allegedly, there is no controversy among the opposing parties over substantive rights.

The trend followed by the legislators extending the procedure in chambers to contentious matters has not been well received by scholars, who have emphasized the dangers this choice could bring about in the judicial enforcement of the right of action and its procedural applications, either enshrined in the Constitution or implied by the constitutional rules on the guarantee of due process.[12] In particular, it has been maintained that proceedings in chambers lack an adequate protection of the right to be heard, grant the court an excessive amount of discretion, and, most of all, result in orders unable to become *res judicata*, since they can be modified or revoked at any time: the features that make proceedings in chambers valuable for a quick and efficient disposition of non-contentious matters become serious flaws in the framework of contentious jurisdiction, since substantive rights, when disputed, have to be adjudicated with the full panoply of the guarantees

[10] For an extensive overview of separation and divorce proceedings, see Graziosi, Andrea (ed.). 2011. *I processi di separazione e di divorzio* (2nd edn.). Torino: Giappichelli Editore, 2011.

[11] The issue of the statute for the simplification of special proceedings will be addressed further on, in para. 6.

[12] The relevant rules of the Italian Constitution are the following:

Art. 24.

'Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law.

Defense is an inviolable right at every stage and instance of legal proceedings.

The poor are entitled by law to proper means for action or defense in all courts.

The law shall define the conditions and forms of reparation in case of judicial errors.'

Article 111.

'Jurisdiction is implemented through due process regulated by law.

All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials. …

All judicial decisions shall include a statement of reasons.

Appeals to the Court of Cassation in cases of violations of the law are always allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts. This rule can only be waived in cases of sentences by military tribunals in time of war.

Appeals to the Court of Cassation against decisions of the Council of State and the Court of Accounts are permitted only for reasons of jurisdiction.' (Official translation, available on the website of the Italian Senate, at http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.)

offered by ordinary proceedings, leading to judgments able to acquire the irrefutable certainty and everlasting durability that only *res judicata* can assure.[13]

In spite of the concerns voiced by scholars, the Italian Supreme Court has repeatedly supported the policy upheld by the legislators in adopting the 'default rules' of proceedings in chambers also for contentious matters, such as family matters concerning parental authority, filiation, adoption, as well as matters related to the management of companies and to bankruptcy, just to mention a few. According to the Court, proceedings in chambers are 'neutral containers', that is, they outline (by virtue of the 'default rules') a malleable procedural model suitable to be adopted as it is by the legislators, or to be enriched with the features that, according to the matter at stake, are necessary to comply with the constitutional mandate upholding the due process clause.[14] By the same token, the case law of the Constitutional Court supports the position that the choice of the procedural rules to be applied to contentious or non-contentious matters falls completely within the discretion of the legislators, provided that such discretion is exercised in a manner that is consistent with the principle of reasonableness. According to the Court, the rules governing proceedings in chambers by themselves are not at odds with the basic tenets of due process: therefore, it is possible (and sometimes even imperative) to interpret them so as to 'make room' for the procedural steps that, from time to time, are required by the fundamental guarantees surrounding the judicial enforcement of substantive rights.[15]

6. As noted above, the growing number of 'special proceedings' dealing with both contentious and non-contentious matters and the difficulties brought about by the overlapping of different legal sources making it quite complex to identify the proper proceeding to be instituted persuaded the legislators to engage in an effort to simplify the procedural landscape. It is well known that the road to hell is paved with good intentions, and the statute 'on the reduction and simplification of judicial proceedings'[16] is a perfect demonstration that good intentions are not enough to produce good results.

The idea underlying the statute was to reduce the special proceedings to only three procedural models already existing in the Code of Civil Procedure, that is, the ordinary proceeding, the proceeding in labor cases, and the summary proceeding. Unfortunately, not all special proceedings were taken into consideration, but only the ones regarding contentious matters and governed by specific statutes; other exceptions were contemplated, for instance as regards family law, consumer law, and intellectual property (IP) law. In short, the statute on simplification applies only to some special proceedings of minor importance, and certainly not to the ones that crowd the courts' dockets. In addition, even for the proceedings affected by the so-called simplification new and complex rules had to be enacted so as to make the transmigration from the old rules to those of the 'proceeding of destination' viable. It seems superfluous to elaborate any further on the absurdity and uselessness of such an effort, whose positive outcomes have yet to be proven.

Even though the statute on simplification has affected some proceedings that originally took place in chambers (for instance, the ones concerning immigration law), nothing has changed in the arrangement of Book Four of the Code of Civil Procedure, in which a disparate variety of special proceedings continue to coexist as strange bedfellows.

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[13] The volume of academic writing on whether it is appropriate to resort to proceedings in chambers for contentious matters is monumental. Among the most significant and recent contributions to the debate, see Carratta, Antonio. 2010. Processo camerale (diritto processuale civile). In *Enciclopedia del diritto, Annali*, III, Milano: Giuffrè Editore, 928–59.

[14] See in particular the judgment of the Italian Supreme Court issued *en banc* on 19 June 1996, no. 5629, published in *Giurisprudenza italiana*, 1996, I, 1, 1300.

[15] See, for instance, the following judgments issued by the Constitutional Court: no. 140 of 2001; no. 160 of 1995; no. 52 of 1995; no. 573 of 1989. All the judgments of the Court are published (in Italian) on its institutional website, at http://www.giurcost.org/decisioni/index.html.

[16] The statute referred to in the text is statute no. 150 of 2011. For an extensive commentary, see Carratta, Antonio. 2012. *La «semplificazione» dei riti e le nuove modifiche del processo civile*, Torino: Giappichelli Editore.

7. It is difficult to foresee whether in the near future more attention will be devoted by Italian legislators to non-contentious jurisdiction so as to lay down rules that are uniform and consistent. In recent decades, Italian civil procedure has been re-written again and again in the attempt to solve the most serious and enduring problem of the justice system, namely, the excessive length of proceedings.[17] Many reforms have failed and from those that are too recent to be appreciated positive results, if any, cannot reasonably be expected in the short run. The uncertainties of the political landscape and the continuing serious economic crisis affecting the country make it unlikely that the spotlight will shine again on non-contentious matters any time soon, since the situation is much more dramatic in other aspects of civil justice, that is, in ordinary proceedings and in enforcement proceedings. In the meantime, Italian scholars, who are often more interested in strictly theoretical issues than in the daily problems of judicial administration, will keep on chasing the perfect answer to the question whether non-contentious jurisdiction is true jurisdiction or something else, even though, already back in 1987, one of the most prominent scholars in procedural law of the last century, the late Vittorio Denti,[18] wrote that the notion of non-contentious jurisdiction belonged to the history of the doctrines and ideologies of civil procedure that were popular in the past but had lost their appeal in the contemporary cultural environment, in which there seemed to be no space left for great conceptual constructions. Drawing inspiration from this thought, this author thinks that both scholars and legislators should set aside any concerns about the true nature of non-contentious jurisdiction and address a more mundane issue: whether or not, in light of the present situation of Italian courts, overloaded with cases and lacking human and material resources, it still makes sense to entrust the judiciary with duties that – where the conflict between private individuals is over matters devoid of any public interest – could be discharged hopefully in a more efficient and less time-consuming way by administrative authorities.

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[17] See Silvestri, Elisabetta, 'The Never-Ending Reform of Italian Civil Justice', available at http://ssrn.com/abstract=1903863.
[18] See Denti, Vittorio, above n. 2, at 339.