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Articles

The Constitutionality of the Death Penalty and Methods of Execution, and Citizen Participation in Death Penalty Trials

*Noboru Yanase**

1. Introduction

A *Saiban-in* (lay judge) trial system enabling citizen participation in criminal trials was introduced in Japan in May of 2009. Under this system, ordinary Japanese citizens are randomly selected and appointed as *saiban-ins* to take part in the adjudication of criminal trials. Six *saiban-ins* and three professional judges form a panel that determines the facts of a case and sentences the defendant in a district court. The harshest sentence that can be imposed is the death penalty, a punishment that Japan retains (Articles 9 and 11 of the Penal Code).

As stipulated by Article 2, Paragraph 1, Item 1 of the Act on Criminal Trials with the Participation of *Saiban-in* (hereafter, the "*Saiban-in* Act"), district courts shall handle cases involving offenses punishable with the death penalty or life imprisonment through panel with the participation of *saiban-ins*. This means that *saiban-ins* appointed from among the general public are involved in trials in which a defendant may be sentenced to death.

This paper examines the constitutionality of the death penalty and the methods of execution, focusing also on the involvement of *saiban-ins* in sentencing death.

Note that this paper interprets legal issues to do with the death penalty on the premise that Japan has the death penalty. At no point does the paper discuss whether the death penalty should be retained or abolished.

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2. The Constitutionality of the Death Penalty and the Methods of Execution

There have been numerous arguments over the death penalty, such as what criteria should be applied in sentencing the death penalty in criminal trials[1)] and whether capital punishment should be abolished as a criminal policy.[2)] However, the constitutionality of the death penalty has not been actively discussed in Japanese constitutional law scholarship, although it is a significant human rights issue. Since the Supreme Court ruled it to be constitutional in 1948, the court's position has been clear and unwavering.

2.1. The Constitutionality of the Arguments for the Death Penalty

Among the various provisions of the Japanese constitution, the most contested provision regarding the constitutionality of the death penalty is Article 36, which stipulates that "cruel punishments are absolutely forbidden" (derived from the Eighth Amendment to the Constitution of the United States, which stipulates that "Excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments* inflicted.").[3)]

According to the dominant view in the Japanese constitutional scholarship, the meaning of "cruel punishments" prohibited under Article 36 of the Constitution of Japan should be interpreted in view of the time and

1) A prominent study on this topic in Japan is Kenji Nagata, *Shikei Sentaku Kijun no Kenkyu* [*A Study on the Criteria for Selecting the Death Penalty*], Kansai University Press, 2010.

2) Kenzo Mihara, *Shikei Haishi no Kenkyu* [*A Study on Abolition of the Death Penalty*], 6th ed., Seibundo, 2010 provides a summary of the debate on the retention and abolition of the death penalty in Japan from the perspective of abolitionism. Shigemitsu Dando, *Shikei Haishi-ron* [*Argument of Abolition of the Death Penalty*], 6th ed., Yuhikaku, 2000 is another often-cited source when considering the abolitionist theories.

3) The difference can be seen in the wording "cruel punishments" in the Japanese constitution versus "cruel and unusual punishments" in the American constitution. Although "cruel and unusual punishment" was initially proposed in the draft by the General Headquarters, Supreme Commander for the Allied Powers (SCAP), the word "unusual" was deemed to be redundant and useless in discussions between the Japanese Government and the SCAP, and accordingly removed (Kenzo Takayanagi, et al. eds., *Nihonkoku Kempo Seitei no Katei* [*The Making of the Constitution of Japan*], vol. 2, Yuhikaku, 1972, p. 188). Hence, the difference in wording should not be construed to have any special significance. Hogaku Kyokai, ed., *Chukai Nihon-koku Kempo* [*Annotated the Constitution of Japan*], vol. 1, Yuhikaku, 1953, p. 636.

environment.[4] One of the most authoritative commentaries on the Japanese constitution argues that the term "cruel" denotes "de-culturalized and anti-humanitarian" conduct that would "shock those with the normal human feelings of ordinary people," further noting that "what constitutes cruelty is ultimately a matter of the socially accepted ideas."[5]

The Supreme Court judgment most often cited by contemporary scholars to establish the meaning of "cruel punishments" prohibited under Article 36 (S. Ct. Grand Bench, Judgment, June 23, 1948, 2(7) KEISHU 777)[6] defined them as "punishments that are deemed cruel from a humanitarian perspective and that involve unnecessary mental or physical suffering."[7] According to that judgment, as well as another Supreme Court judgment on the constitutionality of the death penalty (S. Ct. Grand Bench, Judgment, March 12, 1948, 2(3) KEISHU 191) (to be discussed below), two articles from the Constitution of Japan support the interpretation that the death penalty is not constitutionally prohibited: Article 13 stipulates that "Their right to life […] shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs"; Article 31 stipulates that "No person shall be deprived of life […], except according to procedure established by law."[8] In sum, "It is not a

4) Some scholars, however, insist that the meaning of "cruel punishments" should be determined in light of the purpose of the penalty. Yasuo Sugihara, "Keibatsu-ken no Jittai-teki Genkai [Substantive Limits of the Power to Punish]," Nobuyoshi Ashibe ed., *Kempo* [*Constitutional Law*], vol. 2, Yuhikaku, 1981, p. 269. This minority view holds that the death penalty should be considered cruel if it lacks coercive power and can be substituted by life imprisonment. Junji Abe, "Shikei to Zangyaku-na Keibatsu [Death Penalty and Cruel Punishment]," in *Kempo Hanrei Hyakusen*, [*Leading Cases in Constitutional Law*], vol. 1, 2nd ed., Yuhikaku, 1988, p. 223.

5) Hogaku Kyokai, *supra* note (3), p. 636.

6) Although the official court reporter writes that this judgment was held on June 30, 1948, the correct date of judgment was June 23, 1948. This judgment clarified the meaning of Article 36 of the Constitution not in the context of the constitutionality of the death penalty, but in response to a defendant's claim that the sentence he incurred for violating an election law, namely, three months' imprisonment and the forfeiture of 140 yen, constituted cruel punishment.

7) Nobuyoshi Ashibe, *Kempo* [*Constitutional Law*], 8th ed., Iwanami Shoten, 2023, p. 278; Koji Sato, *Nihon-koku Kempo-ron* [*Japanese Constitutional Law*], 2nd ed., Seibundo, 2020, pp. 376-377.

8) Hideki Shibutani, *Kempo* [*Japanese Constitutional Law*], 3rd ed., Yuhikaku, 2017, pp. 261-262. In explaining why the death penalty cannot be construed to be prohibited under the Japanese constitution, Professor Hideki Shibutani cites, in addition to the interpretations of Articles 13 and 31, the fact that the Japan Socialist Party and Japanese Communist Party proposed that the abolition of the death penalty be included in the Constitution of Japan during the process of enacting it but without success. Another reason, which the author of this paper goes on to demonstrate, may be the choice by Germany to include a provision abolishing the death penalty in its postwar constitution, that is, to follow a course not taken by Japan in its own new constitution.

leading view that the death penalty constitutes 'cruel punishments' prohibited under Article 36 of the Japanese constitution," and "None of the major commentaries on the Japanese constitution explicitly assert that the death penalty violates Article 36 of the Constitution."[9)]

There is no disagreement that "cruel punishments" prohibited under Article 36 of the Constitution exclude the infliction of suffering necessary for punishment but include the infliction of unnecessary pain. For whom, then, is the pain intended? The pain inflicted should be construed to mean that suffered by the executed person. Professor Takeshi Tsuchimoto, a former public prosecutor, points out that the four methods of execution the Supreme Court ruled to be typical cruel punishments in its judgment on the constitutionality of the death penalty of 1948 (described below) seem to be reflective of the public's strong sense that the cruelty lies in the publicity of the execution rather than the physical pain suffered by the executed person. In particular, he criticizes the selection of beheading and the display of the severed head on the gallows, the latter being only an incidental post-execution treatment, and decries the fact that cruelty is determined solely based on the public's perception, which has no relation to the suffering of the person.[10)] "[G]iven that the human rights guaranteed by the Constitution protect the rights of the minority from the majority," states Professor Satoshi Yokodaido, "it is disconcerting to evaluate whether 'mental and physical suffering' is unnecessary from the perspective of an average person at a remove from the person who actually feels the pain."[11)] In the author's interpretation, "cruel punishments" prohibited under Article 36 not only encompass the imposition of mental and physical suffering on the executed person, but also seem objectively cruel to humanity from the viewpoint of ordinary people who are able to perceive whether the executed person actually feels pain. Given that the first sentence of Article 13 of the Constitution of Japan stipulates that "All people shall be respected as individuals," any punishments felt by ordinary people to undermine the dignity and respect of an executed person should be construed to subjectively or objectively constitute "cruel punishments" prohibited under Article 36 of the Constitution, even if such punishments cause no pain to the executed

9) Yasuo Hasebe, *Kempo* [*Constitutional Law*], 8th ed, Shinsei-sha, 2022, pp. 277-278.
10) Takeshi Tsuchimoto, "Koshu-kei no Hoteki-Konkyo to Zangyaku-sei [Legal Grounds for Hanging and its Cruelty]," *Hanreijiho*, No. 2143 (2012), pp. 5-6.
11) Satoshi Yokodaido, "Kempo kara Shikei wo Kangaeru [Considering the Death Penalty from a Constitutional Perspective]," *Hougaku Seminar*, No. 729 (2015), p. 31.

person himself.[12)]

Apart from Article 36, scholars have raised arguments questioning the constitutionality of the death penalty under several other articles of the Constitution, as well.

The first focuses on the relationship between the death penalty and Article 9 of the Constitution which renounces war. Professor Kameji Kimura, one of the first generation of criminal law professors after the enactment of the Constitution of Japan, states, "The new constitution proclaims international democracy by declaring the renunciation of war. War forces individuals to sacrifice their lives for the sake of a country's supremacy. To renounce war is to reject the supremacy of a country and affirm the dignity of an individual's life. It is an essential contradiction to renounce war and simultaneously support the death penalty, which takes an individual's life. The new constitution, which declares the renunciation of war, does not affirm the death penalty."[13)]

Some constitutional scholars argue that the death penalty violates Article 9 of the Constitution. For example, Professor Takasuke Kobayashi argues, "Article 9 of the Constitution renounces war. War is murder by public authority. As the death penalty is likewise nothing more than murder by public authority, it is not allowed in light of the purpose of Article 9."[14)] Professor Toshihiro Yamauchi states that "Although Article 9 of the Constitution stipulates the renunciation of war and the non-maintenance of war potential without explicitly prohibiting the death penalty, the Preamble and Article 9 order the Japanese Government not to kill. Therefore, considering the constitutional protection of human life, the termination of the life of a person by means of the death penalty is inconsistent with the spirit of the of the Preamble and Article 9, even if the person has committed a serious crime,

12) Professor Yasuo Hasebe points out the following as one factor to consider when deliberating whether the death penalty constitutes cruel punishment: "The pain people imagine from a punishment rather than the pain it actually imposes is significant to the punishment's effect as a general deterrent." Hasebe, *supra* note (9), p. 277.

13) Kameji Kimura, "Minshu Kakumei to Keiji-hou [Democratic Revolution and Criminal Law]," in his *Shin-kempo to Keiji-hou* [*The New Constitution and Criminal Law*], Hobunsha, 1950, p. 135. The "democracy" to which Kimura refers is probably liberalism. As the concept of democracy was still immature in Japan immediately after the war, we can infer that there was some confusion in the use of the concept. Masayoshi Ohno introduces Kimura's argument in "Capital Punishment and Penal Reform," *Osaka University Law Review*, vol. 22 (1975), pp. 1-18.

14) Takasuke Kobayashi, *Kempo* [*Constitutional Law*], new ed., Nippon Hyoron Sha, 1998, p. 107.

such as murder, in this country."[15)]

The second argument maintains that the death penalty infringes on the constitutional right to life of the person to be executed on the grounds that the Constitution of Japan guarantees the right to life as a human right. The second sentence of Article 13 of the Constitution stipulates that "Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." Professor Yamauchi states that "Under the Constitution, the right to life should be recognized as a constitutionally guaranteed human right that is relatively separate from the right to liberty and the right to the pursuit of happiness," for three reasons: the interpretation of the text, the uniqueness of the content of such right, and the international trend of the right to life.[16)] Yamauchi further argues that "the death penalty is unconstitutional because it infringes on the right to life, [which is constitutionally guaranteed by the second sentence of Article 13]."[17)]

The mainstream constitutional scholars, however, eschew the arguments that hold the right to life to be a constitutionally guaranteed human right. Most of the scholars see no need to distinguish the individual rights guaranteed by Article 13 into three different rights, finding it sufficient to construe them as a single comprehensive right and seeing no real merit in interpretation.[18)]

The third argument is that the death penalty violates the spirit of the Constitution when compared to other stronger human rights guarantees, such as the absolute prohibition of holding persons in slave-like bondage or servitude in Article 18.

Professor Kobayashi states, for example, that "It is difficult to say what constitutes cruel punishments, but nothing can be crueler than the deprivation of life. All people are equally guaranteed human rights and have the right to life (Articles 11 and 25). Therefore, only 'servitude' can be toler-

15) Toshihiro Yamauchi, "Seimei-ken to Shikei Seido [Right to Life and the Death Penalty]" in his *Jinken, Shuken, Heiwa* [*Human Rights, Sovereignty and Peace*], Nippon Hyoron Sha, 2003, p. 53.

16) Toshihiro Yamauchi, "Kihon-teki Jinken toshiteno Seimei-ken [The Right to Life as a Fundamental Human Right]," in his *Jinken, Shuken, Heiwa*, p. 3.

17) Yamauchi, *supra* note (16), p. 9.

18) Yasuo Hasebe ed., *Chushaku Nihon-koku Kempo* [*Annotated Constitution of Japan*], vol. 2, Yuhikaku, 2017, p. 96 (written by Masakazu Doi). It is understood that all three rights listed in the second sentence of Article 13 of the Constitution should be comprehensively understood as relating to the interests of individuals. Yoichi Higuchi, et al., *Chukai Horitsu-gaku Zenshu: Kempo* [*Annotated Jurisprudence Collection: Constitutional Law*], vol. 1, Seirin Shoin, 1994, p. 277 (written by Koji Sato).

ated, not 'slave-like bondage,' as a criminal punishment (Article 18). The death penalty must also be impermissible, because even slave-like bondage is forbidden."[19] Professor Sota Kimura states, "If asked which is a more severe restriction of rights, slave-like bondage, servitude, or the death penalty, most people would probably say the last. As slave-like bondage and servitude are prohibited, the death penalty should also be prohibited. This kind of argument, which draws a comparison, is persuasive."[20] He continues, "For example, most scholars seem to believe that punishments such as destroying eyes or chopping off arms can be considered 'cruel punishments,' and the Supreme Court would agree"; and "the conclusion that depriving a person of his eyes or arms is unconstitutional while depriving a person of his life is constitutional is also quite strange." He therefore argues that "the death penalty falls into the category of 'cruel punishments' and can be more naturally thought to be unconstitutional."[21] Furthermore, Professor Sota Kimura states that "the death penalty also infringes on an individual's freedom of internal thought, which is considered absolutely guaranteed. […] According to the prevailing theory, the right to think and form values in the mind is absolutely guaranteed by Article 19 of the Constitution," whereas a person executed will lose his "internal thoughts and no longer be able to think." Therefore, "a natural train of thought leads to the conclusion that the death penalty is unconstitutional as long as it is based on the generally accepted premise of the absolute guarantee of freedom of thought and conscience."[22]

The theories presented above argue that the death penalty is unconstitutional based on provisions other than Article 36 of the Constitution. Yet according to Professor Yasuhiro Okudaira, "Arguments based on pacifism, one of the fundamental principles of the Constitution, or on the right to live in peace, a dignity of an individual specified under Article 13 of the Constitution, or freedom from slave-like bondage and servitude under Article 18 of the Constitution, and so on, are only abstract arguments that are too far from the core, or arguments that are satisfied with numerous reasons that provoke counterarguments. These arguments serve only as a kind of

19) Kobayashi, *supra* note (14), p. 107.

20) Sota Kimura, "Shikei Iken-ron wo Kangaeru [Considering the Unconstitutionality of the Death Penalty]" in his *Kempo Gakusha no Shikoho* [*The Way of Thinking of the Constitutional Scholar*], Seido-sha, 2021, p. 133.

21) Kimura, *supra* note (20), pp. 133-134. Professor Koichi Kikuta, a prominent criminologist and abolitionist of the death penalty, argues the same point. Koichi Kikuta, *Shikei Haishi wo Kangaeru* [*Considering Abolition of the Death Penalty*], revised ed., Iwanami Shoten, 1994, p. 6.

22) Kimura, *supra* note (20), p. 134.

abolitionism or as a policy argument that 'according to the spirit of the Constitution, the death penalty is undesirable and should be prohibited,' and that constitutional studies 'have so far been unable to find an effective theory under which the death penalty is unconstitutional.'"[23)]

2.2. The Supreme Court's Judgment on the Constitutionality of the Death Penalty

What was the Supreme Court of Japan's stand on the constitutionality of the death penalty? In 1948, the Supreme Court handed down a rulings on the constitutionality of the death penalty in a judgment to an appeal contesting a lower court judgment under which a defendant was sentenced to death under Articles 200 (for the crime of parricide, deleted later), 199, and 190 of the Penal Code for killing his mother and sister and abandoning their corpses (S. Ct. Grand Bench, Judgment, March 12, 1948, 2(3) KEISHU 191[24)]). The defense counsel argued that Article 36 of the new constitution stipulated that while "The infliction of torture by any public officer and cruel punishments are absolutely forbidden," the Constitution should be assumed to "naturally eliminate the provisions of the death penalty in the Penal Code," given that "the death penalty is the cruelest form of punishment."

The Supreme Court began the analysis for its judgment in response by explaining the preciousness of life: "Life is precious. One human life is more important than the whole earth. The death penalty is certainly the grimmest of all punishments; it is the ultimate punishment and is indeed generated from things that are unavoidable." The judgment went on to indicate that "the institution of the death penalty always requires deep thought and consideration, both from the standpoint of national criminal policy and from a humanitarian perspective." It pointed out that the legal issue of the death penalty as a punishment for deprivation of life (rather than being unambiguous and universally defined from provisions of the Constitution) generally depends on the times and environment (not only in Japan, but also in other countries), by stating, "if we review the history of the punishment in each country, the death penalty and its application can be construed to have changed, shifted, and evolved according to history and circumstance,

23) Yasuhiro Okudaira, *Kempo (Kempo ga Hosho-suru Kenri)* [*Constitutional Law (Rights Guaranteed by the Constitutional Law)*], vol. 3, Yuhikaku, 1993, pp. 379-380.

24) An unofficial English translation of the text of this judgment (translated by John M. Maki) is available in John M. Maki ed., *Court and Constitution in Japan: Selected Supreme Court Decisions, 1948–1960*, University of Washington Press, 1964, pp. 156-164.

like everything else."[25)]

The passage that follows argued for the constitutionality of the death penalty: "First of all, Article 13 of the Constitution provides that all the people shall be respected as individuals and that their right to life shall be a supreme consideration in legislation and in other governmental affairs. Yet in interpreting the same Article, it must naturally be presumed that even a person's right to life can be legally limited or taken away in a case in which the basic principle of public welfare is violated. Nevertheless, according to Article 31 of the Constitution, it is clear that, notwithstanding the preciousness of human life, a punishment that would deprive an individual of life can be imposed under appropriate procedures established by law." In sum, if one logically interprets the second sentence of Article 13, "Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs," one can conclude that the right of the people to life cannot be respected if it interferes with the public welfare. If one logically interprets Article 31, "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to a procedure established by law," one can conclude that a person can be deprived of his life in accordance with the procedures established by law. In response to the defense counsel's claim that the death penalty violates Article 36 of the Constitution, the judgment, referring to Articles 13 and 31, explicitly declared that "the Constitution of Japan, like those in most civilized countries at the present time, must be interpreted to recognize and affirm the retention of the death penalty as a form of punishment." The judgment went on as follows: "In the Constitution, in other words, the threat of the death penalty itself may be a general deterrence, the execution of the death penalty may be a means of cutting off at the root special social evils, and both may be used to protect society. Again, the approval of the death penalty must be interpreted as giving supremacy to the concept of humanity as a whole rather than to the concept of humanity as individuals, and the retention of the death penalty must ultimately be recognized as

25) This phrase reminds readers of the "evolving standards of decency that mark the progress of a maturing society," which is a determinative factor for cruel and unusual punishment in the Eighth Amendment of the U.S. Constitution. In *Gregg v. Georgia* (428 US 153 (1976)), the Supreme Court of the United States applied this standard and held that the death penalty does not violate the Eighth Amendment in all circumstances. It can be said that both Japan and the United States have similar standards regarding the cruelty of punishment. In 1948, the Supreme Court of Japan, preceded by the highest court of the country on the other side of the Pacific, upheld the constitutionality of the death penalty by applying the "evolutionary theory" standard.

necessary for public welfare." The judgment thus recognized the deterrent effect of the death penalty as a punishment and affirmed that the principle of public welfare necessitates the death penalty. Although the defense counsel contended that the provisions of the Criminal Code authorizing the death penalty violate Article 36 of the Constitution, which absolutely prohibits cruel punishments, the Court concluded that "The death penalty, as we pointed out above, is both the ultimate and the grimmest of punishments; however, the death penalty, as a punishment, is not generally and immediately regarded as being one of the cruel punishments referred to in the said Article."

The Supreme Court, however, abstained from the view that the death penalty is categorically not a cruel punishment. "Nevertheless, the death penalty, when the method of execution is deemed to be generally recognized as cruel from the humanitarian point of view of a particular period under certain circumstances, must then, like other punishments, be deemed cruel. Therefore, if a law that calls for a cruel method, such as those used in the past—burning at the stake, crucifixion, cutting off the head and displaying it on the gallows, or boiling alive to death in a cauldron—is enacted, then that law itself must be regarded as truly in contravention of Article 36 of the Constitution." In sum, the Supreme Court suggested that although the death penalty itself does not "generally and immediately" violate Article 36 of the Constitution, one can expect that it will violate Article 36 in the future if the public perception of the cruelty of the method of execution changes from a humanitarian perspective. The judgment also noted that the current method of execution, that is, hanging, does not constitute a cruel punishment when compared to other methods of execution, such as burning at the stake.

Two opinions were handed down in this judgment: that delivered by the Justices Tamotsu Shima, Hachiro Fujita, Saburo Iwamatsu, and Matasuke Kawamura (hereafter, the "four-Justice joint opinion"), and that delivered by Justice Noboru Inoue.

The four-Justice joint opinion suggested that the constitutionality of the death penalty itself may change in the future, as the Constitution only established the death penalty as a reflection of public sentiment at the time of its enactment and cannot be considered a permanent endorsement of the death penalty. The four-Justice joint opinion pointed out that the cruelty of the death penalty itself (not of the method of execution) depends on public sentiment, which is variable, and further suggested that, depending on public sentiment, the interpretation of Article 31 of the Constitution may be limited and that the death penalty itself may be unconstitutional. Justice Inoue's opinion also supported the majority opinion on the argument that the death penalty is constitutional based on the interpretation of Articles 13 and

31 of the Constitution, and confirmed that Article 36 cannot be interpreted as an absolute prohibition of the death penalty, given that Article 31 explicitly allows the punishment of life. He also stated, however, that there are no constitutional requirements that the death penalty be retained, and that if the death penalty is deemed to be unnecessary or opposed by the people as a whole, the Diet will willingly abolish the death penalty or judges will refrain from imposing the death penalty if the provisions for it remain.

In examining the significance of this judgment, the author focuses closely on the following points: (1) In its interpretation of Articles 13 and 31 of the Constitution, the Supreme Court maintained that the Constitution both assumes and endorses the preservation of the death penalty; (2) As grounds for judging the constitutionality of the death penalty, the Court cited the trends in the penal systems of other countries at the time; and (3) The Court suggested that if the method by which the death penalty is executed is generally recognized as cruel from a humanitarian perspective at the time and in the environment, it can be judged to be in violation of Article 36.

With regard to the first point, the Supreme Court seems to believe that the conduct of a defendant who commits a crime punishable by death constitutes a violation of the "public welfare" in Article 13 of the Constitution. In its judgment of 1949 (S. Ct. 1st Petty Bench, Judgment, August 18, 1949, 3(9) Keishu 1478), the Supreme Court cited its earlier judgment of 1948 and affirmed the constitutionality of the death penalty, stating, "The right to life is sacred by nature, and the right to life is inalienable, but respect for the lives and personalities of the individuals who constitute a society must be the same for oneself as for others, and therefore, a person who intentionally invades the life of another without respect for that life deserves the penalty of the loss of his own life and is responsible for his own act." In examining Article 31 of the Constitution in its judgment of 1948, the Supreme Court stated, "the retention of the death penalty must ultimately be recognized as necessary for the public welfare." The author disagrees with this view. Article 31 neither prohibits a penalty depriving a person of life nor requires the death penalty. The author therefore believes the retention of the death penalty is not constitutionally required (the Constitution simply allows its existence) and that the retention or abolition of the death penalty is merely a matter of legislation.

With regard to the second point, the Supreme Court ruled that "the Constitution of Japan, like those in most civilized countries at the present time, must be interpreted to recognize and affirm the retention of the death penalty." Many other countries retained the death penalty in 1948, when this judgment was rendered. Since this judgment, however, the abolition of the death penalty has been proceeding rapidly in other countries, especially in

the those recognized by the Supreme Court as the "most civilized," and the retention of the death penalty under the Constitution does not necessarily mean that the countries that retain it are "like […] most civilized countries at the present time." In 1965, for example, the United Kingdom enacted a five-year moratorium on executions with the support of public opinion calling for the abolition of the death penalty on humanitarian grounds and the possibility of a miscarriage of justice. When elected president of France in 1981, Francois Mitterrand brought with him a promise to submit a parliamentary bill to abolish the death penalty, and a law abolishing the death penalty was subsequently enacted despite the prevailing public opinion in favor of the death penalty. The death penalty was abolished from the 1960s to the 2000s in other European countries pursuant to the adoption of two protocols. The first, Protocol VI by the Council of Europe to the European Convention on Human Rights (ECHR), was adopted in 1982 to prohibit the imposition of the death penalty during peacetime. The second, Protocol XIII to the ECHR, was adopted to extend the prohibition to all circumstances, including wartime, as the European Union had abolished the death penalty as a condition of membership.[26] Article 6, Paragraph 1 of the International Covenant on Civil and Political Rights, an accord adopted by the United Nations General Assembly in 1966, entered into force in 1976, and ratified by Japan in 1979, states that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Paragraph 2 of the same Article states that, "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide." Although the UN General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights with the aim of abolishing the death penalty in 1989, Japan has never ratified this optional protocol. Thus, Japan is not necessarily obliged to abolish the death penalty under this or other interna-

26) Article 2, Paragraph 2 of the Charter of Fundamental Rights of the European Union stipulates that "No one shall be condemned to the death penalty or executed."

tional treaties.[27)]

The Supreme Court of Japan does not ignore the trend toward abolishing the death penalty in other countries or in the international community. A Supreme Court judgment rendered in 1993 (S. Ct. 3rd Petit Bench, Judgment, September 21, 1993, 262 Shukei 421) concluded that the provisions of the Penal Code that provide for the death penalty are constitutional, citing the court's 1948 judgment on the constitutionality of the death penalty. Justice Masao Ohno wrote the following concurring opinion to the 1993 judgment: "Unlike in 1948 [when the death penalty was first ruled constitutional by the Supreme Court], many civilized countries have gradually come to regard the death penalty, a punishment by which a country deprives a person of life, as a system inimical to the human dignity of individuals and not essential to the general deterrence of society"; and "it should be noted that in the 45 years [since the ruling on the death penalty] there has been a profound change in the underlying legislative facts [that support the constitutionality of the death penalty]."[28)]

Some scholars insist that Japan should abolish the death penalty in align-

27) As Article 98, Paragraph 2 of the Constitution stipulates that "The treaties concluded by Japan and established laws of nations shall be faithfully observed," the Japanese Government should abolish the death penalty if Japan ratifies the Second Optional Protocol to the International Covenant on Civil and Political Rights or if treaties ratified by Japan otherwise require the abolition of the death penalty. Japan, however, has never ratified this Optional Protocol, and there are no other treaties that legally oblige Japan to abolish the death penalty. Professor Yokodaido establishes that the Human Rights Committee of the United Nations has repeatedly recommended that Japan abolish the death penalty or introduce a moratorium, that the Japanese Government has refused to do so because the majority of Japanese citizens support the death penalty, and that the General Assembly of the United Nations has also adopted several resolutions for a moratorium on the use of the death penalty. On the basis of the foregoing, he concludes the following: "There have been many requirements and recommendations made by other countries to abolish the death penalty in Japan, but none of these are *legally* binding," and "the Japanese Constitution does not require considering international law that Japan is not party to, nor does it specifically require for the use of foreign law in constitutional interpretation." Satoshi Yokodaido, "Discussing the Constitutionality of the Death Penalty in Japan: Toward More Humane Methods of Execution," *Journal of Japanese Law*, vol. 28, No. 56 (2023), pp. 62-65 (emphasis in the original).

28) Justice Ohno states that "when sentencing a person to death, judges should always consider whether there is room to assess the death penalty as a cruel punishment in view of changes in the times, social conditions, and public awareness of the balance between crimes and punishments." He notes two points to forward this view: (1) a growing number of countries have abolished the death penalty and the Second Optional Protocol to the International Covenant on Civil and Political Rights has been adopted and enacted, and (2) over the past 45 years, four persons sentenced to death were acquitted after retrial in Japan. Alternatively, he notes that a public opinion survey conducted by the Cabinet Office on the death penalty reveals hardly any change in the public's attitude toward the death penalty, that is, consistent support for the retention of the death penalty by the majority of the public, over the past 40 years. Considering the standard of tolerance in society in general and the current limited sentencing to the death penalty by the courts in Japan, it is impossible to declare that the death penalty is an unbalanced and excessive punishment that violates the Constitution at this point in time.

ment with the foreign and international trends toward its abolition. Professor Kazuhiko Matsumoto, for example, states, "When considering the cruelty of the death penalty in light of the standards of modern civilization, the death penalty should be considered a cruel punishment, given that the majority of developed countries have abolished the death penalty, including a growing number of countries that have joined the Convention on the Abolition of the Death Penalty."[29] However, arguments for the unconstitutionality of the death penalty on the grounds of foreign and international trends toward its abolition are criticized as logically ambiguous.[30] The abolishment of the death penalty in a growing number of countries has no direct legal effect domestically: there are no direct changes to the meaning of the Constitution of Japan resulting from the trend, and the execution of the death penalty in Japan, a country that is not a party to the Treaty on the Abolition of the Death Penalty, does not constitute a violation of international law.[31]

With regard to the third point, the judgment of the 1948 death penalty held that cruelty is measured by whether it is objectively recognized as cruel from a humanitarian perspective rather than by whether it is subjectively perceived as cruel by the person sentenced to death, and that this is not universal but the perceptions of the public and individuals vary over time and under changing circumstances. While the majority opinion of the judgment held that "when the method by which the death penalty is executed *is deemed to be generally recognized as cruel* from the humanitarian point of view of a particular period under certain circumstances, the death penalty can be called cruel," the four-Justice joint opinion stated that the cruelty of the death penalty depends on *public sentiment*, which is variable.

Some scholars argue that it is inappropriate to define the death penalty based on public sentiments, which are unstable.[32] Professor Ken Nemori, for example, criticizes "the constitutional interpretation that makes so-called 'socially accepted ideas' the deciding factor in judgments when human rights are at stake."[33] In his concurring opinion to the above-mentioned Supreme Court judgment of 1993, on the other hand, Justice Ohno stated, "As

29) Yasuyuki Watanabe et al., *Kempo: Kihon-ken* [*Constitution Law: Fundamental Rights*], vol. 1, 2nd ed., Nippon Hyoron Sha, 2023, p. 319 (written by Kazuhiko Matsumoto).
30) Masaomi Kimizuka, *Zoku Shiho-ken / Kenpousosho-ron* [*Sequel to the Arguments on the Judicial Power and the Power of Constitutional Litigation*], Horitsu Bunka Sha, 2023, p. 534.
31) Kimizuka, *supra* note (30), pp. 504-505.
32) Sugihara, *supra* note (4), p. 272.
33) Ken Nemori, "Saikou-sai to Shikei no Kempo Kaishaku [Supreme Court and Constitutional Interpretation of Capital Punishment]," in Yasuhiro Okudaira ed., *Gendai Kempo no Shoso* [*Some Aspects of Contemporary Constitutional Law*], Senshu University Press, 1992, pp. 134-135.

the justification for punishment lies in the proper balance between crime and punishment, one needs to consider whether the death penalty seriously undermines the balance between crime and punishment in light of the standard of tolerance in society as a whole, taking into account the severity of *injuria* and the public's attitude toward the death penalty," adding that it is appropriate to rely on "the consciousness and sentiment of the people in Japan toward the death penalty" to define cruel punishments.

As cruel punishments are prohibited under Article 36 of the Constitution, the cruelty of the death penalty itself creates problems with regard to its constitutionality. The Supreme Court has often applied the standard of the average person in light of socially accepted ideas when deciding constitutional cases (including restrictions on the individual's freedom of expression, which should be given the highest weight in the catalog of human rights, and the question of whether the penal laws and regulations are clear).[34] As such, it is unreasonable to deviate from the standards of an average person or socially accepted ideas only when assessing the cruelty of the punishment.

Professor Munenobu Hirakawa argues that "Whether the death penalty is constitutional should be a problem of the limits of the right to life, that

34) According to Professor Tatsuhiko Yamamoto, the standard of the average person is often applied as a criterion for legal judgment in cases involving restrictions on an individual's freedom of expression or the clarity of penal laws and regulations, as well as in cases of defamation resulting in torts. Tatsuhiko Yamamoto, "'Yomu' Hito, 'Yomanu' Hito: 'Ippan-Jin Kijun' Zakkou ['Reading' Person, 'Non-Reading' Person: A Miscellaneous View of 'the Standards of the Average Person']," in Akio Nakabayashi & Tatsuhiko Yamamoto, *Kempo Hanrei no Kontekusuto* [*Context of Constitutional Cases*], Nippon Hyoron Sha, 2019, p. 57. The standards of the average person or socially accepted ideas are also often applied in Supreme Court rulings when the violation of the principle of separation of religion and state is raised as an issue. The Court has objectively made judgments in light of socially accepted ideas as they come into play under various circumstances, such as the religious reputation of the average person or the effect or impact of an activity by the State on the average person. According to Professor Yasuyuki Watanabe, "The Supreme Court has always regarded 'socially accepted ideas' as normative." Yasuyuki Watanabe, "Iken-Shinsa no Seito-sei to 'Konsensasu' naishi 'Shakai Tunen' [Legitimacy of Constitutional Review and 'Consensus' or 'Socially Accepted Ideas']," *Jurist*, No. 1022 (1993), p. 131. Professor Yokodaido also comments, "It is certainly not difficult to understand the approach adopted by the Supreme Court in this ruling [on the constitutionality of the death penalty in 1948], given that the Supreme Court has applied the standard of the average person in making constitutional judgments in various aspects of its rulings." He goes on to conclude as follows, however: "Considering that the death penalty is a capital punishment that deprives a person of life and that corporal punishments are prohibited, whether or not a sentence constitutes 'cruel punishments' prohibited under Article 36 of the Constitution should in principle be assessed solely based on whether the individual feels *unnecessary* physical or mental suffering." Satoshi Yokodaido, "Saiban-in Seido to Shikei [The *Saiban-in* System and the Death Penalty]," in Miyoko Tsujimura ed., *Kempo Kihon Hanrei: Saishin no Hanketsu kara Yomitoku* [*Basic Constitutional Cases: Reading from the Latest Cases*], Shogakusya, 2015, p. 249 (emphasis in the original).

is, the extent to which an individual's life is guaranteed under the Constitution," and that "it is inappropriate as a human rights theory that it be determined by the sentiments and opinions of the majority of the people, in other words, by 'numbers.'"[35)]

The public sentiment referred to in the four-Justice joint opinion is not a sentiment of a large number of people that can be measured quantitatively (as Professor Hirakawa states). The author points out that misunderstanding and confusion were caused by the fact that the majority opinion in the Court's judgment on the death penalty in 1948 carefully stated that practices "are deemed to be generally recognized as cruel," whereas the four-Justice joint opinion paraphrased this standard as "public sentiment." While Justice Ohno's concurring opinion in the Supreme Court judgment of 1993 relies on the four-Justice joint opinion in the judgment of 1948, Ohno shows that he was aware of the problem when he stated, "As the death penalty is a measure of criminal policy based on people's moral sentiment, it cannot be determined solely by people's actual awareness of the issue." Hirakawa, meanwhile, states, "It must be said that on issues related to human rights [including the death penalty], the constitutional principles and ideals are the objective will of the people (so-called 'general will'), and that 'public consciousness and sentiment' are merely a set of subjective opinions."[36)] The author agrees with Hirakawa on this point. The cruelty of the death penalty is evaluated in view of not the sentiment of individuals or a group of people, but rather the abstract or conceptual understanding and perception of the general population, or a set of socially accepted ideas and the consciousness of the public as a whole.[37)]

In 1951, moreover, the Supreme Court of Japan rejected several other arguments maintaining that the death penalty was unconstitutional based on articles other than Article 36. The defense counsel in the case in ques-

35) Munenobu Hirakawa, "Shikei-Seido to Kempo Rinen: Kempo-teki Shikei-ron no Koso [The Death Penalty System and Constitutional Ideals: Constitutional Argument on the Death Penalty]," in his *Kempo-teki Keiho-gaku no Tenkai: Bukkyo Shiso wo Kiban to shite* [*Constitutional Criminal Law Studies: Based on the Buddhist Theory*], Yuhikaku, 2014, p. 202. Hirakawa argues that it is problematic to suggest that the constitutionality of the death penalty could change simply because public opinion changes. This logic is flawed because it would make constitutional interpretation dependent on shifting public sentiments, which risks making constitutional interpretation fluid over time. (*ibid*., pp. 202-203).

36) Hirakawa, *supra* note (35), p. 192.

37) In its judgment (S. Ct. Grand Bench, Judgment, March 13, 1957, 11(3) Keishu 997), the Supreme Court defined socially accepted ideas as "the common sense in general society," one that "is not a collection or average of individual perceptions, but a greater collective consciousness that cannot be denied by individual people with contrary perceptions," and held that "it is up to judges under the present system to decide what such socially accepted ideas are."

tion relied on Professor Kameji Kimura's argument. The Supreme Court, however, explicitly stated that it could find no reason to conclude that the death penalty should be abolished from the provision of Article 9 of the Constitution, and held that the argument that the death penalty violates Article 13 of the Constitution could not be accepted, as indicated by the earlier Supreme Court judgment of 1948 on the constitutionality of the death penalty.[38] Whenever a defendant or defense counsel has questioned the constitutionality of the death penalty in cases since the 1948 judgment, the Supreme Court has consistently ruled that the death penalty itself is not unconstitutional, citing its 1948 judgment as a precedent. Professor Masahide Maeda states, "The constitutionality of the death penalty has never wavered in the courts."[39]

2.3. The Supreme Court's Judgment on the Constitutionality of the Method by which the Death Penalty is Executed in the 20th Century

The Supreme Court judgement of 1948 on the constitutionality of the death penalty suggested that, while the death penalty itself is not generally and immediately regarded as a cruel punishment as referred to in Article 36, it may be unconstitutional and void if the method by which the punishment is executed is generally recognized as cruel from a humanitarian point of view during a particular period under certain circumstances.

In deliberating whether hanging, the method of execution currently used in Japan, constitutes cruel punishment, the Supreme Court ruled as follows in the Teikoku Ginko Bank Poisoning Murder Case (S. Ct. Grand Bench, Judgment, April 6, 1955, 9(4) Keishu 663): "The methods of execution currently used in other countries include hanging, beheading, shooting, electrocution, and gas poisoning; although there are criticisms of the merits and demerits of these methods, there is no reason to consider the method of hanging currently used in Japan to be particularly cruel from a humanitarian perspective in comparison with the other methods; therefore, there is no reason to claim that hanging violates Article 36 of the Constitution."

While the judgment was significant as the Supreme Court's first to rule on the constitutionality of the method of execution, it was quite brief as a response to the defense counsel's argument (among many others) that hanging violates Article 36 of the Constitution. Although the judgment dis-

38) S. Ct. Grand Bench, Judgment, April 18, 1951, 5(5) Keishu 923.

39) Masahide Maeda, "Shikei to Muki-kei to no Genkai [The Limits of the Death Penalty and Life Sentence]," in Harada Kunio Hanji Taikan Kinen Ronbun-shu Kankou-kai ed., *Atarashii Jidai no Keiji Saiban* [*Criminal Trials in the New Era*], Hanrei Times, 2010, p. 470.

cussed hanging in comparison to other methods of execution, it offered no detailed examination of the legal basis or content of the death penalty or other methods of execution under scrutiny. Hence, two open questions remain in this regard: what is the current method by which the death penalty is executed as provided for by law, and is this method constitutional? The next sections of this paper, 2.3.1 and 2.3.2, examine the procedural and substantive aspects of the method by which the death penalty is executed.

2.3.1 Procedural Aspects of the Method by which the Death Penalty is Executed

Regarding the procedures for the execution of the death penalty, Article 11, Paragraph 1 of the Penal Code stipulates that "The death penalty is executed by hanging at a penal institution"; Article 475, Paragraph 1 of the Code of Criminal Procedure stipulates that the "Execution of the death penalty shall be ordered by the Minister of Justice"; Article 178, Paragraph 1 of the Act on Penal Detention Facilities and the Treatment of Inmates and Detainees stipulates that "The death penalty is to be carried out at an execution site inside a penal institution"; and Article 179 of the same Act stipulates that "Nooses are to be unfastened five minutes after the confirmation of death when the death penalty is carried out by hanging."[40)]

In addition, the Dajokan[41)] Announcement No. 65 of 1873 (the so-called "Hangman's Instrument Scheme," hereafter referred to as the "Dajokan Fukoku of 1873")[42)] regulates such matters as the structure and method of use of the instruments used in the execution and the method of handling the body of the person to be executed.

40) In addition, the Code of Criminal Procedure stipulates that, in principle, executions shall be carried out within five days of an order by the Minister of Justice (Article 475, Paragraph 2), that the public prosecutor and other officers shall be present at the execution, that no person unauthorized to enter the execution site may do so (Article 477, Paragraphs 1 and 2), that the execution shall be suspended if the person sentenced to death is insane or pregnant (Article 479, Paragraphs 1 and 2), and so on. Article 178, Paragraph 2 of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees lists the days when the death penalty is not to be carried out. The former Prison Act, the law in effect prior to the enactment of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees, also contained provisions similar to those of the current Act (Articles 71 and 72).

41) Dajokan [Grand Council of State] was the highest organ of Japan's premodern Imperial government until it was replaced by the Cabinet in December 1885.

42) The e-Gov Laws and Regulations Search, a database managed and designated by the Digital Agency, lists the Dajokan Fukoku of 1873 (it is not treated as repealed, expired, or no longer in effect). This listing implies that the Japanese Government considers the Dajokan Fukoku of 1873 to be a valid law (the data on laws and regulations listed in the e-Gov Laws and Regulations Search are said to have been verified by the Judicial Law Department of the Ministry of Justice and other government ministries).

In the trial of a robbery-murder case in which the defendant was sentenced to death, the defense counsel argued that a death sentence without any specification of the method of execution violated Articles 31 and 36 of the Constitution, as the court essentially dared to sentence the defendant to death when there was no provision in the laws regarding the method by which the death penalty is to be executed. In an appeal to this case, the Supreme Court ruled that the procedural aspect of the method of execution was constitutional (S. Ct. Grand Bench, Judgment, July 19, 1961, 15(7) KEISHU 1106). The specific arguments of the defense counsel were as follows: (1) Although the basic matters concerning the method by which the death penalty is executed should be provided by law (Article 31 of the Constitution), the Penal Code only provides for the death penalty in Article 11, Paragraph 1, and does not specify the method by which the execution is carried out. There are no provisions in the Code of Criminal Procedure, the Prison Act (at that time), or other laws providing for basic matters concerning the method of execution. (2) Although the Dajokan Fukoku of 1873 provides for basic matters concerning when the death penalty is executed by hanging, (i) this Fukoku expired at the end of 1881 pursuant to the implementation of the so-called Former Penal Code (the Dajokan Fukoku No. 36 of 1881), and (ii) even if this Fukoku had neither expired nor been repealed, it was repealed at the end of 1947 pursuant to Article 1 of the Act No. 72 of 1947.[43] Moreover, (iii) even if it had not expired, this Fukoku should be deemed to be in violation of Article 36 of the Constitution and invalid in light of the method of execution specified (in that a person who may be in a coma is nonetheless placed on the gallows to be hanged). (3) The method of execution currently employed in Japan, hanging below ground, with the dropping of the body into an underground moat, differs from the method of hanging above ground prescribed in the Dajokan Fukoku of 1873, and there is no clear legal basis for the adoption of such a different method, and the method cannot be said to be in accordance with the "procedure established by law" prescribed by Article 31 of the Constitution; and (4) As stated above, the defense counsel argued that the execution of the death penalty, not pursuant to the provisions of the law and without knowledge of the method of execution to be adopted, violates Article 31.

The Supreme Court dismissed the appeal in response, rejecting the de-

43) This act addressed ordinances that were enacted under the former constitution (the Constitution of the Empire of Japan) without deliberation by the Imperial Diet, to provide for matters to be described by law. Specifically, the Act ensured that such ordinances were to retain tentative effects as laws until the end of the year when the new constitution (the Constitution of Japan) took effect.

fense counsel's claim regarding Articles 31 and 36 of the Constitution. The majority opinion of the judgment reads as follows: (1) There is no legal basis for finding that the Dajokan Fukoku of 1873 has been repealed or has expired as of the date of this judgment.[44] (2) Although not all matters concerning the method by which the death penalty is executed stipulated in the Fukoku are matters that should be stipulated by law, important matters concerning the method by which the death penalty is executed are basic matters that should have been stipulated by law, and had the force of law, under the former constitution. (3) The basic matters regarding the method by which the death penalty is executed stipulated in the Fukoku[45] are still matters to be addressed by law under the new constitution (Article 31). (4) The Act No. 72 of 1947 regulates the effects of the provisions of previous ordinances that provide for matters to be prescribed by law under the new constitution and does not provide for laws that were already recognized as laws under the former constitution, such as the Dajokan Fukoku of 1873. Therefore, the Fukoku cannot be deemed to have expired as of the end of 1947 and remains valid under the new constitution as having the same effect as a law (Article 98, Paragraph 1 of the Constitution). (5) According to the Supreme Court judgement of 1955, the current method of executing the death penalty cannot be construed as "cruel punishments" prohibited under Article 36 of the Constitution. (6) Therefore, the existing laws concerning the death penalty include the Penal Code, the Code of Criminal Procedure, the Prison Act, and other laws, as well as the Dajokan Fukoku of 1873, which is recognized as having the same effect as a law under the Constitution, and the death sentence imposed pursuant to these laws was based on the "procedures established by law" as stipulated in Article 31 of the Constitution. (7) The current method by which the death penalty is executed is based on the "procedure prescribed by law" as stipulated in Article 31 of the Constitution. (8) Although the current method of executing the death penalty may not be in accordance with the provisions of the Dajokan Fukoku of 1873, it cannot be said to violate Article 31 of the Constitution because it does not violate the basic principles of the method of executing the death penalty stipulated in the Dajokan Fukoku of 1873.

The research law clerk in charge of the Supreme Court judgement of

44) Laws and regulations enacted prior to the enactment of the former constitution, regardless of their title, were valid as laws if they regulated matters that should be regulated by law (Article 76, Paragraph 1 of the Constitution of the Empire of Japan).

45) The Fukoku states that, "To hang a person, his hands must be tied behind his back, his face is to be covered, he is to be placed on a platform, and the rope is to be placed around his neck. […] The platform opens immediately and the person falls, his body flying through the air."

1961 stated, "Even so, the continued reliance on an antiquated Dajokan Fukoku from about a century ago in governing the basic matters concerning the method executing such a grave punishment, the death penalty, is truly bizarre, apart from any questions concerning the legal validity of the Fukoku."[46] He also expressed, "It is my earnest hope that the Dajokan Fukoku, an antiquated document from about a century ago, will be promptly replaced by a new act adapted to modern times."[47]

The Dajokan Fukoku was promulgated in 1873, and explanatory notes by the research law clerk were published in 1961. There has been no new legislation, however, on the method of executing the death penalty. As of this paper, in 2024, the death penalty is being executed in Japan pursuant to a Fukoku promulgated more than 150 years ago, but not in accordance with that Fukoku's procedures.

2.3.2 Substantive Aspects of the Method by which the Death Penalty is Executed

The substantive judgment, prior to the Supreme Court judgement of 1961, on whether hanging constitutes "cruel punishments" prohibited under Article 36 of the Constitution, was disputed in a trial at the court of second instance in a certain robbery-murder case occurring shortly after the Constitution was enacted. The defendant's defense counsel argued that hanging violated Article 36 of the Constitution and requested an expert opinion on the cruelty of hanging. The Court ordered two criminal law scholars and one forensic scientist to evaluate the constitutionality of hanging. One of the three experts, Professor Tanemoto Furuhata, a forensic scientist, wrote the following in his appraisal report submitted to the court: "There are five methods of execution in other countries: hanging, beheading, electrocution, gas poisoning, and shooting. Cyanide gas poisoning and hanging are considered the best among these five methods of execution from a forensic perspective, as both cause less pain to the executed person and result in instant death. When carried out in an ideal manner, hanging is superior to other methods in that it causes no damage to the corpse, no pain to the ex-

46) Tadashi Kurita, "Case Commentary," *Saiko Saiban-sho Hanrei Kaisetsu, Keiji-hen, Showa 36-nendo* [*Supreme Court's Case Commentaries, Criminal Cases, FY 1961*], Hosokai, 1973, p. 197.

47) Tadashi Kurita, "Toki no Hanrei, Shikei (Koushu-kei) no Senkoku ha Kempo 31-jou ni Ihan-suru ka: Meiji 6-nen Dajokan Fukoku Kouzai Kikai Zushiki no Koryoku [Contemporary Cases, Does Sentencing to Death (Hanging) Violate Article 31 of the Constitution? The Validity of the Dajokan Announcement No. 65 of 1873, Hangman's Instrument Scheme]," *Jurist*, No. 232 (1961), p. 55.

ecuted person, and no postmortem cruelty. […] I believe that the hangings currently practiced in Japan are no crueler than the methods of execution currently practiced in other countries."

The author considers that "cruel punishments" prohibited under Article 36 of the Constitution refer to punishments that not only cause unnecessary mental or physical suffering to the executed person, but also may be perceived by the general public as undermining the dignity of the executed person. Assuming that Furuhata's view is correct, hanging, according to the author's definition, is not an unconstitutional cruel punishment, as it causes no physical pain to the executed person or damage to the executed person's corpse.

The Tokyo High Court affirmed a district court judgment (Nagano District Court, Matsumoto Branch, Judgment, March 31, 1950) that sentenced a defendant to death. In dismissing the appeal (Tokyo High Court, Judgment, December 19, 1955), the High Court stated, "As stated in several Supreme Court precedents, the death penalty in the Penal Code does not violate Article 36 of the Constitution, and that the hangings currently employed in Japan for executions do not constitute 'cruel punishments' prohibited under Article 36 of the Constitution." The defense counsel appealed, but the Supreme Court dismissed the appeal on the same grounds as the High Court (S. Ct. 1st Petty Bench, Judgment, April 17, 1958, 124 Shukei 253).

2.4. The Supreme Court's Judgment on the Constitutionality of the Method by which the Death Penalty is Executed in the 21st Century

The constitutionality of the method by which the death penalty is executed has been repeatedly challenged since the Supreme Court judgment of 1955. Every time the Supreme Court of Japan dismissed such claims of unconstitutionality, it cited its judgments of 1948, 1955, and 1961. In the 21st century, the constitutionality of the substantive aspects of the method of execution was challenged in the Tokyo Metro (Subway) Sarin Attack Case (against defendant Tomomasa Nakagawa). The defense counsels claimed that the death penalty in Japan violates Article 36 of the Constitution as a cruel punishment, on the following grounds: literature describing the occurrences of head separation in Japan and other countries suggests that "In Japan, as in other countries, there is a possibility that the head of the executed person will be torn off," and that "It may take several minutes

or more to suffocate the executed person."[48] In addition, Sinritsu-Koryo (1899), the penal code in force at the time of the Dajokan Fukoku of 1873, distinguished between "hanging" and "beheading," stipulating that hanging "maintains the body in a perfect form," whereas the current method by which the death penalty is executed, in which there is a possibility that the head will be separated, cannot be considered hanging as stipulated in Article 11 of the current Penal Code and violates Article 31 of the Constitution, which stipulates that "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."[49] To support their argument, the defense counsels referred to the opinion of Austrian forensic scientist Professor Walter Rabl, who argues that Furuhata's expert opinion on the non-cruelty of the method of execution is incorrect.[50] The Supreme Court, however, dismissed the defense counsels' claim that hanging violates Articles 31 and 36 of the Constitution, on the grounds that Supreme Court precedents (judgments of 1948, 1955, and 1961) firmly establish that the death penalty, including the method of execution, is not in violation of the Constitution (S. Ct. 2nd Petty Bench, Judgment, November 18, 2011, 305 Shukei 1).

After the *saiban-in* system was introduced, the argument that hanging violates Articles 36 and 31 of the Constitution on the grounds that head separation may occur and consciousness may remain was raised again in

48) 305 Shukei 16-28; Nakagawa Tomomasa Bengo-dan [Defense Counsel Team for Tomomasa Nakagawa] & Walter Rabl, ed. *Koshu-kei ha Zangyaku-na Keibatsu deha nainoka?: Shimbun to Hoigaku ga Kataru Shinjitsu* [*Hanging is a Cruel Punishment: The Truth Revealed by Journalism and Forensic Science*], Gendai Jinbun-sha, 2011, pp. 32-46. As the defense counsels themselves confess, the examples of head separation they showed "are largely out of date" with the exception of one execution in Iraq known from an interview report (*ibid*., p. 60), and one "actual case" (according to the defense counsels) from Japan known from a newspaper account of an execution that took place in 1883.

49) 305 Shukei 28-29; Tomomasa Nakagawa Bengo-dan & Rabl, ed., *supra* note (48), 46-47. The defense counsels also argued that the lack of requisite provisions in the law relating to the death penalty (on "the method of execution by hanging without head separation of the executed person") and improper procedures (on "methods of execution other than that provided for in Article 11 of the Penal Code") violate Article 31 of the Constitution. 305 Shukei 30-31; Tomomasa Nakagawa Bengo-dan & Rabl, ed., *supra* note (48), 48-50.

50) Professor Rabl's view of how hanging causes a person to die is briefly described, with illustrations, in Yukihiro Masaki, "Is Judicial Hanging a Cruel Punishment?" *Ryukoku Corrections and Rehabilitation Center Journal*, No. 4 (2014), pp. 24-27. Attorney Yukihiko Masaki concludes that "Judicial [h]anging in Japan is a cruel punishment, and that Article 11 of the Penal Code violates Article 36 of the Constitution of Japan" (*ibid*., p. 28).

the Osaka Pachinko Parlor Arson Murder Case.[51] The defense counsels believed that *saiban-ins* have the right and need to know how the death penalty is executed, that hanging is unconstitutional in light of the possibility of head separation, and that *saiban-ins* need to understand the method of execution in detail because they take part in the selection of both the punishment to be imposed and the severity of punishment. Therefore, they requested that the district court allow the examination of documentary evidence concerning execution by hanging and the examination of witnesses Professors Rabl and Tsuchimoto in the trial, one in which *saiban-ins* were participating. The public prosecutors objected, arguing that such examinations were unnecessary and confusing for the *saiban-ins*.

The matter that the defense counsels were attempting to argue and prove regarding the death penalty was not about sentencing (Article 6, Paragraph 1, Item 3 of the *Saiban-in* Act), which should be decided by a panel composed of both judges and *saiban-ins*, but rather about the interpretation of laws and regulations (Article 6, Paragraph 2, Item 1 of the same Act), which should be decided by a panel composed of only of judges, apart from *saiban-ins* (Article 6, Paragraph 3 of the same Act). The *saiban-ins* in this case, however, were inevitably aware that the constitutionality of the death penalty was being discussed through court proceedings, and as such, could be expected to have a natural interest in what arguments and evidence were presented. It conforms with the purpose of Article 1 of the *Saiban-in* Act that *saiban-ins* are to be given them the opportunity to be present at the proceedings (including those that examine evidence and arguments) and to observe judges' deliberations concerning the interpretation of laws and regulations, even though they are not bound by duty to do so as *saiban-ins*. Pursuant to Article 60 of the *Saiban-in* Act, the judges on the panel decided to allow the *saiban-ins* to be present at the proceedings to review the constitutionality of the death penalty. At the proceedings, Professor Rabl "testified scientifically and empirically, using papers and videos, about what happens during a hanging." Professor Tsuchimoto "testified about his experience in corresponding with an inmate, a person for whom he had

51) Due to a mental disorder, the defendant had delusions that the unpleasant happenings around him were caused by a psychic named "Mihi" who possessed him, and by a group named "Mark" (associated with Mihi) that harassed him. He planned to commit random mass murders as revenge against a society that tolerated and neglected the harassment by Mihi and Mihi's colleagues. He poured gasoline, which he had prepared in advance, into a crowded pachinko parlor and set fire to it, burning down the parlor and killing five customers and seriously injuring ten others. The defense counsel team included an attorney (Attorney Sadato Goto) who had previously served as a defense counsel in the Tokyo Metro Sarin Attack Case (against defendant Tomomasa Nakagawa).

sought the death penalty as a prosecutor and who was later executed, and his experience of being present at an execution."[52] The judges also allowed the *saiban-ins* who wanted to observe the judges' deliberations on the constitutionality of the death penalty pursuant to Article 68, Paragraph 3 of the *Saiban-in* Act.

In response to the defense counsels' claim that hanging violates Articles 36 and 31 of the Constitution, the Osaka District Court ruled that "after hearing the opinions of the *saiban-ins* (Article 68, Paragraph 3 of the *Saiban-in* Act) and considering the defense counsels' claim, we have come to the conclusion that hanging is not unconstitutional" (Osaka District Court, Judgment, October 31, 2011, 1397 HANTA 104). Citing the testimony of witnesses Rabl and Tsuchimoto, this judgment stated that "Hanging often requires a minimum of five to eight seconds for loss of consciousness, or two minutes or more depending on how the neck is tightened, during which time the executed person may continue to feel pain," that "In some cases, head separation, especially damage to the internal tissues of the neck, may be involved," and that "There are problems in that the course of a person's death cannot be fully predicted."

However, the Osaka District Court dismissed the defense counsels' claim that hanging violates Articles 36 and 31 of the Constitution, stating the following: "The death penalty is a punishment that makes a criminal atone for his crime by depriving him of his life against his will. The Constitution of Japan also recognizes the inevitable nature of the death penalty by continuing to maintain its constitutional status. […] The execution of the death penalty constitutes a 'cruel punishment' prohibited under Article 36 of the Constitution only in the most bizarre cases among the possible methods of execution. While it is true that methods of execution that cause unnecessary suffering to the person, offend his honor, or humiliate him are not permitted, there is clearly no obligation to alleviate the mental and physical suffering of the person insofar as possible or to limit such suffering to the minimum necessary level, as in the case of medical treatment. Whether the execution is particularly bizarre may vary from country to country, ethnic group to ethnic group, or person to person due to differences in history, religious background, and values. The method of execution should be considered cruel only if it is inhumane, unhumanitarian, and shocking to

52) Satoru Shinomiya, "Kokumin wo Ningen-teki / Jindou-teki Handan kara Toozakete-iru mono ha Nani-ka: Koshu-kei no Zangyaku-sei ga Arasowareta Saiban-in Saiban no Igi [What Prevents People from Making Human and Humanitarian Decisions: The Significance of the *Saiban-in* Trials in which the Cruelty of Hanging was Contested]," *Horitsu Jiho*, vol. 84, No. 2 (2012), p. 2.

those with the normal feelings of ordinary people; if it is not, the method chosen is a matter of legislative discretion. Whether hanging is the best method of execution is controversial and divisive. Although hanging is premodern and unpredictable, the person sentenced to death has committed a crime that warrants the punishment, and the executed person should bear some mental and physical pain from the execution as a matter of course. If other methods of execution are used, unpredictable situations may still occur; thus, hanging cannot constitute cruel punishments prohibited under Article 36 of the Constitution. Head separation occurs only by accident in exceptional cases, and in most cases when it does occur it is limited to the separation of the internal tissues of the neck and does not result in decapitation. It is unreasonable to generalize very rare exceptional cases by saying that they are instances of decapitation rather than hanging."[53]

As stated in Section 2.1., the author believes that the suffering necessary for punishment is not considered "cruel punishment" prohibited under Article 36 of the Constitution. This judgment, which stated that "some mental and physical pain from the execution should naturally be borne by the executed person," is in line with the author's view.[54] Scholars who interpret the cruel punishments prohibited under Article 36 of the Constitution as punishments that impose suffering only for the person to be executed will criticize the judgment in its contention that "The method of execution should be considered cruel only if it is inhumane, unhumanitarian and shocking to those with the normal feelings of ordinary people."[55] From the author's perspective, the cruel punishments in question include those perceived by the general public to impose a loss of the executed person's dignity as an individual.

The defense counsels appealed, but the Osaka High Court dismissed

53) Professor Yokodaido focuses on the difference in the definition of unconstitutional "cruel punishment" between the Supreme Court precedents and this Osaka District Court ruling, stating, "This Ōsaka District Court ruling of 2011 seems to define a cruel punishment more restrictedly than the SC, seemingly shifting from '*unnecessary* psychological and physical suffering' to '*intentional* psychological and physical suffering.'" Yokodaido, *supra* note (27), p. 80 (emphasis in the original).

54) Contrarily, Professor Yokodaido argues that the death penalty can be judged to be unconstitutional if the court does not consider methods other than hanging (such as lethal injection), stating, "[I]f the Japanese courts use the standard of 'unnecessary psychological and physical suffering' properly, they should not ignore methods of execution introduced in other countries that may minimize suffering" (Yokodaido, *supra* note (27), p. 82), and "Because other methods of execution can reduce 'unnecessary psychological and physical suffering' to the utmost, as long as such methods are available, and in the absence of any justifiable reason not to consider the introduction of such an alternative, hanging may be said to inflict not only 'unnecessary' but also 'intentional' mental and physical suffering on the executed." (*ibid*., p. 81).

55) Yokodaido, *supra* note (34), p. 249.

their motion (Osaka High Court Judgment, July 31, 2013, 1417 Hanta 174). The defense counsels further appealed, but the Supreme Court dismissed this appeal, as well. Addressing the defense counsels' argument that the method of execution in death penalty cases violates Articles 31 and 36 of the Constitution, the Supreme Court referred to precedents (Supreme Court judgments of 1948, 1955, and 1961) establishing that neither the death penalty nor the method by which it is executed violates the aforesaid provisions (S Ct. 3rd Petit Bench, Judgment, February 23, 2016, 319 Shukei 1).

3. *Saiban-ins'* Involvement in the Judgment on the Constitutionality of the Death Penalty

3.1. *Saiban-ins'* Involvement in the Trial of the Osaka Pachinko Parlor Arson Murder Case

The constitutionality of the death penalty was solely determined by professional judges before the *saiban-in* system was introduced. Since the introduction of the *saiban-in* system, however, *saiban-ins* have generally participated in the trials of cases involving crimes punishable with the death penalty (Article 2, Paragraph 1, Item 1 of the *Saiban-in* Act). If the defendant or his defense counsel argues that the death penalty is unconstitutional in such a case, the constitutionality of the death penalty arises as an issue in a trial in which *saiban-ins* can participate.

Whether the death penalty as a punishment (Article 11 of the Penal Code) violates Article 36 or other Articles of the Constitution is a decision based on the interpretation of laws and regulations (Article 6, Paragraph 2, Item 1 of the *Saiban-in* Act). As mentioned above, the question is deliberated and decided not by a panel composed of both professional judges and *saiban-ins*, but a panel of professional judges alone (Article 6, Paragraph 3, and Article 68, Paragraph 1 of the same Act).

Why was the process designed to exclude *saiban-ins* from participating in decisions that involve the interpretation of laws and regulations? According to a commentary written by the official in charge of drafting the *Saiban-in* Act, the interpretation of laws and regulations often requires professional and complex legal judgments, and the uniformity of judgments should be maintained from the standpoint of legal stability.[56)]

During the process to legislate the *Saiban-in* Act, it was already recog-

56) Hiroyuki Tsuji, "'Saiban-in no Sanka-suru Keiji Saiban ni Kansuru Houritsu' no Kaisetsu [Commentary on the 'Act on Criminal Trials with the Participation of *Saiban-in*] (1)," *Hoso Jiho*, vol. 59, No. 11 (2007), p. 96.

nized that the *saiban-ins* who participate in a criminal trial, being ordinary citizens who are selected by lottery and do not necessarily possess legal expertise or rationality, lack the legitimacy to exercise the right to review the constitutionality of laws and regulations.[57)]

However, as it may be necessary or useful for *saiban-ins* to know the content of proceedings in which decisions are to be made only by professional judges, such as decisions based on the interpretation of laws and regulations, the professional judges on the panel may permit *saiban-ins* to attend such proceedings (Article 60 of the *Saiban-in* Act).[58)] The *saiban-ins'* attendance in proceedings falling within the purview of the duties of professional judges can also help achieve the purpose of the *saiban-in* system, that is, to enhance citizens' understanding of and trust in the judiciary,[59)] albeit in matters beyond the duties of the *saiban-ins*. Moreover, because it may sometimes be useful, in some contexts, for the professional judges to hear the *saiban-ins'* opinions as a reference in rendering their decisions, the professional judges may permit the *saiban-ins* to observe their deliberations on decisions that should be made only by professional judges and to hear the *saiban-ins'* opinions on their decisions (Article 68, Paragraph 3 of the same Act).[60)] Even if *saiban-ins* are permitted to attend such proceedings and deliberations, decisions on the interpretation of laws and regulations (as well as whether to involve the *saiban-ins* in such proceedings and deliberations) should be made solely by professional judges.

57) For example, the statement by Professor Morio Takeshita, Acting Chairman of the Justice System Reform Council, at the 51st meeting of the Justice System Reform Council (March 13, 2001), and the response by Judge Ushio Yamazaki, Executive Director of the Office for Promotion of Justice System Reform, at the House of Representatives Committee on Judicial Affairs (April 6, 2004). *See* Noboru Yanase, *Saiban-in Seido no Rippou-gaku: Tougi-Minshushugi Riron ni motoduku Kokumin no Shihou-Sanka no Igi no Sai-kousei* [*Institutional Design of the Saiban-in System: Reanalysis of the Meaning of the General Public's Participation in the Criminal Justice System Based on the Theory of Deliberative Democracy*], Nippon Hyoron Sha, 2009, pp. 41-42, 80-81. *See* also Tsuji, *supra* note (56), p. 97.

58) Hiroyuki Tsuji, "'Saiban-in no Sanka-suru Keiji Saiban ni Kansuru Houritsu' no Kaisetsu [Commentary on the 'Act on Criminal Trials with the Participation of *Saiban-in*] (3)," *Hoso Jiho*, vol. 60, No. 3 (2008), pp. 56-57.

59) As for the purpose of the *saiban-in* system, *see* Noboru Yanase, "Deliberative Democracy and the Japanese *Saiban-in* (Lay Judge) Trial System," *Asian Journal of Law and Society*, vol. 3 (2016), pp. 327-349.

60) Sometimes, during deliberation by a panel composed of both professional judges and *saiban-ins*, a situation calling for decisions on the Items of Article 6, Paragraph 2 of the *Saiban-in* Act may sometimes arise, in which case a panel composed of professional judges only (stipulated in Paragraph 1) must be conducted. When this situation arises, the professional judges must halt the deliberation with the *saiban-ins*, remove them from the deliberation room, convene their deliberation, and invite the *saiban-ins* back into the room to resume the deliberation with the *saiban-ins*. This procedure is too formal and not always appropriate in terms of the reality and efficiency of the deliberation, and this is another of the reasons for Article 68, Paragraph 3. Tsuji, *supra* note (58), pp. 94-96.

As described in Section 2.4., in the trial of the Osaka Pachinko Parlor Arson Murder Case at the District Court, the professional judges permitted the *saiban-ins* to attend the proceedings to review the constitutionality of hanging as a method of execution pursuant to Article 60 of the *Saiban-in* Act, permitted the *saiban-ins* to attend the deliberations on the matter, and reached their decision after hearing the *saiban-ins'* opinions on the matter pursuant to Article 68, Paragraph 3 of the same Act. The professional judges dared to state in the judgment that they had heard the *saiban-ins'* opinions on rendering the constitutionality of the death penalty. After hearing the *saiban-ins'* opinions, the professional judges concluded that hanging does not violate the Constitution.

What is the significance of the professional judges' decision to state in their judgment that they had heard *saiban-ins'* opinions on rendering the constitutionality of the death penalty? Some scholars may conclude that by including this statement, namely, that *saiban-ins* selected from among ordinary citizens agreed that hanging was constitutional, in their judgment, the professional judges intended to demonstrate that the constitutionality of hanging was supported by ordinary citizens as well as professional judges. In other words, hanging was legitimized not only by legal experts, but also by democratic opinion. As Professor Toshikuni Murai points out, however, "It is impossible to generalize the judgment of a citizen randomly selected as a *saiban-in* and assigned to a death penalty case as a citizen's opinion on the constitutionality of the death penalty."[61)]

Rather, the mention of *saiban-ins* in the judgment should be understood merely as the judges' response to a strong request from the defense counsel that the *saiban-ins* be given a role in the decision on the constitutionality of the method of execution. One should avoid other general interpretations, such as the characterization of the judgment as a significant ruling in which a *saiban-in*, a general citizen without any right to interpret laws and regulations or review the constitutionality of the State's action, affirmed the constitutionality of hanging.[62)] While *saiban-ins'* opinions may be considered for reference, decisions about the constitutionality of the death penalty rest

61) Toshikuni Murai, "Case Comment," *Shin Hanrei Kaisetsu Watch*, No. 11 (2012), p. 146.

62) If the constitutionality of the death penalty or the method of execution is challenged in a *saiban-in* trial similar to this case in the future and the combined panel of professional judges and *saiban-ins* rules that the death penalty is a cruel punishment, the judgment should not be overstated. The judgment should not, for example, state that the *saiban-ins* have denied the constitutionality of the death penalty or the method of execution. Professor Murai's remark should be quoted again here: "It is impossible to generalize the judgment of a citizen randomly selected as a *saiban-in* and assigned to a death penalty case as a citizen's opinion on the constitutionality of the death penalty."

solely with the professional judges, as these decisions involve legal interpretation.

As mentioned above, Supreme Court precedent clearly establishes that the death penalty itself and hanging as a method of execution are constitutional. Professional judges cannot be expected to make decisions that differ from the Supreme Court precedent unless there is a particular change in circumstances. Alternatively, the defense counsels probably expected that if they could illustrate the details of hanging in court, the *saiban-ins* selected from among ordinary citizens to serve in the court would be more likely to think that hanging was a cruel punishment. Although the *saiban-ins* were invited to participate in both the proceedings and deliberations on the constitutionality of hanging, and despite the testimony by Professors Rabl and Tsuchimoto describing the brutality of hanging —testimony presented at the defense counsels' request— the final judgment reached with the *saiban-ins'* involvement, which found hanging constitutional, was contrary to the defense counsels' expectations.

Two issues emerged when the defense counsels appealed to the Osaka High Court: the cruelty of hanging and the appropriate role of *saiban-ins* in the decision. The defense counsels argued as follows: "A detailed examination of how hanging ends the life of a death row inmate provides essential facts for the *saiban-ins* when deciding whether or not to impose the death penalty in sentencing; these matters fall under the jurisdiction of the combined panel of professional judges and *saiban-ins*." Even if the fact of the execution itself was not a matter to be decided by the combined panel of professional judges and *saiban-ins*, they went on to argue, the matters they attempted to prove regarding the cruelty of hanging were still matters to be heard in a courtroom in which *saiban-ins* participate. The district court judges ruled that the constitutionality of hanging was a matter to be decided only by the professional judges (not by the *saiban-ins*) and that the presence of the *saiban-ins* was only to be permitted at the proceedings to review the constitutionality pursuant to Article 60 of the *Saiban-in* Act, in this case. The defense counsels insisted that such proceedings by the district court judges violated the *Saiban-in* Act, arguing that the constitutionality of hanging was a matter to be decided by *saiban-ins* and professional judges together.

The Osaka High Court dismissed the defense counsels' claim in the appeal, holding the following (Osaka High Court, Judgment, July 31, 2013, 1417 Hanta 174). "Unlike a decision reached with the participation of *saiban-ins* (Article 6, Paragraph 2, Item 1 of the *Saiban-in* Act), a decision on the interpretation of laws and regulations (Article 6, Paragraph 2, Item 1 of the same Act) often requires professional and complex legal judgments.

Given the need to maintain the uniformity of judgments from the standpoint of legal stability, it is appropriate that the decision be reached only by judges with legal expertise. The 'interpretation of laws and regulations' referred to in Paragraph 2, Item 1 of the same Article generally means the objective and concrete clarification of the meaning of laws and regulations in applying them to specific cases. The interpretation of substantive penal laws is a typical example of such an interpretation. In view of the purpose of this provision, the judgment under this item also includes a decision on the constitutionality of substantive penal laws, as such a decision is requisite for the interpretation of these laws. One should understand that the determination of the legislative facts, which forms the basis for evaluating the constitutionality of substantive penal laws, remains exclusively within the purview of judges with legal expertise. This authority falls under their judicial scope since it involves factual determinations necessary for assessing whether laws and regulations are constitutional. The *saiban-ins* need to have a certain level of understanding of the general content of the current laws in order to determine conditions pertaining to the degree of punishment and execution, such as the content of the sentence, the method of execution, and the treatment of the sentenced person. One does not expect, however, that the *saiban-ins* will consider the detailed implementation of the penal laws, the historical course, or the actual situations in other countries, that is, matters that were argued and proved by the defense counsels in the district court and that should serve as materials for judging the constitutionality of substantive penal laws or for establishing laws."

The defense counsels appealed to the Supreme Court, stating as follows: "What happens in the execution of hanging is knowledge that the *saiban-ins* must possess in order to determine the degree of punishment. The method of execution is a matter to be decided not only by judges, but also by the *saiban-ins* who are charged with the responsibility of determining the amount of punishment. As executions by hanging in Japan have been carried out in secret, *saiban-ins* have no knowledge of what happens to persons executed by hanging, and judges also lack that knowledge or have incorrect knowledge (and thus are unable to explain the details of the execution of hanging to the *saiban-ins*). Thus, presenting arguments and evidence before the *saiban-ins* is essential to establishing the grounds for an appropriate sentence. The matters regarding hanging, which were argued by the defense counsels in the district court, are not interpretations of the text of the laws and regulations but legal arguments based on factual assertions from a forensic perspective and historical facts from various countries. In light of the meaning and purpose of the *Saiban-in* Act, the involvement of *saiban-ins* should be guaranteed in cases in which the defendant and

defense counsels challenge the constitutionality of the method by which the death penalty is executed, citing specific grounds and evidence. The district court, however, erroneously ruled that the constitutionality of the method of execution was not a matter to be decided with the participation of the *saiban-ins*; thus, the case was conducted as an illegal proceeding in violation of Article 6, Paragraph 2 of the *Saiban-in* Act, and the second sentence of Article 6, Paragraph 3 of the same Act. As the presiding judge of the district court misinformed the *saiban-ins* that they were not obliged to be present on the hearing date when the cruelty of hanging was to be examined, some *saiban-ins* were absent or left court on that date."

In response, the Supreme Court rejected all of the aforesaid arguments raised by the defense counsels (S. Ct. 3rd Petty Bench, Judgment, February 23, 2016, 319 Shukei 1).

Even if the constitutionality of the death penalty or the method of execution was to be challenged in a *saiban-in* trial, and even if a defense counsel argued, in a proceeding conducted without the involvement of a *saiban-in* to determine the constitutionality of the death penalty, that the death penalty would remain unconstitutional or illegal in the future barring a particular change in circumstances, the Supreme Court's precedent of 2016 would compel every court to reject such an argument. This is because the constitutionality of the death penalty or the method of execution is a decision on the interpretation of laws and regulations, and is therefore not a matter to be decided by a panel composed of both professional judges and *saiban-ins*. The professional judges in a *saiban-in* trial make decisions on the interpretation of laws and regulations, whereupon the presiding judge indicates the decisions to the *saiban-ins*, who are charged with duties accordingly (Article 66, Paragraph 4 of the *Saiban-in* Act). As the Osaka High Court ruled that a *saiban-in* was not to be expected to consider the details of the execution of the death penalty, all district courts will determine that *saiban-ins* need not be present during proceedings to examine the constitutionality of the death penalty, when a defendant or defense counsel requests that they be present.

In sum, while *saiban-ins* randomly selected from among ordinary citizens can participate in proceedings to judge the constitutionality of the death penalty or the method of execution by attending the proceedings, observing the deliberations, and hearing opinions, provided that the professional judges hearing the case approve such participation, the *saiban-ins* are not permitted to make substantive judgments on the constitutionality of the death penalty. The Supreme Court affirmed that it was neither unconstitutional nor illegal for a *saiban-ins* not to make a substantive judgment on the constitutionality of the death penalty or the method of execution.

Therefore, unless particular changes in circumstances arise, the trial of the Osaka Pachinko Parlor Arson Murder Case should be deemed as the last case in which *saiban-ins* attended the proceedings and deliberations and gave opinions as a reference on the constitutionality of the death penalty or its execution.

3.2. The Meaning of *Saiban-in* Participation in Determining the Constitutionality of the Death Penalty: A Conclusion

The Supreme Court of Japan has continued to rule that the death penalty and the method of execution are constitutional. This ruling has never changed, even since the introduction of the *saiban-in* system to involve the public in sentencing in criminal trials. In one case in which the defense counsels representing a defendant facing the death penalty challenged the constitutionality of the method of execution, the *saiban-ins* attended the proceedings and deliberations on the constitutionality of the method of execution by the professional judges and expressed their opinions as a reference. Some may see this as a kind of participation of ordinary citizens as *saiban-ins* in a review of the constitutionality of the death penalty.

Constitutional scholars discussing the counter-majoritarian difficulty have questioned why the judicial branch can review and invalidate laws enacted by the legislative branch.[63] Why is it legitimate to allow judges who are not elected by the people, that is, who lack democratic legitimacy, to review the constitutionality of laws enacted by a legislature composed of democratically elected members and declare laws unconstitutional and void? The scholars have yet to agree on an answer to this question. If the participation of *saiban-ins*, who are selected from among the general public, in criminal trials is considered democratic, then the anti-democratic nature of a judicial review can be circumvented by a judicial review conducted by a democratic entity, the *saiban-ins*.

This assertion, however, is misguided. The constitutionality of the death penalty or the method of execution is a decision on the interpretation of laws and regulations and is to be decided solely by professional judges, not by a combined panel of professional judges and *saiban-ins*. In the earlier cases in which the *saiban-ins* took part in the proceedings to review the constitutionality of the death penalty and the method of execution, the *saiban-ins* offered their opinions only for reference, and all substantive de-

63) The counter-majoritarian difficulty was first raised in the United States by Professor Alexander Bickel in his book, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Yale University Press, 1962.

cisions were reached by professional judges. At no point did the *saiban-ins*, who were ordinary citizens, review the issue of constitutionality. There is no justification for allowing a *saiban-in*, a person who has been randomly selected by lottery among ordinary citizens and lacks legal knowledge or experience, to review the constitutionality of the State's actions. As such, the Diet made the appropriate choice, in designing the *Saiban-in* Act, to disallow *saiban-in* participation in judicial reviews, and the Supreme Court was reasonable in upholding the constitutionality of this restriction.

This paper examined whether it is constitutional for a *saiban-in* not to be substantially involved in reviews of the constitutionality of the death penalty and the method of execution. It did not, however, examine whether it is constitutional for a *saiban-in* to participate in a trial in which a defendant potentially faces the death penalty. And if *saiban-in* participation in such a trial is constitutional, are there any additional conditions or constitutional requirements to be met when the *saiban-ins* join with professional judges in sentencing a defendant to the death penalty?[64] The author will examine these questions in the next paper.

64) Professor David T. Johnson strongly criticizes the death penalty in Japan from an American perspective. In analyzing the precedents of the U.S. Supreme Court since the 1970s, he finds that capital defendants are guaranteed a series of special procedural protections that constitute "super due process" as a constitutional requirement. David T. Johnson, *The Culture of Capital Punishment in Japan*, Palgrave Pivot, 2019, p. 21. According to Johnson, super due process has five implications in American criminal procedure: (1) bifurcated proceedings into separate guilt and sentencing phases; (2) providing instructions to guide jury discretion at the sentencing stage; (3) automatic appellate review; (4) engaging in proportionality reviews in appellate courts; and (5) a unanimous verdict to impose the death penalty (*ibid*., pp. 21-22). He identifies over 12 problems with the death penalty in Japan, stating that "Japanese law makes no promise of super due process" (*ibid*., pp. 24-31). As for adopting a unanimous verdict in the *saiban-in* trial for death penalty cases, Elizabeth M. Sher proposes that the Japanese *saiban-in* system adopt a unanimous requirement for a death sentence in order to adhere to Article 36 of the Constitution of Japan and comply with international legal standards. Elizabeth M. Sher, "Death Penalty Sentencing in Japan under the Lay Assessor System: Avoiding the Avoidable Through Unanimity," *Pacific Rim Law & Policy Journal*, vol. 20, No. 3 (2011), pp. 656-658.

Pragmatics in Roman Law Texts: Application of Speech Act Theory to the Verb Quaero in Justinianus's Digesta

*Takashi Izumo**

Abstract

In our daily lives, we make various utterances. Some can be evaluated as true or false, such as the statement, 'The earth is round', while others are intended to perform an action, such as issuing an order. Since John L. Austin's 1955 lecture at Harvard University, the latter type of speech act has been known as a 'performative' and has been widely discussed across various fields. This paper applies insights from Austin's speech act theory to the study of Roman law, particularly through an analysis of the Latin verb *quaero* in Justinianus's *Digesta*. This verb is not a specialized term limited to a specific period or group but reflects the common question-and-answer style used by multiple jurists from the Julio–Claudian dynasty to the Crisis of the Third Century. By analysing the co-occurrence of *quaero* with other words, this paper presents evidence that most of the 353 *quaero*-fragments in Justinianus's *Digesta* are of the prompting consideration type in terms of illocutionary force. In most cases, the jurist or the editor of the jurist's works who used the verb *quaero* was not seeking advice or posing a question to themselves. Instead, they often attempted to convey a legal point to the reader or audience and document how the jurist had addressed the issue in the past. Additionally, 13 instances of consulting have been identified, eight of which involve a letter from a client in which the client explicitly states, 'I ask'. These eight fragments likely provide a relatively accurate reflection of the interactions between jurists and their clients. This study serves as a pilot example of how pragmatics can offer educated insights into the contexts and situations of the time.

1 Introduction

In our everyday lives, we engage in a range of linguistic acts. These include offering greetings, giving commands, providing instructions, asking questions, and making suggestions, all of which form a part of our routine

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communication. These examples have one thing in common; they do not concern some truth or falsehood. For example, the greeting 'Good morning' does not mean 'the statement that today's morning is good is true', just as the instruction, 'Please do this task' does not mean 'the statement that you will do this task is true'. The fact that not all utterances and sentences are related to truth values has been widely known since John L. Austin's lecture at Harvard University in 1955 where he defined such a speech act as 'performative'.[1)] His theory has been applied in linguistics, pragmatics and gender studies.[2)] However, it has not been fully applied in comparative law. Past and foreign laws are types of speech or sentences, most of which Austin calls performatives. This paper considers the role of performativity in this field, focusing on Austin's speech act theory and the Latin verb *quaero* in fragments of Justinianus's *Digesta* (hereinafter, it is called J's *Digesta*). Section 2 provides a basic introduction to the speech act theory. Section 3 examines the use of *quaero* in J's *Digesta* and presents a preliminary analysis of the pragmatics of the Roman jurists. Finally, Section 4 summarises the results of this analysis.

2 Speech Act Theory

(1) Constative and Performative

The speech act theory was first proposed in a lecture given by Austin at Harvard University in 1955. One of the aims of the lecture was to distinguish between the constative and performative in English. Austin defines a performative utterance or sentence as satisfying the following two conditions:[3)]

A) A performative does not 'describe' or 'report' or constate anything at all and is not 'true' or 'false'.
B) The uttering of a sentence is or is a part of the doing of an action, which again would not normally be described as, or as 'just', saying something.

As Austin exemplifies, the utterance 'I name this ship *Queen Elizabeth*'

1) Michael Morris, *An Introduction to the Philosophy of Language*, Cambridge: Cambridge University Press, 2006, p. 231.
2) The following literature provides a survey of each field. Savas L. Tsohatzidis (ed.), *Foundations of Speech Act Theory: Philosophical and Linguistic Perspectives*, London and New York: Routledge, 1994; John R. Searle, Ferenc Kiefer and Manfred Bierwisch (eds.), *Speech Act Theory and Pragmatics*, Dordrecht, Boston and London: D. Reidel, 1980; Judith Butler, 'Performativity, Precarity and Sexual Politics', *Revista de Antropología Iberoamericana* 4(3) 1–13 (2009).
3) Jhon L. Austin, *How to Do Things with Words*, 2nd ed., edited by J. O. Urmson and Marina Sbisà, Cambridge: Harvard University Press, 1975, p. 5.

meets these requirements when smashing a bottle against the stem.[4] The person who named the ship does not intend merely to describe that they are naming it *Queen Elizabeth*. In other words, they do not want to state, 'The sentence "I name this ship *Queen Elizabeth*" is true'. Rather, they perform the act of naming.

(2) Conditions for the Adequacy of Performatives

If we follow Austin's analysis, performatives do not have truth values. Instead of the true table in logic, he brings up the criterion of appropriateness: performatives should be distinguished from inappropriate utterances or sentences. He requires the following as conditions for appropriate speech:[5]

(A.1) There must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances and further,
(A.2) the particular persons and circumstances in a given case must be appropriate for the invocation of the particular procedure invoked.
(B.1) The procedure must be executed by all participants both correctly and
(B.2) completely.
(Γ.1) Where, as often, the procedure is designed for use by persons having certain thoughts or feelings, or for the inauguration of certain consequential conduct on the part of any participant, then a person participating in and so invoking the procedure must in fact have those thoughts or feelings, and the participants must intend so to conduct themselves, and further
(Γ.2) must actually so conduct themselves subsequently.

The conditions are divided into those with the Roman characters (A and B) and those with the Greek character Γ. This difference is significant; the four conditions with Roman characters must be satisfied to perform something successfully. For example, in a society where polygamy is not allowed, the second declaration of 'I am getting married' is not accepted, so the condition of A.1 is not met, therefore, the act fails and is void or without effect.[6] Austin calls such a case a 'misfire'.[7] In contrast, a statement that

4) *Ibid*., at 5.
5) *Ibid*., at 14f.
6) *Ibid*., at 15f.
7) *Ibid*., at 16.

does not satisfy the condition of Γ is called 'abuse'.[8] Austin acknowledges that there is no clear boundary between the two.[9]

(3) Locution, Illocution and Perlocution

Austin divides the process by which a performative influences reality into locution, illocution, and perlocution (or consequential effects).[10] Locution is an utterance expressed in speech or text, as in 'Shoot her!'[11] Illocution is the act within the locution: the illocutionary force of 'Shoot her!' is the urging, advising or ordering of someone to shoot a woman.[12] Perlocution is the act of the speaker indirectly performed by someone through an utterance.[13] This third part can be subdivided into two sorts: the act referring to the performance of a locutionary or illocutionary act (e.g. a person persuaded someone to shoot a woman through the utterance, 'Shoot her!'), and the act without such a reference (e.g. a person actually caused someone to shoot a woman through the utterance, 'Shoot her!').[14] Austin paraphrased the classification of perlocution as an act that achieves a perlocutionary object (e.g. a person stopped someone from doing something by saying, 'Don't!'), and an act that merely produces a perlocutionary sequel (e.g. a person strengthened someone's conviction to commit an act despite their cautioning, 'Don't!').[15] This paper calls the former referential perlocution and the latter nonreferential perlocution. Austin gives another example as follows:[16]

> Locution: He said to me, 'You can't do that.'
> Illocution: He protested against my doing it.
> Perlocution (referential): He pulled me up or checked me.
> Perlocution (nonreferential): He stopped me, brought me to my senses, annoyed me, etc.

8) *Ibid*., at 16.
9) *Ibid*., at 16.
10) *Ibid*., at 101f. The validity of the distinction is often called into question. *See* Jhon R. Searle, 'Austin on Locutionary and Illocutionary Acts', *Philosophical Review* 77(4) 405–424 (1968); Ted Cohen, 'Illocutions and Perlocutions', *Foundations of Language* 9(4) 492–503 (1973). This paper maintains Austin's distinction, but does not go into its philosophical interpretation.
11) Austin, *supra* note 3, at 101.
12) *Ibid*., at 101f.
13) *Ibid*., at 101.
14) *Ibid*., at 101f.
15) *Ibid*., at 118.
16) *Ibid*., at 102.

(4) Five Types of Performatives

Austin classified performatives into five categories: verdictives, exercitives, commissives, behabitives and expositives.[17] A verdictive utterance or sentence is 'essentially giving a finding as to something—fact, or value—which is for different reasons hard to be certain about'.[18] For example, 'interpret as', 'read it as', 'calculate', 'estimate' and 'grade'.[19] An exercitive is 'the exercising of powers, rights, or influence. Examples are appointing, voting, ordering, urging, advising, warning &c.'[20] A commissive is 'typified by promising or otherwise undertaking', e.g. 'promise', 'plan' and 'agree'.[21] A behabitive is 'a very miscellaneous group, and ha[s] to do with attitudes and social behaviour. Examples are apologizing, congratulating, commending, condoling, cursing, and challenging.'[22] Finally, expositives 'make plain how our utterances fit into the course of an argument or conversation, how we are using words, or, in general, are expository. Examples are "I reply", "I argue", "I concede", "I illustrate", "I assume", "I postulate".'[23]

As Austin recognised, these categories are not sharply delineated but overlap each other. For example, if a person verdicts or estimates something, this speech act can commit others to certain future conduct.[24] Austin does not exemplify it by a concrete case but it is possibly such a case that a judge condemned a suspect as a thief. In the sentence, the judge interprets the act of the suspect as theft (verdictive) and at the same time, orders public officers to dispense the appropriate punishment to the thief (exercitive). In this paper, we are not seeking a strict classification of verbs in pragmatics, so in the following sections, it will be assumed that the activities of Roman jurists in the classical period consisted of a combination of these five categories. In the following example, Ulpianus[25] assessed the amount of compensation (verdictive) and indirectly advised the *iudex* to have the seller pay it (exercitive).

D 19.1.1 pr (Ulpianus, *Ad Sabinum*, 28)

If something is sold and not then delivered, an action lies for the interest, that is, the buyer's interest in having the thing. Sometimes this amount ex-

17) *Ibid*., at 151.
18) *Ibid*., at 151.
19) *Ibid*., at 153.
20) *Ibid*., at 151.
21) *Ibid*., at 151 and 157f.
22) *Ibid*., at 152.
23) *Ibid*., at 152.
24) *Ibid*., at 154.
25) In this paper, all personal names have been retained in their original Latin form to respect the linguistic identity associated with them.

ceeds the price, as when his interest is greater than the object's value or the price paid for it.[26)]

3 Pragmatics in Roman Law Texts

(1) *Quaero*

This paper focuses on the Latin verb *quaero* as a starting point. According to the author's research, 353 fragments contain *quaero* in J's *Digesta* of *Corpus Iuris Civilis*. When analysed grammatically, *quaero* is an indicative verb in the first-person singular present tense of *quaerere*. If translated directly into English, the following would be synonymous ways of saying it: I seek, I ask, I question, I strive for, I miss, I lack, I desire, I require, I want, I aim at, etc.[27)] In J's *Digesta*, however, it only appears in the sense 'I ask'[28)] or 'I question' and often in the form, 'I ask whether A or B (including whether A or not).' Furthermore, *quaero* usually co-occurs with '*respondi*' (I have answered) or '*respondit*' (he has answered). The following fragment is typical:

D 2.8.14 (Paulus, *Responsa*, 2)

A son-in-power defends an action brought against his absent father. I ask whether he ought to give security that the judgment will be satisfied. Paulus has replied that one who defends an absent person, whether he is a son or father, ought to give security to the plaintiff in accordance with the provision of the edict.[29)]

Schulz (1961) states that we cannot determine the Roman jurists' intend-

26) Alan Watson (ed.), *The Digest of Justinian*, revised ed., vol. 1–4, Philadelphia: University of Pennsylvania Press, 1998, vol. 2, p. 86. The original Latin text: 'Si res vendita non tradatur, in id quod interest agitur, hoc est quod rem habere interest emptoris: hoc autem interdum pretium egreditur, si pluris interest, quam res valet vel empta est.' In this paper, all English translations of Roman law fragments are sourced from Watson (1998), although the author has partially modified the texts.

27) *See* Charlton T. Lewis and Charles Short, *A Latin Dictionary*, Oxford: Clarendon Press, 1879.

28) There are various arguments about to analyse simple verbs like 'say' and 'ask'. For the latest survey, *see* Indrek Reiland, 'Austin vs. Searle on locutionary and illocutionary acts', *Inquiry* (2024) 1–26. <https://doi.org/10.1080/0020174X.2024.2380322>. The author does not engage in the philosophical debate but assumes that the verb 'ask' is not necessarily constative. Given the social roles of jurists during the classical period of the Roman Empire, a question to a jurist was likely not merely constative but also performative.

29) Watson (ed.), *supra* note 26, vol. 1, at 51. The original Latin text: 'Filius familias defendit absentem patrem: quaero an iudicatum solvi satisdare debeat. paulus respondit eum qui absentem defendit, etiam si filius vel pater sit, satisdare petituro ex forma edicti debere.'

ed meaning of this word,[30] however, his argument is not based on pragmatic analysis. He suggests: (a) various abbreviations were used in their manuscripts—Schulz does not explain in what forms but possibly *q.* with special marks[31]—and later generations restored them at their discretion so that the distinction between '*quaero*' (I ask) and '*quaesitum est*' (it has been asked) is insignificant, and (b) the fact that *quaero* is grammatically in the first person does not necessarily mean it reflects the writer's question.[32] His pointing out the indeterminate meanings is somewhat plausible, especially regarding the challenge of identifying the utterer, but leave room for reconsideration from the point of view of pragmatics.

(2) Basic Data about *Quaero*

Here is a list of basic information about *quaero* in J's *Digesta*.

- The total number of fragments containing the verb *quaero* in J's *Digesta* is 353 (*See* Appendix at the end of this paper).
- Of the 38 Roman jurists cited as the authors of the fragments in J's *Digesta*,[33] 11 used *quaero*: Cervidius Scaevola (in this paper, the name of Scaevola always refers only to him, not to Quintus Mucius Scaevola), Paulus, Modestinus, Marcellus, Iavolenus, Iulianus, Proculus, Papinianus, Ulpianus, Celsus and Pomponius.
- The number of fragments in which *quaero* appears: 133 attributed to Scaevola, 82 to Paulus, 49 to Modestinus, 30 to Marcellus, 22 to Iavolenus, 16 to Iulianus, seven to Proculus, five to Papinianus, five to Ulpianus, three to Celsus and one to Pomponius.
- These 11 jurists did not use the word *quaero* in all their writings, only in the ones that follow: Scaevola's *Digesta* and *Responsa*, Paulus's *Quaestiones* and *Responsa*, Modestinus's *Responsa*, Marcellus's *Digesta* and *Responsa*, Iavolenus's *Epistulae*, Iulianus's *Digesta* and *Ex minicio* (or *Ad minicium*), Proculus's *Epistulae*, Papinianus's *De adulteriis* and *Quaestiones*, Ulpianus's *Ad edictum* and *Ad Sabinum*, Celsus's *Digesta* and Pomponius's *Epistulae et variae lectiones*.
- The frequency of *quaero* varies among jurists. To be precise, the quotations from a particular jurist in J's *Digesta* are not proportional to the

30) Fritz Schulz, *Geschichte der römischen Rechtswissenschaft*, Weimar: H. Böhlaus, 1961, S. 283.

31) Adriano Cappelli, *Dizionario di abbreviature latine ed italiane usate nelle carte e codici specialmente nel medio–evo*, Milano: Ulrico Hoepli, 1899, p. 279.

32) Schulz, *supra* note 30, S. 283.

33) The author referred to *Index auctorum*, in: Okko Behrends et al. (Hrsg.), *Corpus Iuris Civilis: Text und Übersetzung: Digesten 1–10*, Heidelberg: C.F. Müller, 1995, SS. 19–26.

number of times the jurist used this verb.[34)]

Table 1: Data about *quaero* in Justinianus's *Digesta*

Author	Counts[35)]	Frequency[36)]	Book title	Co-occurrence
Scaevola	133	1.69	*Digesta* (49) *Responsa* (84)	respondi (40) respondit (92) (no verb) (1)
Paulus	82	0.28	*Quaestiones* (26) *Responsa* (56)	respondi (30) respondit (52)
Modestinus	49	1.18	*Responsa* (49)	respondit (49)
Marcellus	30	0.92	*Digesta* (10) *Responsa* (20)	respondi (5) respondit (25)
Iavolenus	22	0.94	*Epistulae* (22)	respondi (4) respondit (18)
Iulianus	16	0.18	*Digesta* (12) *Ex minicio* (4)	respondi (9) respoindit (5) Paulus notat (1) negavit (1)
Proculus	7	1.17	*Epistulae* (7)	respondit (6) salutem (1)
Papinianus	5	0.05	*De adulteriis* (3) *Quaestiones* (2)	respondi (2) respondit (3)
Ulpianus	5	0.01	*Ad edictum* (4) *Ad Sabinum* (1)	dico (1) constat (1) puto (2) Iulianus diceret (1)
Celsus	3	0.13	*Digesta* (3)	respondit (1) salutem (2)
Pomponius	1	0.01	*Epistulae et variae lectiones* (1)	dubitari non potest (1)

From this table, several significant observations are evinced. First, the top five most quoted jurists in J's *Digesta*, namely Ulpianus, Paulus, Papinianus, Iulianus and Pomponius, do not often use *quaero*. Although Paulus

34) It should be noted that Ulpianus, whose works are quoted most frequently in J's *Digesta*, rarely used '*quaero*' (I ask) and preferred '*quaeritur*' (it is asked) instead. This preference suggests that Ulpianus objectified the legal debate and freed jurisprudence from the framework of resolving individual cases. Ulpianus was likely one of the early figures to have raised jurisprudence to an academic level. This assumption can be supported because he clearly stated the sources of other jurists' theories and did not use the verb *respondere* when expressing his opinions.

35) Fragments were counted. Therefore, even if *quaero* occurs multiple times in a fragment (e.g. D 4.4.47.1), it is counted only once.

36) The author calculated the frequency using the following formula: the number of fragments containing *quaero* / the contribution pages estimated in *Palingenesia* of Hommelius. About the denominator part, *see* William Smith, *A Dictionary of Greek and Roman Antiquities*, London: John Murray, 1875, pp. 858–861.

is second in terms of the number of times he used the term, the frequency is not so high.

The titles of the books also reveal their characteristics. Books that contain the word *quaero* are more likely to have titles such as *Responsa* (*Replies*), *Digesta* (*Digest*) or *Epistulae* (*Letters*). Also, the title *Quaestiones* (*Questions*) evokes the word *quaero*. However, this does not mean that if a book has one of these titles, *quaero* is more likely to appear in it. For example, Papinianus also wrote the book *Responsa*, which includes over 300 fragments,[37] but he did not use *quaero* there.[38] This means that *quaero* tends to be associated with specific titles, yet those titles do not tend to be linked with this verb, creating a unidirectional relationship.

In addition, it is also important to consider what phrase follows *quaero*. Table 1 and Appendix demonstrate that it co-occurs most frequently with '*respondi*' (I have answered, 90 fragments) or '*respondit*' (he has answered, 251 fragments). These are far more than in the other examples. The exceptions of '*Paulus notat*' (Paulus notes),[39] '*negavit*' (he has negated), '*dico*' (I say), '*constat*' (it is certain), '*Iulianus diceret*' (Iulianus said) and '*dubitari*

37) *See* Otto Lenel, *Palingenesia Iuris Civilis*, vol. 1, Leipzig: Bernhard Tauchnitz, 1889, col. 881–946.

38) Of the jurists who are cited in J's *Digesta*, eight wrote a book with the title *Responsa*, that is, Papinianus, Neratius, Marcellus, Cervidius Scaevola, Ulpianus, Paulus, Gallus Aquilius and Modestinus. *See* Behrends et al. (Hrsg.), *supra* note 33, at 19–26.

39) This expression is not directly related to the analysis of *quaero*, but it is worth noting from a pragmatic perspective. Since Paulus was a jurist of a later generation than Iulianus, it seems odd that Iulianus mentioned Paulus. Could this be an interpolation? The author's view is as follows. The phrase 'Paulus notat' appears several times in *Digesta* of Iulianus (D 5.1.75, 37.6.3.1, 39.6.15 and 40.2.4.2), *Responsa* of Scaevola (D 5.2.13), *Quaestiones* and *Responsa* of Papinianus (*Quaestiones*: D 1.21.1.1, 18.1.72 pr, 22.1.1.2, 38.2.42 pr, 45.1.116 and 46.5.8 pr, *Responsa*: D 28.4.4 and 33.1.9) and *Ad Neratium* of Paulus himself (D 24.1.63). In addition, the expression 'Marcellus notat' is added just before Paulus's note in D 5.1.75. 'Marcellus notat' can be found in Iulianus's *Digesta* (D 4.6.41, 5.1.75, 15.1.16, 15.3.14, 19.1.23, 26.8.12, 30.92 pr, 39.6.13.1 and 39.6.15), Pomponius's *Regulae* (D 28.1.16.1) and Ulpianus's *Ad Sabinum* (D 4.2.9.8, 7.4.29.2, 26.4.1.3 and 34.3.3.5). The compilers of J's *Digesta* sometimes regarded Paulus's and Marcellus's notes as independent documents left on Iulianus's *Digesta* (Paulus: D 4.2.11 and 18.5.4, Marcellus: D 28.5.5, 30.80, 35.1.20 and 35.2.34) and Papinianus's *Quaestiones* (Paulus: D 6.2.16 and 8.1.18). Justinianus mentioned such notes in Constitutio 'Deo Auctore' 6: '[…] quae antea in notis Aemilii Papiniani ex Ulpiano et Paulo nec non Marciano adscripta sunt […]'. *See* Behrends et al. (Hrsg.), *supra* note 33, S. 57. From the discussion so far—namely, Paulus and other jurists wrote *Notae* to *Digesta* of Iulianus and *Quaestiones* of Papinianus, and that parts of their notes can be found in these books themselves—we can suggest that the actual books of Iulianus's *Digesta* and Papinianus's *Quaestiones*, which the compilers of J's *Digesta* quoted, were likely not their original versions but later editions bound together with Paulus's and Marcellus's notes, such as *Iuliani Digesta cum notis Pauli et Marcelli* and *Papiniani Quaestiones cum notis Pauli*. If so, both new editions were likely published later, possibly after Iulianus and Papinianus had died, however, this insertion is not interpolation in the strict sense, because it was made before the compilation of *Corpus Iuris Civilis*.

non potest' (it cannot be doubted) are used only once, '*puto*' (I think) is found twice and '*salutem*' (greetings) occurs three times. As a special fragment, Scaevola or his editor missed a corresponding verb in D 24.1.66 pr.[40)]

Using either *respondi* or *respondit* differs depending on the source. Hayashi (2021) clarified that Scaevola's *Digesta* contains only three fragments in which the combination of *quaero* and *respondi* is used and assumed that the objectification (i.e. the tendency to employ *respondit*) originates in the edition by Tryphoninus.[41)] In Modestinus's *Responsa*, only *respondit* can be found. This implies that this book was not his own work but edited or compiled by others.

The case of Paulus is more complicated. In Paulus's *Quaestiones*, there is a tendency to use *respondi* (*respondi* in 23 fragments, *respondit* in three fragments). By contrast, in his *Responsa*, *respondit* is preferred (*respondi* in seven fragments, *respondit* in 49 fragments). It is not easy to interpret this trend, but the author speculates that Paulus wrote *Quaestiones*, but an anonymous compiled *Responsa*. The three exceptions of *respondit* found in *Quaestiones* (D 26.2.30, D 40.13.4 and 48.10.14 pr) were likely inserted when transcribed later; in D 26.2.30, '*respondit: is datus est* […]' (He has replied: The man who is appointed […]), in D 40.13.4, '*respondit: venditio* […] *contrahi potest* […]' (He has replied: There can be a contract of sale […]), and in D 48.10.14 pr, '*respondit: plures quaestiones coniunxisti*' (He has replied: You have joined several questions together).[42)] In these cases, we can delete '*respondit*' (he has replied) without affecting the grammar of the other words. Moreover, the utterance 'You have joined several questions together' appears to be his own. If someone edited the text, they would have separated the confusing questions for readability. Regarding the seven exceptions of *respondi* in Paulus's *Responsa* (D 27.1.36.1, 28.6.45 pr, 28.6.46, 29.1.40 pr, 29.1.40.2, 31.86 pr and 32.92 pr), an editor possibly transcribed the original texts of Paulus verbatim. If the discussion so far is correct, it would mean that *Quaestiones* was written before *Responsa* and could more faithfully reflect the original ideas of Paulus. This analysis can be supported by an interesting fragment, D 31.86 pr, in which the phrase *Paulus respondi* appears. This conjugation is grammatically incorrect because *respondi* is in the first person, hence, the Mommsen edition suggests a

40) Cf. Okko Behrends et al. (Hrsg.), *Corpus Iuris Civilis: Text und Übersetzung: Digesten 21–27*, Heidelberg: C.F. Müller, 2005, SS. 266f.

41) Tomoyoshi Hayashi, 'An Analysis on the Styles of Questions and Answers in the Digesta of Cervidius Scaevola', *Osaka Law Review* 71(3–4) 7–27 (2021) 11f (written in Japanese).

42) Watson (ed.), *supra* note 26, vol. 2, at 293, vol., 3, at 484, and vol. 4, at 339.

misprint in *respondit*.[43] That such a grammatical error exists in *Responsa* reinforces the assumption that this book may have had a compiler who transcribed Paulus's original texts.[44]

Curiously enough, *Quaestiones* and *Responsa* of Papinianus are also published in that order, i.e. *Quaestiones* comes first, followed by *Responsa*. This order can be proven by the fact that Papinianus mentioned Septimius Severus (reign: 193–211) as the sole emperor in the former but added Caracalla (reign: 198–217) as Severus's co-emperor in the latter.[45] While it is necessary to consider other jurists, it is permissible to assume that the title *Quaestiones* was preferred by several—relatively philosophical—Roman jurists when writing works with high originality. Ancient Greek philosophy probably influenced this style, because the book Προβλήματα by a pseudo-Aristotle was well-known and was translated into Latin as *Quaestiones*.[46]

From the observations, the phrase *quaero* is not a quirk of a particular Roman jurist or editor, but a common style that was accepted by a part of the 38 jurists, especially Scaevola, Paulus, Modestinus, Marcellus and Iavolenus.[47] What kind of style is it? This will be examined below supported by speech act theory.

(3) Classification of the Meanings of *Quaero*

Although Austin did not subdivide the five categories mentioned above in more detail, the following subdivisions are more useful when analysing *quaero*: consulting, prompting consideration[48] and asking oneself questions. The type of consulting that likely comes to mind first when we hear the word 'ask' is when someone lacks knowledge about a particular matter and seeks information from someone who knows it. For example, if some-

43) Theodor Mommsen, Paul Krüger and Alan Watson (eds.), *The Digest of Justinian*, vol. 3, Philadelphia: University of Pennsylvania Press, 1985, p. 64.

44) The person referred to here as an editor or compiler does not mean someone who made a pirated version without the permission of a jurist. Therefore, the author's argument in this paragraph is not that *Responsa* is like *Pauli sententiae*.

45) Hans Ankum, 'Papinian, ein dunkler Jurist?', translated into Japanese by Kozo Ogawa, *The Hokkaido Law Review* 44(2) 221–265 (1993) 226.

46) Schulz, *supra* note 30, SS. 282f.

47) Importantly, this style was not in fashion at a particular time, nor did factions determine it. These jurists include those who flourished in the Julio–Claudian dynasty (Proculus), the Nerva–Antonine dynasty (Iavolenus, Celsus, Iulianus, Marcellus, Pomponius and Scaevola), the Severan dynasty (Papinianus, Paulus and Ulpianus) and the Crisis of the Third Century (Modestinus). Even among those who appear to have had a master–disciple relationship, there is no evidence of influence, for example, Modestinus was a student of Ulpianus, but the frequency of *quaero* was 1.18 for the former while 0.01 for the latter.

48) Also, Hayashi (2021), while limited to Cervidius Scaevola, bases the hypothesis that the verb *quaero* has the characteristic of prompting consideration. *See* Hayashi, *An Analysis*, *supra* note 41, at 12.

one does not know the way to a station, they ask a police officer for directions. The prompting consideration type occurs when we question someone about something we already know the answer to, such as when an instructor queries a student. This type often appears to be didactic in Roman law texts, resembling a dialogue between a jurist and his pupils. The last type is self-questioning and is not a form of communication, but rather a way of thinking to oneself. This is the case where we ponder something, as in when we wonder whether we should cancel our plan to go to a party. Thus, as far as relying on Austin's analysis of speech acts, the verb *quaero* theoretically can follow one of three patterns:[49)]

<Consulting Type>
- Locution: A client wrote 'I ask whether A or B.'
- Illocution: The client requested a jurist to answer it (expositive[50)]).
- Perlocution (referential): The client had the jurist feel professionally responsible.
- Perlocution (nonreferential): The client frustrated the jurist by burdening him with additional work, delighted him by getting in touch after a long time, etc.

<Prompting Consideration Type>
- Locution: A jurist or an editor wrote 'I ask whether A or B.'
- Illocution: The jurist or editor required readers[51)] to notice the legal issue (expositive).
- Perlocution (referential): The jurist or editor prompted the readers to understand it.
- Perlocution (nonreferential): The jurist or editor got the readers to feel at a loss due to its difficulty, bored them because the question was too easy, etc.

49) Hayashi (2016) classifies the verb *quaero* into three categories, not based on illocution, but on the assumption that the speaker is either a client, a pupil, or a jurist himself. Namely, the categories are legal consultation from a client, legal education to a pupil and self-questioning. *See* Tomoyoshi Hayashi, 'I ask and he gave his opinion (*quaero*, *respondit*) – Some Reflections on the Forms of Legal Questions and Responses in D. 17,1,59 and on their Background', in U. Manthe, S. Nishimura und M. Igimi (Hers.), *Aus der Werkstatt römischer Juristen*, Berlin: Duncker & Humblot, 2016, pp. 137f.

50) *See* Austin, *supra* note 3, at 162.

51) The intended audience was possibly pupils who studied under the jurist because some legal books seem to be written for education. *See* Heinrich Honsell, Theo Mayer-Maly und Walter Selb, *Römisches Recht*, 4. Aufl., aufgrund des Werkes von Paul Jörs, Wolfgang Kunkel und Leopold Wenger (Enzyklopädie der Rechts- und Staatswissenschaft: Abteilung Rechtswissenschaft) Berlin, Heidelberg, New York, London, Paris und Tokyo: Springer-Verlag, 1987, SS. 28f.

<Self-questioning Type>

- Locution: A jurist wrote 'I ask whether A or B.'
- Illocution: The jurist wondered whether A or B (expositive?).
- Perlocution (referential): The jurist felt the need to consider it.
- Perlocution (nonreferential): The jurist realised a third possibility, chose to stop dwelling on the problem and let it go, etc.

As this analysis shows, pragmatics partially[52] contributes to dispelling Schulz's uncertainties regarding (a) and (b) (*See* Section 3(1)). The analysis identifies the writer's intended meaning of the word *quaero*, temporally setting aside the question of whether a jurist wrote it, an editor inserted it, or someone arbitrarily reverted an abbreviation, e.g. *q.* into *quaero*. In J's *Digesta*, of the three characteristics of *quaero* (consulting, prompting consideration and self-questioning), as far as can be clearly classified, only 13 fragments are of the consulting type (D 3.5.33, 8.2.10, 23.4.17, 24.1.49, 27.1.32, 28.1.27, 29.7.18, 31.48 pr, 34.9.13, 35.2.22 pr, 37.5.6, 40.13.4 and 46.3.94.3) and three of them do not co-occur with the phrase *respondi* or *respondit* (D 28.1.7, 29.7.18 and 31.48 pr). Furthermore, within the scope of what can be objectively identified, there are only three self-questioning texts,[53] i.e. D 3.5.9.1, 15.4.1.2 and 33.4.1.12 written by Ulpianus.[54] Most of the remaining 337 fragments seem to be of the prompting consideration type.[55]

The following inference can explain the frequency of the prompting consideration type in J's *Digesta*. The verb '*respondere*' (answer, reply,

52) Pragmatics does not resolve Schulz's doubt completely because it cannot answer his question of who asked whom. *See* Schulz, *supra* note 30, at 283. However, we have managed to counter his argument that 'whether the question in our texts is introduced with *quaero* or *quaesitum est* is insignificant' (S. 283, translated into English by the author); the illocution of '*quaesitum est*' (it has been asked) is: a jurist or an editor required the reader to notice a legal issue (expositive) and at the same time they reported that it had been asked in the past (verdictive).

53) Hayashi (2021) classifies the combination of '*quaero*' (I ask) and '*respondi*' (I have answered) itself as a self-questioning type. *See* Hayashi, *An Analysis*, *supra* note 41, at 12f. However, the prompting consideration and self-questioning types can be distinguished when the illocution of *quaero* is analysed based on speech act theory.

54) The fact that Ulpianus used the self-questioning type of *quaero* holds important significance in the history of law because he objectified legal issues here. He concentrated, even if not always, not on providing advice but on organising and evaluating previous opinions. In this case, he suggested rather than explicitly stated the answer, and this approach aligns with his tendency to use understated expressions such as '*puto*' (I think). This characteristic is also shared, in part, by Paulus. D 12.3.4.2 might also belong to the self-questioning type; however, the Latin word *constat* used there may not reflect Ulpianus's opinion but rather introduce the prevailing view of the time.

55) Some hard cases are difficult to classify, e.g. D 17.1.62.1, 19.2.51 pr, 21.1.58.2, 31.41.1, 33.5.15, 33.9.7, 34.3.25, 36.1.46.1, 39.5.2.7, 45.1.107, 47.2.75 and 48.5.12.10.

respond), which frequently co-occurs with '*quaero*' (I ask), is conjugated with either '*respondi*' (I have answered) or '*respondit*' (he has answered), and both are in the present perfect tense, whilst '*quaero*' (I ask) is in the first-person present tense. Thus, what is important is that the answer comes first, and the question follows, which is the reverse chronological order from the usual sequence. This suggests that the Q&A style involving the combination of *quaero* and *respondi*/*respondit* is not asking oneself questions, but prompting consideration based on recollection and takes one of the following forms:

- The author, a Roman jurist, raised a question for auditors/readers and explained how he had answered it in the past.
- The editor who compiled the texts of a Roman jurist raised a question for auditors/readers and explained how the jurist had answered it in the past.

For example, in D 2.14.44, Scaevola raised a legal issue for readers and reviewed how he had solved it. In contrast, in D 2.8.14, an anonymous editor provided a question for readers and reported how Paulus had answered it. This structure is appropriate for legal texts because one of the main purposes of such writing is to impart legal knowledge to the reader. Therefore, it is unsurprising that most fragments containing *quaero* are of the prompting consideration type.

(4) Client's Letter

Why do we find the consulting type in legal texts written by experts? The reason is that the 13 fragments mentioned above take the form of direct communication with their clients, in other words, the verb *quaero* appears in the style of a dialogue, and eight of them (D 3.5.33, 23.4.17, 28.1.27, 29.7.18, 31.48 pr, 34.9.13, 37.5.6 and 46.3.94.3) are letters from the clients.[56)]

D 3.5.33 (Paulus, *Quaestiones*, 1)

'Nesennius Apollinaris to Julius Paulus, greetings. A grandmother managed the affairs of her grandson. Both died and the heirs of the grandmother brought an action for unauthorised administration against the heirs

56) The remaining five texts (D 8.2.10, 24.1.49, 27.1.32, 35.2.22 pr and 40.13.4) are unclear as to whether they are letters. For example, in the case of D 8.2.10, it begins with the Latin phrase *Gaurus Marcello* but there is no definitive evidence to determine whether this is the pairing of the sender and the recipient of a letter (i.e. Gaurus to Marcellus) or a shortened form indicating that '*Gaurus consuluit Marcello*' (Gaurus has consulted Marcellus).

of the grandson. The heirs of the grandmother were trying to take into account the maintenance provided for the grandson. The rejoinder was that the grandmother had provided it at her own expense as an obligation to a member of her family; he had not asked for a maintenance order nor had such an order been made (*or* nor would such an order have been made). Moreover, it was said that it had been laid down that if a mother provided maintenance, she was not able to claim for what she had provided at her own expense from a sense of obligation to her family. On the other side, it was said that it was only correct to say this if there was proof that the mother had provided maintenance at her own expense; but in the case under discussion, it was probable that the grandmother, who acted as manager, provided maintenance from the grandson's own resources. The point at issue is: Does maintenance appear to have been paid for from both estates? I ask which appears to you to be the juster view.' I have replied that the question was one of fact; for I do not think that the decision in the mother's case should be so generally applicable either. For what would be the position if she went so far as to state publicly that in providing maintenance for her son, she had it in mind to take either her son himself or his tutors to court? Suppose his father died abroad and the mother supported the son together with the rest of the entourage on the return journey. In a case of this sort, the deified Antoninus Pius laid down that an action should be granted even against the *pupillus* himself. So, my opinion will be that it is easier to listen to the grandmother or her heirs on the question of fact if they want to take maintenance into account, particularly if it is also shown that the grandmother had even entered it in her expenditure account. The view that it was paid for from both estates should, I think, be completely rejected.[57)]

57) Watson (ed.), *supra* note 26, vol. 1, at 106f. The original Latin text: 'Nesennius Apollinaris Iulio Paulo salutem. Avia nepotis sui negotia gessit: defunctis utrisque aviae heredes conveniebantur a nepotis heredibus negotiorum gestorum actione: reputabant heredes aviae alimenta praestita nepoti. respondebatur aviam iure pietatis de suo praestitisse: nec enim aut desiderasse, ut decernerentur alimenta, aut decreta essent. praeterea constitutum esse dicebatur, ut si mater aluisset, non posset alimenta, quae pietate cogente de suo praestitisset, repetere. ex contrario dicebatur tunc hoc recte dici, ut de suo aluisse mater probaretur: at in proposito aviam, quae negotia administrabat, verisimile esse de re ipsius nepotis eum aluisse. tractatum est, numquid utroque patrimonio erogata videantur. quaero quid tibi iustius videatur. respondi: haec disceptatio in factum constitit: nam et illud, quod in matre constitutum est, non puto ita perpetuo observandum. quid enim si etiam protestata est se filium ideo alere, ut aut ipsum aut tutores eius conveniret? pone peregre patrem eius obisse et matrem, dum in patriam revertitur, tam filium quam familiam eius exhibuisse: in qua specie etiam in ipsum pupillum negotiorum gestorum dandam actionem divus pius antoninus constituit. igitur in re facti facilius putabo aviam vel heredes eius audiendos, si reputare velint alimenta, maxime si etiam in ratione impensarum ea rettulisse aviam apparebit. illud nequaquam admittendum puto, ut de utroque patrimonio erogata videantur.'

D 23.4.17 (Proculus, *Epistulae*, 11)

'Atillicinus to his friend Proculus, greetings: A pact was entered into between a man and his wife before marriage that, on divorce, the same period should be allowed for returning the dowry as was given for providing it. The woman gave her husband the dowry five years after the marriage took place. On divorce, I ask whether the husband should return the dowry to his wife within five years or within the period prescribed by law?' Proculus has replied: As regards the time for returning the dowry, I think that a pact can only improve a woman's position and not adversely affect it. So, if the pact provides for the return of the dowry within a shorter period than the law prescribes, it ought to be upheld; but if it involves a longer period, the pact is invalid. It is proper to mention in connection with this opinion that if the pact provides for the same delay in returning the dowry on divorce as there was in delivering it after the marriage, and if the delay in returning it was shorter than the prescribed one, the pact will be valid. If the delay is longer, the pact will not be valid.[58)]

D 28.1.27 (Celsus, *Digesta*, 15)

'Domitius Labeo to Celsus, his friend, greetings. I ask you whether a person who, when he had been asked to write a will, also sealed the will when he had written it, is to be regarded as one of the witnesses.' 'Juventius Celsus to Labeo, his friend, greetings. I do not understand what it is that you have consulted me about, or else your consultation is really stupid; for it is more than ridiculous to doubt whether someone has been lawfully used as a witness when he also wrote the will.'[59)]

58) *Ibid*., vol. 2, at 231. The original Latin text: 'Atilicinus Proculo suo salutem. Cum inter virum et uxorem pactum conventum ante nuptias factum sit, ut quibus diebus dos data esset, isdem divortio facto redderetur, post quinquennium quam nuptiae factae sunt uxor viro dotem dedit: divortio facto quaero, utrum quinquennii die vir uxori dotem redderet an statuto legibus tempore. Proculus respondit: quod ad diem reddendae dotis attinet, pacto existimo meliorem condicionem mulieris fieri posse, deteriorem non posse: itaque si cautum est, ut propiore tempore, quam legibus constitutum est, reddatur, stari eo debere, si ut longiore, nec valere id pactum conventum. cuius sententiae conveniens est dicere, si pacto convento cautum est, ut quanto serius quaeque et post nuptias data fuerit, tanto post divortium reddatur, si propiore, quam in reddenda dote constitutum est, data sit, valere pactum conventum, si longiore, non valere.'

59) *Ibid*., vol. 2, at 360. The original Latin text: 'Domitius Labeo Celso suo salutem. Quaero, an testimonium numero habendus sit is, qui, cum rogatus est ad testamentum scribendum, idem quoque cum tabulas scripsisset, signaverit. Iuventius Celsus Labeoni suo salutem. Non intellego quid sit, de quo me consuleris, aut valide stulta est consultatio tua: plus enim quam ridiculum est dubitare, an aliquis iure testis adhibitus sit, quoniam idem et tabulas testamenti scripserit.'

D 29.7.18 (Celsus, *Digesta*, 20)

'Plotiana to her friend Celsus, greetings. Lucius Titius drew a document in the following terms, thus: "If I have left anything in tablets or any other form relating to this will, I wish it to take effect thus." I ask whether a codicil which was written before this will ought to be regarded as ratified.' 'Juventius Celsus to his friend Plotiana, greetings. The words, "If I have left anything relating to this will, I wish it to take effect" cover also what was written before the will.'[60)]

D 31.48 pr (Proculus, *Epistulae*, 8)

'Licinnius Lucusta to Proculus, greetings. When a husband makes a condition in repaying a dowry by a legacy that his wife should, if she prefers, receive the slaves she had given him as dowry instead of a sum of money, I ask: Will those slaves who have been subsequently born from the slaves given as dowry also be due to the wife?' 'Proculus to Lucusta, greetings. If the wife prefers to take slaves rather than dowry money, then the slaves themselves that she gave, valued for the purpose of dowry, shall be due to her, but not also the offspring of the slaves.'[61)]

D 34.9.13 (Papinianus, *Quaestiones*, 32)

'Claudius Selencus to his friend Papinianus, greetings. Maevius was condemned for adultery with Sempronia and later married the said Sempronia who had not been condemned. At his death, he left her as his heir. I ask: Was the marriage legal and should the woman be permitted to receive the inheritance?' I have replied that such a marriage could not stand, that the woman should not profit by receipt of the inheritance and that what was left should go to the imperial treasury. We also hold that if such a woman appoints her husband as heir, he should be deprived of the inheritance on

60) *Ibid*., vol. 2, at 448. The original Latin text: 'Plotiana Celso suo salutem. Lucius Titius his verbis ita cavit: "si quid tabulis aliove quo genere ad hoc testamentum pertinens reliquero, ita valere volo". quaero, an codicilli, qui ante hoc testamentum scripti sunt, debeant rati esse. Iuventius Celsus Plotianae salutem. Haec verba: "si quid ad hoc testamentum pertinens reliquero, valere volo", etiam ea, quae ante testamentum scripta sunt, comprehendere.'

61) *Ibid*., vol. 3, at 48. The original Latin text: 'Licinnius Lucusta Proculo suo salutem. Cum faciat condicionem in releganda dote, ut, si mallet uxor mancipia quae in dotem dederit quam pecuniam numeratam, recipere, si ea mancipia uxor malit, numquid etiam ea mancipia, quae postea ex his mancipiis nata sunt, uxori debeantur, quaero. Proculus Lucustae suo salutem. Si uxor mallet mancipia quam dotem accipere, ipsa mancipia, quae aestimata in dotem dedit, non etiam partus mancipiorum ei debebuntur.'

grounds of unfitness.[62)]

D 37.5.6 (Iulianus, *Digesta*, 23)

'Salvius Aristo to Iulianus, greetings. A man who had an emancipated son passed him over in his will, and instituted his father heir, together with a stranger to the family and gave a legacy to his father; the son applies for *bonorum possessio* contrary to the terms of a will. I ask if both, or either, or neither, of them, had accepted the inheritance, whether, and how much of, the legacy is to be due to the father.' He [= Iulianus] has replied: I have often observed that this part of the Edict, whereby an emancipated son, who has received *bonorum possessio* contrary to the terms of a will, is bidden to pay legacies to ascendants and descendants, has some defects; for if three-quarters of the estate has been left as a legacy, the legatee is in a position to receive more than the emancipated son. And so the position will have to be modified by decree, so that both the emancipated son pays out a share of the inheritance in such a way that the appointed heir does not receive more than the emancipated son, and the amount of the legacies is modified so that no one receives more from the legacies than will remain with the emancipated son in virtue if *bonorum possessio*.[63)]

D 46.3.94.3 (Papinianus, *Quaestiones*, 8)

'Fabius Januarius to Papinianus, greetings. When Titius owed Gaius Seius a certain sum under a *fideicommissum* and the same amount on a ground on which there could be no action and which did not present a claim on the payment, the slave agent of Titius, in his master's absence, paid a sum equivalent to one of the debts, and it was noted that it was paid out of the total due; I ask: On which ground is the payment to be seen as made?'

62) *Ibid*., vol. 3, at 179f. The original Latin text: 'Claudius Seleucus Papiniano suo salutem. Maevius in adulterio Semproniae damnatus eandem Semproniam non damnatam duxit uxorem: qui moriens heredem eam reliquit: quaero, an iustum matrimonium fuerit et an mulier ad hereditatem admittatur. respondi neque tale matrimonium stare neque hereditatis lucrum ad mulierem pertinere, sed quod relictum est ad fiscum pervenire. sed et si talis mulier virum heredem instituerit, et ab eo quasi ab indigno hereditatem auferri dicimus.'

63) *Ibid*., vol. 3, at 287. The original Latin text: 'Salvius Aristo Iuliano salutem. Qui filium emancipatum habebat, praeterito eo patrem suum et extraneum heredem instituit et patri legatum dedit: filius contra tabulas bonorum possessionem petit: quaero, si aut uterque hereditatem adisset aut alter ex his aut neuter, an et quantum legatorum nomine patri debeatur. respondit: saepe animadverti hanc partem edicti, qua emancipatus accepta contra tabulas bonorum possessione liberis et parentibus legata praestare iubetur, habere nonnullas reprehensiones: nam si dodrans legatus fuerit, plus habiturus est cui legatum erit quam emancipatus. decreto itaque ista temperari debebunt, ut et hereditatis partem emancipatus praestet ita, ne scriptus heres amplius habeat quam emancipatus, et legatorum modus temperaretur, ut nihil plus ex legatis ad aliquem perveniat, quam apud emancipatum bonorum possessionis nomine remansurum est.'

I have replied: If, indeed, Seius so provided with Titius that the payment to him should be as from the total due, the term "credit" should be seen as referring only to the money due on the *fideicommissum* not to that for which no action lay, but, the money having been paid, it could not be reclaimed. But when Titius's slave agent, in his master's absence, paid the money, ownership of the coins would not be transferred in respect of that head of obligation for which the relief of a defense was available, although the payment was said to be under that head. For it is hardly likely that his master appointed the slave to pay money which did not have to be paid, any more than he should pay money from his *peculium* on a suretyship which the slave had not accepted for the good of the *peculium*.[64)]

The greeting characterises the letters. The style 'X to Y, greetings' is found in 24 fragments of J's *Digesta* (*See* Table 2). These texts include the eight consulting-type fragments and can be divided into four groups.

- Group A (client ↔ jurist): A client sent a letter to a jurist asking a legal question and the jurist answered in a letter. Both the letters were recorded.
- Group B (client → jurist): A client sent a letter to a jurist asking a legal question, but the letter in reply was not recorded. The fragment merely reported how the jurist had responded to the client's letter.
- Group C (client ← jurist): A client likely sent a letter to a jurist asking a legal question. However, this letter was not recorded but only a letter in reply from the jurist was transcribed. Note: it is possible that the jurist unilaterally sent a letter in which he touched on a legal issue.
- Group D (someone → someone): A person wrote a letter to someone who was not a jurist, and the letter gave rise to a legal problem. A jurist expressed his opinion on this issue.

64) *Ibid*., vol. 4, at 230. The original Latin text: 'Fabius Ianuarius Papiniano salutem. Cum Titius Gaio Seio deberet ex causa fideicommissi certam quantitatem et tantundem eidem ex alia causa, quae peti quidem non poterat, ex solutione autem petitionem non praestat, Titii servus actor absente domino solvit eam summam, quae efficeret ad quantitatem unius debiti, cautumque est ei solutum ex universo credito: quaero, id quod solutum est in quam causam acceptum videtur. respondi, si quidem Titio Seius ita cavisset, ut sibi solutum ex universo credito significaret, crediti appellatio solam fideicommissi pecuniam demonstrare videtur, non eam, quae petitionem quidem non habet, solutione autem facta repeti pecunia non potest. cum vero servus Titii actor absente domino pecuniam solverit, ne dominium quidem nummorum in eam speciem obligationis, quae habuit auxilium exceptionis, translatum foret, si ex ea causa solutio facta proponeretur, quia non est vero simile dominum ad eam speciem solvendis pecuniis servum praeposuisse, quae solvi non debuerunt, non magis quam ut nummos peculiares ex causa fideiussionis, quam servus non ex utilitate peculii suscepit, solveret.'

Table 2: Fragments including greetings in Justinianus's *Digesta*

Fragment	Jurist's name	Book title	Sender	Addressee	Style	Group
3.5.33	Paulus	*Quaestiones 1*	Nesennius Apollinaris	Paulus	quaero respondi	B
4.4.50	Pomponius	*Epistulae et variae lectiones 9*	Iunius Diophantus	Pomponius	Tu quid de eo putas? respondit	B
16.3.24	Papinianus	*Quaestiones 9*	Lucius Titius	Sempronius	quaeritur respondi	D
17.1.59.5	Paulus	*Responsa 4*	(anonym)	(anonym)	quaero respondit	D
17.1.60.1	Scaevola	*Responsa 1*	Titius	Seius	quaero respondi	D
17.1.62.1	Scaevola	*Digesta 6*	Lucius Titius	Gaius	quaero respondit	D
23.3.67	Proculus	*Epistulae 7*	Proculus	grandson	-	C
23.4.17	Proculus	*Epistulae 11*	Atilicinus	Proculus	quaero respondit	B
28.1.27	Celsus	*Digesta 15*	Domitius Labeo	Celsus	quaero salutem	A
29.7.18	Celsus	*Digesta 20*	Plotiana	Celsus	quaero salutem	A
31.47	Proculus	*Epistulae 6*	Proculus	grandson	quaeris respondit	C
31.48 pr	Proculus	*Epistulae 8*	Licinnius Lucusta	Proculus	quaero salutem	A
32.37.2	Scaevola	*Digesta 18*	Lucius Titius	Seia (heir)	quaesitum est respondit	D
32.37.3	Scaevola	*Digesta 18*	Lucius Titius	son	quaesitum est respondit	D
34.9.13	Papinianus	*Quaestiones 32*	Claudius Seleucus	Papinianus	quaero respondi	B
36.1.77 pr	Scaevola	*Digesta 18*	Titius	Cornelius (heir)	quaesitum est respondit	D
37.5.6	Iulianus	*Digesta 23*	Salvius Aristo	Iulianus	quaero respondit	B
38.2.47.2	Paulus	*Responsa 11*	Sempronius	Zolius (freedman)	quaero respondit	D
39.5.32	Scaevola	*Responsa 5*	Lucius Titius	(anonym)	quaero respondit	D
39.5.35 pr	Scaevola	*Digesta 31*	Titius	Stichus (freedman)	quaesitum est respondit	D
40.5.56	Marcellus	*Responsa*	Lucius Titius	heirs	quaero respondit	D
44.7.61.1	Scaevola	*Digesta 28*	Seia	Lucius Titius	quaero respondit	D

46.3.94.3	Papinianus	*Quaestiones 8*	Fabius Ianuarius	Papinianus	quaero respondi	B
50.16.125	Proculus	*Epistulae 5*	grandson	Proculus	Quomodo interpretaris? existimo	B

An example of each group is shown below.

<Group A>
D 28.1.27 (Celsus, *Digesta*, 15)
See above.

<Group B>
D 4.4.50 (Pomponius, *Epistulae et variae lectiones*, 9)
'Junius Diophantus to his friend Pomponius, greetings. Someone under twenty-five, with the intention of novating, intervened on behalf of a person who was liable under an action which had to be brought within a certain period of time, when ten days of the period still remained and afterwards obtained *restitutio in integrum*. Is the *restitutio* [of the action] that is given to the creditor against the first debtor for ten days or a more extended period? I have expressed the opinion that from the moment of *restitutio in integrum* as much time is to be offered as remained [of the original period]. I would like you to reply in writing what you think about that.' He [= Pomponius] has replied: Without doubt, I think that what you thought about the action to be brought within a certain period of time with respect to which the *minor* intervened is correct. Therefore, the property which the first debtor gave as a pledge also remains bound.[65)]

<Group C>
D 23.3.67 (Proculus, *Epistulae*, 7)
'Proculus to his grandson, greetings. When a female slave marries and gives her husband money as a dowry, whether she knows she is a slave or not, she cannot make him the owner of this money; it will still belong to whoever

65) *Ibid*., vol. 1, at 138. The original Latin text: 'Iunius Diophantus Pomponio suo salutem. Minor viginti quinque annis novandi animo intercessit pro eo, qui temporali actione tenebatur, tunc cum adhuc supererant decem dies, et postea in integrum restitutus est: utrum restitutio, quae creditori adversus priorem debitorem datur, decem dierum sit an plenior? ego didici ex tempore in integrum restitutionis tantundem temporis praestandum, quantum supererat: tu quid de eo putas velim rescribas. respondit: sine dubio, quod de temporali actione, in qua intercessit minor, sensisti, puto verius esse: ideoque et pignus quod dederat prior debitor, manet obligatum.'

owned it before it was given as a dowry to the husband unless he acquired it by usucapion. She will not be able to change the situation with regard to this money even after she becomes free while living with this man. So, she cannot legally bring an action based on her right of dowry or a *condictio* to recover the money even after a divorce; but the person who owns the money can legally claim it. But if the husband usucapted the money by having it in his possession, because, of course, he thought she was free, I am inclined to think that he has made a profit here, provided he began to usucapt before the marriage. I take the same view where he bought something with the money before it became the dowry so that he was not in possession of it and had not committed fraud in order to avoid possession of it.'[66)]

<Group D>

D 36.1.77 pr (Scaevola, *Digesta*, 18)

A testator wrote a letter to his heir in these words: 'Titius to his heir Cornelius, greetings. I request of you, Cornelius, since my mother's share has devolved upon you, as also the share of the unfortunate Sempronius lately my curator, and thus my whole estate is likely to come to you, that you render and restore one third to Gaius Seius.' Sempronius had been granted *restitutio in integrum* by the emperor, who had deported him, and had accepted the inheritance. It has been asked whether he was also asked to restore the inheritance from his portion. He [= Scaevola] has replied that it was not stated that Sempronius had been asked, but that the heir Cornelius should make restitution to Seius in proportion to the value of the maternal goods of the deceased.[67)]

66) *Ibid*., vol. 2, at 224. The original Latin text: 'Proculus nepoti suo salutem. Ancilla quae nupsit dotisque nomine pecuniam viro tradidit, sive sciat se ancillam esse sive ignoret, non poterit eam pecuniam viri facere eaque nihilo minus mansit eius cuius fuerat antequam eo nomine viro traderetur, nisi forte usucapta est. nec postea quam apud eundem virum libera facta est, eius pecuniae causam mutare potuit. itaque nec facto quidem divortio aut dotis iure aut per condictionem repetere recte potest, sed is cuius pecunia est recte vindicat eam. quod si vir eam pecuniam pro suo possidendo usucepit, scilicet quia existimavit mulierem liberam esse, propius est, ut existimem eum lucrifecisse, utique si, antequam matrimonium esse inciperet, usucepit. et in eadem opinione sum, si quid ex ea pecunia paravit, antequam ea dos fieret, ita, ut nec possideat eam nec dolo fecerit, quo minus eam possideret.'

67) *Ibid*., vol. 3, at 254. The original Latin text: 'Epistulam ad heredem suum in haec verba scripsit: "Titius Cornelio heredi suo salutem. a te peto, Corneli, quoniam ad te devoluta est pars matris meae, item pars Sempronii curatoris quondam mei contraria fortuna usi et per hoc totus as meus apud te esse speratur, uti reddas restituas Gaio Seio uncias quattuor". quaesitum est, cum sempronius in integrum restitutus sit ab imperatore, a quo fuerat deportatus et adierit hereditatem, an is quoque rogatus sit, ut ex sua portione restituat hereditatem. respondit Sempronium quidem non proponi rogatum, Cornelium autem heredem debere pro rata portione maternarum defuncti rerum restitutionem seio facere.'

From Table 2 and the grouping, three points can be observed. First, the titles of the books that appear in Table 2 have few variations, i.e. *Digesta*, *Epistulae*, *Quaestiones*, *Responsa* and *Epistulae et variae lectiones*, and they are mentioned in Table 1. Additionally, the eight jurists in Table 2, Celsus, Iulianus, Marcellus, Papinianus, Paulus, Pomponius, Proculus and Scaevola, are exhaustively named in Table 1. This means that Table 1 includes Table 2 in terms of the jurist's name and book title even though the selection criteria differ in each one. Table 1 shows whether the verb *quaero* appears, whereas Table 2 presents whether a fragment contains a letter with greetings. It is not easy to interpret this inclusion, however, regarding Celsus, the relationship is because he has only one reference as paragraphs in J's *Digesta*, i.e. his *Digesta*, a book of the same name. There are other books attributed to Celsus than his *Digesta*, e.g. *Quaestiones* and *Epistulae*,[68] however, they are only mentioned in other jurists' fragments, as in Ulpianus's fragment D 4.4.3.1: 'On this Celsus has a not inappropriate discussion in the eleventh book of his *Epistulae* and the second book of his *Digesta* about a case on which he was consulted by the praetor Flavius Respectus'.[69] This sentence implies that Celsus introduced the same case in his two different books; it is not plausible to assume that Flavius Respectus would have consulted him on the same case twice. Supposing that the title of *Epistulae* signifies a collection of letters, and the title of *Digesta* denotes a compilation of material, it can be assumed that Celsus, or an editor, initially published several books, such as *Epistulae*, and these books were later compiled into a *digest*.

Second, Scaevola, whose fragments most frequently contain *quaero*, has neither given nor received greetings in J's *Digesta*. He or his editor used letters only to introduce what happened in a case (Group D). However, it is highly improbable that Scaevola would have neither received a letter from a client nor sent one. This missing information becomes more thought-provoking when compared with the other seven jurists, as he and Marcellus are the only ones assigned exclusively to Group D, in other words, letters from or to Celsus, Iulianus, Papinianus, Paulus, Pomponius and Proculus are found in J's *Digesta*. Concerning the following three facts, i.e. the Latin title *Digesta* means a compilation, the phrases '*respondi*' (I have answered)' and '*respondit*' (he has answered) appear to be randomly distributed in Scaevola's *Responsa*, and no letter from or to him is cited in his *Digesta*

68) *See* Lenel, *supra* note 37, vol. 1, col. 169.

69) Watson (ed.), *supra* note 26, vol. 1, at 125. The original Latin text: '[…] unde illud non ineleganter Celsus epistularum libro undecimo et digestorum secundo tractat, ex facto a Flavio Respecto praetore consultus. […]'

and *Responsa* directly, we can support the thesis that the two books are edited by someone other than Scaevola in a way that conceals his direct interactions with clients. Moreover, if speculation is allowed without further evidence, they are possibly lecture transcriptions. This interpretation may resolve the question of why the first- and third-person perspectives mixed in Scaevola's *Responsa*; the choice of the first or third person depends on whether a participant noted Scaevola's firsthand voices—'I have replied' (or someone copied a lecture note exactly as it was)—or arranged them as 'he has replied' (or someone rephrased a lecture note).

Third, when we add a consideration based on the theory of speech acts, we can see how close each historical document is to the original. Types A and B are likely closer to the original questions of the clients than Types C and D; in the latter two, the issues have possibly been revised by the author or editor, and there is no guarantee that they are the same as the questions in the client's letters. This interpretation can be especially supported by D 28.1.27 (Type A). Celsus responded to the client's question, saying, 'Your consultation is really stupid'. It is more plausible to assume that the client raised such a question than that Celsus invented it. Furthermore, there is a gap between the client's question and the jurist's answer in D 3.5.33 (Type B). Here, Paulus said, 'I have replied that the question was one of fact; for I do not think that the decision in the mother's case should be so generally applicable either'. He advised the client 'to listen to the grandmother or her heirs on the question of fact if they want to take maintenance into account'. This means that even the prominent jurist could not accurately respond to the question raised by the client because of a lack of information. If this letter were a work of fiction, Paulus would have freely modified its contents to explain it more comfortably. In addition, although the word *quaero* is not used in D 4.4.50 (Type B), there may be some indirect evidence supporting the originality of the letters. In that text, Diophantus expressed his own opinion. This learned person appears to have relayed his view to someone and then, worried, sought advice from Pomponius. Therefore, unlike the client in D 28.1.27, the sender had some legal knowledge and was possibly a jurist. There was no need to create such a letter in detail, therefore, it could be interpreted that Pomponius quoted the letter as it was written. The reasoning so far is partially compatible with the inference by Hayashi (2021) that, for D 4.4.39.1, 32.37.6 and 32.42, in which letters do not appear, *quaero* is not the utterance of a client and hence the questions are modified by Scaevola.[70)]

70) Hayashi, *An Analysis*, *supra* note 41, at 13f.

Thus, pragmatics and historical records support the assumption that the consulting type of *quaero* retains authentic situations that occurred in the classical period. If this is the case, Roman jurists engaged with diverse people, from simple layperson questions to consultations with people in the same profession.

4 Conclusion

This paper applies John L. Austin's speech act theory to Roman law texts, aiming to focus on Roman jurists' wording and style and to clarify how they employed language to achieve specific purposes. The Latin word *quaero* was analysed to provide a simple example. This word, the first-person singular present tense of the verb *quaerere*, translates into English as 'I ask'. Although Fritz Schulz regarded it as a minor phrase, this paper demonstrates its potential to yield rich insights when viewed from a pragmatic perspective.

First, *quaero* is frequently paired with '*respondi*' (I have answered) or '*respondit*' (he has answered), forming a question-and-answer structure that was a preferred writing style among several jurists of the classical period. This style was employed by 11 jurists from the Julio–Claudian dynasty through the Crisis of the Third Century, including Proculus, Iavolenus, Celsus, Iulianus, Marcellus, Pomponius, Scaevola, Papinianus, Paulus, Ulpianus and Modestinus. However, the frequency of *quaero*'s usage does not necessarily correspond to the volume of each jurist's work quoted in J's *Digesta*. Notably, Scaevola stands out for the number of fragments containing *quaero* and for its frequency, whereas Ulpianus, Papinianus and Pomponius, despite being extensively cited in J's *Digesta*, rarely used the term.

Second, the performativity of *quaero* can be classified into three theoretical categories: (1) when a speaker asks a question to seek information (consulting), (2) when someone who knows the answer prompts another person to consider it (prompting consideration), and (3) when an individual poses a question to themselves (self-questioning). Most *quaero*-fragments in J's *Digesta* belong to the second category, where *quaero* is employed by jurists or editors to draw the reader's attention to legal issues. In such cases, the locution 'I ask' functions as the illocution 'I request you to consider this'.

Third, some fragments belong to the first category because they contain quotations from letters in which clients explicitly stated, 'I ask'. These letters, received by jurists, reflect direct requests for legal guidance. Therefore, in such cases, the locution 'I ask' connects the illocution 'A client requests a jurist to answer a legal question'. Eight fragments in J's *Digesta* clearly quote such letters, three of which also include the jurists' reply letters (D 28.1.27, 29.7.18 and 31.48 pr), whilst the other five indirectly report

the jurists' responses with *respondi* or *respondit* (D 3.5.33, 23.4.17, 34.9.13, 37.5.6 and 46.3.94.3). The former three fragments appear to directly document exchanges between jurists and clients in real disputes, while the latter five seem to preserve at least the original questions. D 28.1.27 supports this supposition, as Celsus replied to his client, 'Your consultation is really stupid'. His teasing tone suggests a direct and authentic interaction rather than fiction or interpolation. Furthermore, D 4.4.50 indicates that even learned individuals with sufficient knowledge sought consultation with jurists to confirm their own understanding. This demonstrates that Roman jurists addressed a wide range of legal needs, from simple layperson inquiries to advanced discussions with legal experts.

Finally, as a secondary conclusion, the application of speech act theory may help infer the chronological order of Roman legal texts. For instance, as discussed in Section 3(2), Paulus's *Quaestiones* likely preceded his *Responsa*, as the latter exhibits a tone suggesting the influence of a subsequent editor. Similarly, this method can be used to infer the sequence between Celsus's *Digesta* and his *Epistulae*, as elaborated in Section 3(4).

As a pilot study applying pragmatics to Roman law texts, this paper's scope is intentionally limited. Not all fragments containing *quaero* were analysed, nor were all 24 texts containing the term '*salutem*' (greetings), a keyword critical for interpreting the eight letters. These limitations highlight avenues for further research in subsequent studies.

Appendix: List of *quaero* in Justinianus's *Digesta*

No	Fragment	Author's name	Book title	Co-occurrence
1	2.8.14	Paulus	*Responsa 2*	Paulus respondit
2	2.14.35	Modestinus	*Responsa 2*	Modestinus respondit
3	2.14.44	Scaevola	*Responsa 5*	respondi
4	2.15.3.1	Scaevola	*Digesta 1*	respondit
5	2.15.14	Scaevola	*Responsa 2*	respondit
6	3.2.21	Paulus	*Responsa 2*	Paulus respondit
7	3.3.70	Scaevola	*Responsa 1*	respondi
8	3.3.76	Iulianus	*Ad minicium 5*	Iulianus respondit
9	3.5.9.1	Ulpianus	*Ad edictum 10*	dico
10	3.5.25	Modestinus	*Responsa 1*	Modestinus respondit
11	3.5.33	Paulus	*Quaestiones 1*	respondi
12	4.4.32	Paulus	*Quaestiones 1*	respondi
13	4.4.39.1	Scaevola	*Digesta 2*	respondi
14	4.4.47 pr	Scaevola	*Responsa 1*	respondi
15	4.4.47.1	Scaevola	*Responsa 1*	respondi

16	5.2.19	Paulus	*Quaestiones 2*	respondi
17	5.3.47	Modestinus	*Responsa 8*	respondit
18	6.1.59	Iulianus	*Ex minicio 6*	respondit
19	7.1.54	Iavolenus	*Epistulae 3*	respondit
20	8.2.10	Marcellus	*Digesta 4*	Marcellus respondit
21	8.2.41.1	Scaevola	*Responsa 1*	respondi
22	8.3.37	Paulus	*Responsa 3*	Paulus respondit
23	8.5.16	Iulianus	*Digesta 7*	respondi
24	8.5.20.1	Scaevola	*Digesta 4*	respondit
25	9.2.51 pr	Iulianus	*Digesta 86*	respondit
26	10.2.30	Modestinus	*Responsa 6*	Modestinus respondit
27	10.2.36	Paulus	*Quaestiones 2*	respondi
28	10.2.38	Paulus	*Responsa 3*	Paulus respondit
29	10.2.39.5	Scaevola	*Responsa 1*	respondi
30	11.1.20.1	Paulus	*Quaestiones 2*	respondi
31	12.3.4.2	Ulpianus	*Ad edictum 36*	constat
32	12.3.8	Marcellus	*Digesta 8*	respondi
33	12.6.67.1	Scaevola	*Digesta 5*	respondit
34	12.6.67.4	Scaevola	*Digesta 5*	respondit
35	13.5.24	Marcellus	*Responsa*	Marcellus respondit
36	13.7.34	Marcellus	*Responsa*	Marcellus respondit
37	13.7.39	Modestinus	*Responsa 4*	Modestinus respondit
38	13.7.43.1	Scaevola	*Digesta 5*	respondit
39	15.3.21	Scaevola	*Digesta 5*	respondit
40	15.4.1.2	Ulpianus	*Ad edictum 29*	puto
41	16.1.29 pr	Paulus	*Responsa 16*	Paulus respondit
42	16.2.15	Iavolenus	*Epistulae 2*	respondit
43	16.3.26.1	Paulus	*Responsa 4*	Paulus respondit
44	16.3.26.2	Paulus	*Responsa 4*	respondit
45	16.3.27	Paulus	*Responsa 7*	Paulus respondit
46	17.1.38 pr	Marcellus	*Responsa*	Marcellus respondit
47	17.1.58.1	Paulus	*Quaestiones 4*	respondi
48	17.1.59.4	Paulus	*Responsa 4*	Paulus respondit
49	17.1.59.5	Paulus	*Responsa 4*	Paulus respondit
50	17.1.60.1	Scaevola	*Responsa 1*	respondi
51	17.1.60.4	Scaevola	*Responsa 1*	respondi
52	17.1.62.1	Scaevola	*Digesta 6*	respondit
53	18.1.64	Iavolenus	*Epistulae 2*	respondi
54	18.1.69	Proculus	*Epistulae 11*	Proculus respondit
55	18.1.81 pr	Scaevola	*Digesta 7*	respondit

56	18.1.81.1	Scaevola	*Digesta 7*	respondit
57	18.7.9	Paulus	*Quaestiones 5*	respondi
58	19.1.11.6	Ulpianus	*Ad edictum 32*	Iulianus diceret
59	19.1.39	Modestinus	*Responsa 5*	Modestinus respondit
60	19.1.43.	Paulus	*Quaestiones 5*	respondi
61	19.1.52.3	Scaevola	*Digesta 7*	respondit
62	19.2.51 pr	Iavolenus	*Epistulae 11*	respondit
63	19.2.54 pr	Paulus	*Responsa 5*	Paulus respondit
64	19.2.54.1	Paulus	*Responsa 5*	Paulus respondit
65	19.5.10	Iavolenus	*Epistulae 13*	respondi
66	20.1.26 pr	Modestinus	*Responsa 4*	Modestinus respondit
67	20.4.18	Scaevola	*Responsa 1*	respondit
68	20.4.19	Scaevola	*Responsa 5*	respondi
69	20.6.9 pr	Modestinus	*Responsa 4*	Modestinus respondit
70	20.6.9.1	Modestinus	*Responsa 4*	Modestinus respondit
71	20.6.11.1	Paulus	*Responsa 4*	Paulus respondit
72	21.1.56	Paulus	*Quaestiones 1*	respondi
73	21.1.58 pr	Paulus	*Responsa 5*	Paulus respondit
74	21.1.58.1	Paulus	*Responsa 5*	Paulus respondit
75	21.1.58.2	Paulus	*Responsa 5*	Paulus respondit
76	21.2.11 pr	Paulus	*Responsa 6*	Paulus respondit
77	21.2.12	Scaevola	*Responsa 2*	respondi
78	21.2.73	Paulus	*Responsa 7*	Paulus respondit
79	22.1.12	Paulus	*Responsa 4*	Paulus respondit
80	22.1.13 pr	Scaevola	*Responsa 1*	respondi
81	22.1.41.1	Modestinus	*Responsa 3*	Modestinus respondit
82	22.1.41.2	Modestinus	*Responsa 3*	Modestinus respondit
83	22.3.27	Scaevola	*Digesta 33*	respondit
84	23.3.60	Celsus	*Digesta 11*	respondit
85	23.3.62	Modestinus	*Responsa 5*	Modestinus respondit
86	23.3.72 pr	Paulus	*Responsa 8*	Paulus respondit
87	23.3.85	Scaevola	*Digesta 8*	respondit
88	23.4.17	Proculus	*Epistulae 11*	Proculus respondit
89	24.1.39	Iulianus	*Ex minicio 5*	respondi
90	24.1.49	Marcellus	*Digesta 7*	respondit
91	24.1.55	Paulus	*Quaestiones 6*	respondi
92	24.1.57	Paulus	*Responsa 7*	Paulus respondit
93	24.1.66 pr	Scaevola	*Digesta 9*	(no verb)
94	24.3.38	Marcellus	*Responsa*	Marcellus respondit
95	24.3.44.1	Paulus	*Quaestiones 5*	respondi

96	24.3.45	Paulus	*Quaestiones 6*	respondi
97	26.2.30	Paulus	*Quaestiones 6*	respondit
98	26.2.32 pr	Paulus	*Responsa 9*	Paulus respondit
99	26.2.32.2	Paulus	*Responsa 9*	Paulus respondit
100	26.5.26	Scaevola	*Responsa 2*	respondi
101	26.7.21	Marcellus	*Responsa*	Marcellus respondit
102	26.7.32 pr	Modestinus	*Responsa 6*	Modestinus respondit
103	26.7.32.4	Modestinus	*Responsa 6*	Modestinus respondit
104	26.7.32.6	Modestinus	*Responsa 6*	Modestinus respondit
105	26.7.43.1	Paulus	*Quaestiones 7*	respondi
106	26.7.46 pr	Paulus	*Responsa 9*	Paulus respondit
107	26.7.46.1	Paulus	*Responsa 9*	Paulus respondit
108	26.7.47.1	Scaevola	*Responsa 2*	respondi
109	26.7.47.2	Scaevola	*Responsa 2*	respondi
110	26.7.47.4	Scaevola	*Responsa 2*	respondi
111	27.1.16	Modestinus	*Responsa 2*	Modestinus respondit
112	27.1.32	Paulus	*Quaestiones 7*	respondi
113	27.1.36.1	Paulus	*Responsa 9*	respondi
114	27.1.37 pr	Scaevola	*Responsa 2*	respondi
115	27.1.37.1	Scaevola	*Responsa 2*	respondi
116	27.5.3	Iavolenus	*Epistulae 5*	respondit
117	27.8.8	Modestinus	*Responsa 6*	Modestinus respondit
118	28.1.27	Celsus	*Digesta 15*	salutem
119	28.2.25.1	Paulus	*Responsa 12*	Paulus respondit
120	28.3.15	Iavolenus	*Epistulae 4*	respondi
121	28.3.20	Scaevola	*Digesta 13*	respondit
122	28.5.54	Marcellus	*Responsa*	Marcellus respondit
123	28.5.62	Modestinus	*Responsa 8*	Modestinus respondit
124	28.5.86	Scaevola	*Responsa 2*	respondit
125	28.6.43 pr	Paulus	*Quaestiones 9*	respondi
126	28.6.43.1	Paulus	*Quaestiones 9*	respondi
127	28.6.45 pr	Paulus	*Responsa 12*	respondi
128	28.6.46	Paulus	*Responsa 13*	respondi
129	28.6.47	Scaevola	*Responsa 2*	respondi
130	28.7.27.1	Modestinus	*Responsa 8*	Modestinus respondit
131	29.1.25	Marcellus	*Responsa*	Marcellus respondit
132	29.1.40 pr	Paulus	*Responsa 11*	respondi
133	29.1.40.2	Paulus	*Responsa 11*	respondi
134	29.2.75	Marcellus	*Digesta 9*	respondit
135	29.2.76 pr	Iavolenus	*Epistulae 4*	respondit

136	29.2.92	Paulus	*Responsa 17*	Paulus respondit
137	29.2.98	Scaevola	*Digesta 26*	respondit
138	29.5.22	Paulus	*Responsa 16*	Paulus respondit
139	29.7.18	Celsus	*Digesta 20*	salutem
140	30.84.19	Iulianus	*Digesta 33*	respondi
141	30.96 pr	Iulianus	*Digesta 39*	respondi
142	30.123 pr	Marcellus	*Responsa*	Marcellus respondit
143	30.123.1	Marcellus	*Responsa*	Marcellus respondit
144	31.33.1	Modestinus	*Responsa 9*	Modestinus respondit
145	31.34 pr	Modestinus	*Responsa 10*	Modestinus respondit
146	31.34.1	Modestinus	*Responsa 10*	Modestinus respondit
147	31.34.2	Modestinus	*Responsa 10*	Modestinus respondit
148	31.34.3	Modestinus	*Responsa 10*	Modestinus respondit
149	31.34.5	Modestinus	*Responsa 10*	Modestinus respondit
150	31.34.6	Modestinus	*Responsa 10*	Modestinus respondit
151	31.34.7	Modestinus	*Responsa 10*	Modestinus respondit
152	31.41.1	Iavolenus	*Epistulae 7*	respondit
153	31.48 pr	Proculus	*Epistulae 8*	salutem
154	31.86 pr	Paulus	*Responsa 13*	Paulus respondi[71)]
155	31.86.1	Paulus	*Responsa 13*	Paulus respondit
156	31.87 pr	Paulus	*Responsa 14*	Paulus respondit
157	31.87.2	Paulus	*Responsa 14*	Paulus respondit
158	31.87.4	Paulus	*Responsa 14*	Paulus respondit
159	31.88 pr	Scaevola	*Responsa 3*	respondi
160	31.88.1	Scaevola	*Responsa 3*	respondi
161	31.88.2	Scaevola	*Responsa 3*	respondi
162	31.88.3	Scaevola	*Responsa 3*	respondi
163	31.88.4	Scaevola	*Responsa 3*	respondi
164	31.88.6	Scaevola	*Responsa 3*	respondi
165	31.88.7	Scaevola	*Responsa 3*	respondi
166	31.88.12	Scaevola	*Responsa 3*	respondi
167	31.88.13	Scaevola	*Responsa 3*	respondi
168	31.88.14	Scaevola	*Responsa 3*	respondi
169	31.88.16	Scaevola	*Responsa 3*	respondi
170	31.89 pr	Scaevola	*Responsa 4*	respondi
171	31.89.2	Scaevola	*Responsa 4*	respondi
172	32.33.1	Scaevola	*Digesta 15*	respondit

71) About this grammatical error, *see* Section 3(2).

173	32.34 pr	Scaevola	*Digesta 16*	respondit
174	32.37.6	Scaevola	*Digesta 18*	respondi
175	32.38.1	Scaevola	*Digesta 19*	respondit
176	32.39 pr	Scaevola	*Digesta 20*	respondit
177	32.42	Scaevola	*Digesta 33*	respondi
178	32.69.1	Marcellus	*Responsa*	Marcellus respondit
179	32.83.1	Modestinus	*Responsa 10*	respondit
180	32.92 pr	Paulus	*Responsa 13*	respondi
181	32.93.4	Scaevola	*Responsa 3*	respondit
182	32.93.5	Scaevola	*Responsa 3*	respondit
183	33.1.5	Modestinus	*Responsa 10*	Modestinus respondit
184	33.1.6	Modestinus	*Responsa 11*	Modestinus respondit
185	33.1.12	Paulus	*Responsa 13*	Paulus respondit
186	33.1.13 pr	Scaevola	*Responsa 4*	respondi
187	33.1.13.1	Scaevola	*Responsa 4*	respondi
188	33.1.19.2	Scaevola	*Digesta 17*	respondit
189	33.1.20.1	Scaevola	*Digesta 18*	respondit
190	33.2.15.1	Marcellus	*Digesta 13*	respondit
191	33.2.16	Modestinus	*Responsa 9*	respondit
192	33.2.17	Scaevola	*Responsa 3*	respondit
193	33.2.18	Modestinus	*Responsa 9*	respondit
194	33.2.26 pr	Paulus	*Quaestiones 10*	respondi
195	33.2.28	Paulus	*Responsa 13*	Paulus respondit
196	33.2.32.5	Scaevola	*Digesta 15*	respondit
197	33.2.33.2	Scaevola	*Digesta 17*	respondit
198	33.2.38	Scaevola	*Responsa 3*	respondit
199	33.4.1.12	Ulpianus	*Ad Sabinum 19*	puto
200	33.4.11	Paulus	*Responsa 7*	respondit
201	33.4.14	Scaevola	*Digesta 15*	respondit
202	33.4.17 pr	Scaevola	*Responsa 3*	respondit
203	33.5.15	Iavolenus	*Epistulae 2*	respondit
204	33.7.20.8	Scaevola	*Responsa 3*	respondit
205	33.9.7	Scaevola	*Responsa 3*	respondit
206	34.1.4 pr	Modestinus	*Responsa 10*	Modestinus respondit
207	34.1.4.1	Modestinus	*Responsa 10*	Modestinus respondit
208	34.1.5	Modestinus	*Responsa 11*	Modestinus respondit
209	34.1.13 pr	Scaevola	*Responsa 4*	respondi
210	34.1.13.2	Scaevola	*Responsa 4*	respondit
211	34.1.20 pr	Scaevola	*Responsa 3*	respondit
212	34.1.20.1	Scaevola	*Responsa 3*	respondit

213	34.1.20.2	Scaevola	*Responsa 3*	respondit
214	34.1.20.3	Scaevola	*Responsa 3*	respondit
215	34.2.6 pr	Marcellus	*Responsa*	Marcellus respondit
216	34.2.6.1	Marcellus	*Responsa*	Marcellus respondit
217	34.2.6.2	Marcellus	*Responsa*	Marcellus respondit
218	34.2.35 pr	Paulus	*Responsa 14*	Paulus respondit
219	34.2.35.1	Paulus	*Responsa 14*	Paulus respondit
220	34.2.36	Scaevola	*Responsa 3*	respondit
221	34.2.38 pr	Scaevola	*Responsa 3*	respondit
222	34.2.38.1	Scaevola	*Responsa 3*	respondit
223	34.3.12	Iulianus	*Digesta 39*	respondi
224	34.3.20.1	Modestinus	*Responsa 10*	Modestinus respondit
225	34.3.25	Paulus	*Quaestiones 10*	respondi
226	34.3.26	Scaevola	*Responsa 4*	respondit
227	34.3.28.2	Scaevola	*Digesta 16*	respondit
228	34.3.28.3	Scaevola	*Digesta 16*	respondit
229	34.3.28.4	Scaevola	*Digesta 16*	respondit
230	34.3.28.6	Scaevola	*Digesta 16*	respondit
231	34.3.31 pr	Scaevola	*Responsa 3*	respondit
232	34.3.31.4	Scaevola	*Responsa 3*	respondit
233	34.4.31.2	Scaevola	*Digesta 14*	respondit
234	34.4.31.3	Scaevola	*Digesta 14*	respondit
235	34.9.13	Papinianus	*Quaestiones 32*	respondi
236	35.1.36 pr	Marcellus	*Responsa*	Marcellus respondit
237	35.1.36.1	Marcellus	*Responsa*	Marcellus respondit
238	35.1.66	Modestinus	*Responsa 10*	Modestinus respondit
239	35.1.67	Iavolenus	*Epistulae 11*	respondit
240	35.1.85	Scaevola	*Responsa 3*	respondit
241	35.2.22 pr	Paulus	*Quaestiones 17*	respondi
242	35.2.26 pr	Scaevola	*Responsa 5*	respondit
243	35.2.61	Iavolenus	*Epistulae 4*	respondit
244	35.2.86	Iulianus	*Digesta 40*	respondi
245	36.1.28.16	Iulianus	*Digesta 40*	respondi
246	36.1.46 pr	Marcellus	*Digesta 15*	respondi
247	36.1.46.1	Marcellus	*Digesta 15*	respondi
248	36.1.48	Iavolenus	*Epistulae 11*	respondi
249	37.5.6	Iulianus	*Digesta 23*	respondit

250	37.6.3.1	Iulianus	*Digesta 23*	Paulus notat[72)]
251	37.8.3	Marcellus	*Digesta 9*	respondi
252	37.10.13	Paulus	*Responsa 11*	Paulus respondit
253	37.14.12	Modestinus	*Responsa 1*	Modestinus respondit
254	37.14.18	Scaevola	*Responsa 4*	Scaevola respondit
255	37.15.3	Marcellus	*Responsa*	respondit
256	38.2.20.4	Iulianus	*Digesta 25*	respondi
257	38.2.35	Iavolenus	*Epistulae 3*	respondit
258	38.2.36	Iavolenus	*Epistulae 8*	respondit
259	38.2.47.1	Paulus	*Responsa 11*	Paulus respondit
260	38.2.47.2	Paulus	*Responsa 11*	Paulus respondit
261	38.2.48	Scaevola	*Responsa 2*	respondit
262	38.5.12	Iavolenus	*Epistulae 3*	respondit
263	38.8.10	Scaevola	*Responsa 2*	respondit
264	39.5.2.7	Iulianus	*Digesta 60*	respondit
265	39.5.32	Scaevola	*Responsa 5*	respondit
266	39.5.35.1	Scaevola	*Digesta 31*	respondit
267	39.5.35.2	Scaevola	*Digesta 31*	respondit
268	39.6.28	Marcellus	*Responsa*	Marcellus respondit
269	40.1.23	Paulus	*Responsa 15*	Paulus respondit
270	40.2.22	Paulus	*Quaestiones 12*	respondi
271	40.4.44	Modestinus	*Responsa 10*	Modestinus respondit
272	40.4.53	Paulus	*Responsa 15*	Paulus respondit
273	40.4.54 pr	Scaevola	*Responsa 4*	respondit
274	40.4.54.1	Scaevola	*Responsa 4*	respondit
275	40.4.59.2	Scaevola	*Digesta 23*	respondit
276	40.4.60	Scaevola	*Digesta 24*	respondit
277	40.5.14	Modestinus	*Responsa 10*	Modestinus respondit
278	40.5.19.1	Scaevola	*Digesta 24*	respondit
279	40.5.40 pr	Paulus	*Responsa 15*	Paulus respondit
280	40.5.41.1	Scaevola	*Responsa 4*	respondit
281	40.5.41.2	Scaevola	*Responsa 4*	respondit
282	40.5.41.4	Scaevola	*Responsa 4*	respondit
283	40.5.41.5	Scaevola	*Responsa 4*	respondit
284	40.5.41.6	Scaevola	*Responsa 4*	respondit
285	40.5.41.7	Scaevola	*Responsa 4*	respondit
286	40.5.41.8	Scaevola	*Responsa 4*	respondit

72) About the interpretation of this phrase, *see* footnote 39.

287	40.5.41.9	Scaevola	*Responsa 4*	respondit
288	40.5.41.13	Scaevola	*Responsa 4*	respondit
289	40.5.41.15	Scaevola	*Responsa 4*	respondit
290	40.5.41.16	Scaevola	*Responsa 4*	respondit
291	40.5.41.17	Scaevola	*Responsa 4*	respondit
292	40.5.47.4	Iulianus	*Digesta 42*	respondi
293	40.5.56	Marcellus	*Responsa*	Marcellus respondit
294	40.7.40.4	Scaevola	*Digesta 24*	respondit
295	40.7.40.5	Scaevola	*Digesta 24*	respondit
296	40.7.40.6	Scaevola	*Digesta 24*	respondit
297	40.7.40.7	Scaevola	*Digesta 24*	respondit
298	40.8.9	Paulus	*Quaestiones 5*	respondi
299	40.12.38.3	Paulus	*Responsa 15*	Paulus respondit
300	40.13.3	Pomponius	*Epistulae et variae lectiones 11*	dubitari non potest
301	40.13.4	Paulus	*Quaestiones 12*	respondit
302	41.1.55	Proculus	*Epistulae 2*	respondit
303	41.1.56 pr	Proculus	*Epistulae 8*	Proculus respondit
304	41.1.56.1	Proculus	*Epistulae 8*	Proculus respondit
305	41.2.19 pr	Marcellus	*Digesta 17*	respondi
306	41.2.23.2	Iavolenus	*Epistulae 1*	respondit
307	41.3.21	Iavolenus	*Epistulae 6*	respondit
308	41.4.13	Scaevola	*Responsa 5*	respondit
309	41.7.8	Paulus	*Responsa 18*	Paulus respondit
310	42.1.27	Modestinus	*Responsa 1*	Modestinus respondit
311	42.5.28	Iavolenus	*Epistulae 1*	respondit
312	42.8.22	Scaevola	*Responsa 5*	respondit
313	43.20.5.1	Iulianus	*Ex minicio 4*	negavit
314	44.1.11	Modestinus	*Responsa 13*	Modestinus respondit
315	44.2.30.1	Paulus	*Quaestiones 14*	respondi
316	44.3.12	Paulus	*Responsa 16*	Paulus respondit
317	44.4.15	Scaevola	*Responsa 5*	respondit
318	44.7.29	Paulus	*Responsa 4*	Paulus respondit
319	44.7.61 pr	Scaevola	*Digesta 28*	respondit
320	44.7.61.1	Scaevola	*Digesta 28*	respondit
321	45.1.107	Iavolenus	*Epistulae 8*	respondit
322	45.1.113.1	Proculus	*Epistulae 2*	Proculus respondit
323	45.1.122.1	Scaevola	*Digesta 28*	respondit
324	45.1.122.2	Scaevola	*Digesta 28*	respondit
325	45.1.122.3	Scaevola	*Digesta 28*	respondit
326	45.1.132 pr	Paulus	*Quaestiones 15*	respondi

327	45.1.134 pr	Paulus	*Responsa 15*	respondit
328	45.1.135 pr	Scaevola	*Responsa 5*	respondit
329	45.1.135.4	Scaevola	*Responsa 5*	respondi
330	46.1.24	Marcellus	*Responsa*	Marcellus respondit
331	46.1.38.1	Marcellus	*Digesta 20*	respondit
332	46.1.44	Iavolenus	*Epistulae 11*	respondit
333	46.3.48	Marcellus	*Responsa*	Marcellus respondit
334	46.3.89.1	Scaevola	*Digesta 29*	respondit
335	46.3.89.2	Scaevola	*Digesta 29*	respondit
336	46.3.94.3	Papinianus	*Quaestiones 8*	respondi
337	46.3.100	Paulus	*Responsa 10*	Paulus respondit
338	46.3.102.1	Scaevola	*Responsa 5*	respondi
339	46.3.102.2	Scaevola	*Responsa 5*	respondi
340	46.3.102.3	Scaevola	*Responsa 5*	respondit
341	47.2.73	Modestinus	*Responsa 7*	Modestinus respondit
342	47.2.75	Iavolenus	*Epistulae 4*	respondit
343	48.2.18	Modestinus	*Responsa 17*	respondit
344	48.5.12.10	Papinianus	*De adulteriis*	respondit
345	48.5.12.12	Papinianus	*De adulteriis*	respondit
346	48.4.12.13	Papinianus	*De adulteriis*	respondit
347	48.10.14 pr	Paulus	*Quaestiones 22*	respondit
348	48.16.17	Modestinus	*Responsa 17*	Modestinus respondit
349	49.1.18	Modestinus	*Responsa 17*	Modestinus respondit
350	49.1.24.1	Scaevola	*Responsa 5*	respondit
351	49.14.9	Modestinus	*Responsa 17*	Modestinus respondit
352	50.1.36 pr	Modestinus	*Responsa 1*	Modestinus respondit
353	50.12.10	Modestinus	*Responsa 1*	Modestinus respondit

Il rapporto tra giudice e legge nel sistema giuridico italiano[1)]

*Marco De Cristofaro**

1. – Il sistema italiano ed il controllo di costituzionalità accentrato: solo la Corte costituzionale è inserita nel sistema delle fonti del diritto

È tradizionale considerare il sistema giuridico italiano tra gli ordinamenti di *civil law*. In effetti nella Costituzione (all'art. 101) si trova il principio fondamentale per cui "il giudice è soggetto alla legge", è dunque chiamato all'applicazione della volontà degli organi del potere legislativo, espressione della volontà popolare ed unica possibile fonte del diritto: vuoi in via diretta, con l'approvazione di leggi frutto di un esame e del Parlamento; vuoi in via indiretta, tramite la conferma dei decreti legge approvati dal Governo per ragioni di urgenza o tramite la delega al Governo per l'elaborazione di testi normativi più articolati e complessi (come i codici o le grandi leggi di riforma del diritto sostanziale o del diritto processuale).

Il giudice pertanto non la facoltà di disapplicare le leggi che ritenga non conformi alla Costituzione[2)]. Certamente anche il sistema italiano è fondato sull'esistenza di una Costituzione "rigida", che ha un rango superiore nella gerarchia delle fonti e non può essere derogata o contrastata dal legislatore ordinario.

Tuttavia non è previsto un controllo di costituzionalità diffuso, quale quello conosciuto agli Stati Uniti, poiché – analogamente a quanto accade, ad es., in Germania – il controllo di conformità delle leggi ordinarie alla Costituzione è affidato in via accentrata ad una Corte costituzionale[3)], disciplinata nella Carta fondamentale, creata nel 1956 e composta da 15 giudici che restano in carica 9 anni: 5 di nomina del Presidente della Repubblica, 5 di nomina del Parlamento e 5 di nomina delle Corti Supreme (3 da parte della Corte Suprema civile e penale, la Corte di cassazione; 2 da parte delle Corti Supreme amministrative, il Consiglio di Stato e la Corte

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1) Testo della Relazione tenuta presso lo Hikakuhō Kenkyūjo di Nihon University il 6 dicembre 2024, integrato delle note.

2) Diversamente da quanto accade nel sistema statunitense, sin dal *milestone case* rappresentato – ancora nei primi tempi di attività della *Supreme Court* – da *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

3) V. art. 134 della Costituzione.

dei Conti)[4].

Se il giudice – qualunque giudice, anche le Corti Supreme civili, penali od amministrative – ha un dubbio circa la compatibilità di una legge ordinaria alla Costituzione deve sottoporre questo dubbio alla Corte costituzionale[5] che, unica nell'ordinamento, ha il potere di dichiarare la legge invalida *in toto* oppure di dichiararla valida ma solo a condizione che ne venga data una certa interpretazione che la rende conforme alla Costituzione[6].

Questo obbligo, per il giudice ordinario, vale anche davanti a leggi che sono chiaramente non conformi ai principi costituzionali elementari: quali quello dell'uguaglianza e della dignità umana. Ad es. negli anni '60 è stato necessario l'intervento della Corte costituzionale per cancellare la previsione per cui solo gli uomini potevano accedere a determinate carriere pubbliche, quale quella di giudice[7] (ad oggi i magistrati sono prevalentemente donne, sul piano numerico); per far dichiarare incostituzionale il reato di adulterio, che poteva essere commesso solo dalla donna sposata ma non dall'uomo sposato[8]; per far dichiarare illegittima la disposizione del codice di procedura civile che imponeva a chi voleva iniziare una causa di depositare

4) V. art. 135 della Costituzione: «La Corte costituzionale è composta di quindici giudici nominati per un terzo dal Presidente della Repubblica, per un terzo dal Parlamento in seduta comune e per un terzo dalle supreme magistrature ordinaria ed amministrative.

I giudici della Corte costituzionale sono scelti tra i magistrati anche a riposo delle giurisdizioni superiori ordinaria ed amministrative, i professori ordinari di università in materie giuridiche e gli avvocati dopo venti anni d'esercizio.

I giudici della Corte costituzionale sono nominati per nove anni, decorrenti per ciascuno di essi dal giorno del giuramento, e non possono essere nuovamente nominati».

5) V. art. 23 della legge sul funzionamento della Corte costituzionale, n. 87 del 11.3.1953: «L'autorità giurisdizionale, qualora il giudizio non possa essere definito indipendentemente dalla risoluzione della questione di legittimità costituzionale o non ritenga che la questione sollevata sia manifestamente infondata, emette ordinanza con la quale, riferiti i termini ed i motivi della istanza con cui fu sollevata la questione, dispone l'immediata trasmissione degli atti alla Corte costituzionale e sospende il giudizio in corso».

6) Si tratta della categoria di *sentenza interpretativa di accoglimento,* con la quale la Corte, chiamata a pronunciarsi sul significato attribuito dal giudice *a quo* alla disposizione di legge controversa, accerta la fondatezza della questione e dichiara la illegittimità costituzionale di tale disposizione di legge nel solo significato difforme da Costituzione. La norma permane così nell'ordinamento giuridico, ma non può esserle attribuito il significato dichiarato incostituzionale. Questa categoria di pronunce ha dato origine ad una complessa fenomenologia, comprensiva delle decisioni che gli studiosi hanno variamente definito "additive", sostitutive", "manipolative", nelle quali la Corte si avvale di una particolare tecnica legislativa, sotto specie di emendamenti puntualmente indicativi degli effetti ritenuti illegittimi e dei rimedi considerati indispensabili.

7) Fu la sentenza n. 33 del 1960 ad aprire l'accesso alle donne a tutti i posti di funzionario pubblico. Successivamente la legge 9.2.1963, n. 66, specificamente consentì alle donne di partecipare al concorso in magistratura. Nel 1965 vi furono le prime 8 donne magistrato.

8) C. Cost., 16.12.1968, n. 126. Invece l'art. 587 codice penale, che prevedeva un'attenuante speciale per il "delitto d'onore", ossia per chi avesse commesso omicidio del coniuge se motivato dal tradimento coniugale, ha dovuto attendere l'abrogazione espressa del legislatore con la legge 5.8.1981, n. 442.

una cauzione per il rimborso delle spese di soccombenza alla controparte: norma che rappresentava un ostacolo all'accesso alla giustizia per la parte sprovvista di mezzi economici ed impediva un confronto equilibrato tra chi era più povero e chi era più benestante, sempre in violazione del principio di uguaglianza[9].

Solo gli interventi della Corte costituzionale si inseriscono nella categoria delle c.d. "fonti del diritto"[10]. Tra le fonti invece non rientrano le decisioni delle Corti ordinarie, nemmeno quelle delle Corti Supreme: queste sono formate da giudici che sono stati ammessi alla magistratura solamente sulla base di un concorso e senza alcuna designazione politica, né per elezione né per designazione da parte del governo nazionale o locale. Le Corti ordinarie non hanno quindi una composizione simile a quella della Corte costituzionale che, sia pur indirettamente, si ricollega alla volontà popolare tramite la nomina di 2/3 dei suoi membri ad opera del Parlamento o del Presidente della Repubblica, che viene a propria volta eletto dal Parlamento.

2. – Il giudice è soggetto soltanto alla legge: autonomia ed indipendenza del magistrato anche nei rapporti con la Corte Suprema di Cassazione

L'art. 101 della Costituzione, già richiamato sopra, certifica l'inesistenza di un vincolo del giudice, di ogni giudice, alle decisioni di altre Corti.

Nel sistema italiano la giustizia civile (e quella penale) prevede normalmente tre gradi di giudizio: contro le decisioni di primo grado è prevista la possibilità di rivolgersi alla Corte d'appello e, infine, alla Corte Suprema. La Corte Suprema è chiamata Corte di cassazione sul modello della rivoluzione francese, quando nel 1792 si volle istituire un nuovo Tribunale che sorvegliasse l'applicazione dei nuovi principi rivoluzionari da parte dei magistrati del vecchio regime che non avevano potuto essere tutti sostituiti[11]. Questo Tribunale aveva il compito, appunto, di annullare, di "cassare" le decisioni contrarie allo spirito del nuovo ordinamento istituito dalla rivoluzione francese: donde il nome di Corte di cassazione che si perpetua ancora oggi per designare sia la Corte Suprema francese che quella italiana.

9) Corte cost., 29.11.1960, n. 67.

10) Al riguardo l'art. 136 Costituzione contempla solamente una funzione di "fonte negativa": «Quando la Corte dichiara l'illegittimità costituzionale di una norma di legge o di atto avente forza di legge, la norma cessa di avere efficacia dal giorno successivo alla pubblicazione della decisione». V. peraltro quanto osservato *supra* con riferimento alla possibilità delle sentenze additive, manipolative o in genere interpretative di accoglimento.

11) V. Calamandrei, *La Cassazione civile*, I vol., Torino, 1920; Consolo, *La revocazione delle decisioni della Cassazione e la formazione del giudicato*, Padova, 1989; Halperin, *Le Tribunal de cassation et les pouvoirs sous la révolution*, Paris, 1987.

La conclusione del processo si avrà solamente quando la sentenza di primo grado o d'appello non viene impugnata, oppure quando verrà respinta l'impugnazione in Cassazione: unicamente in tale momento si avrà la formazione del giudicato, la conclusione irretrattabile del contenzioso con la definitiva attribuzione delle ragioni e dei torti, dei diritti e degli obblighi.

Ebbene: l'art. 101 della Costituzione ci dice non solo che "il giudice è soggetto alla legge", ma anche che è soggetto *soltanto* alla legge. Questo significa che ogni singolo magistrato "dialoga" direttamente con la legge approvata dal potere legislativo[12], senza essere costretto a seguire le interpretazioni delle Corti di grado superiore, nemmeno se provenienti dalla Corte Suprema. Le decisioni di questa potranno influenzare i giudici dei gradi inferiori, ma solo per l'autorevolezza riconosciuta ai giudici che fanno parte della Corte di cassazione e sempre che queste decisioni siano persuasive e capaci di offrire un'adeguata interpretazione della legge.

Se il giudice singolo, anche di primo grado, non ritiene di condividere le decisioni della Corte Suprema, è libero di respingerne l'opinione e di ritenere che la legge abbia un'altra corretta interpretazione, perché è la legge che costituisce l'unico criterio di decisione per ogni giudice, senza che vi sia alcuna intermediazione del diritto giurisprudenziale[13].

Questa regola trova riscontro nell'art. 107 della Costituzione, in base al quale i giudici sono tutti uguali e si distinguono tra loro solo per diversità di funzioni. Non vi è dunque alcuna gerarchia tra i giudici; i componenti della Corte Suprema non sono differenti o migliori rispetto ai giudici che

12) M. Esposito, Iurisdictio in genere sumpta: *il rapporto tra legge e giurisdizione nella prospettiva della domanda giudiziale,* in *Riv. dir. proc*., 2011, 830: «*l'art. 101, comma 2, Cost. dispone la soggezione del giudice non già alle norme, bensì alla legge in senso stretto, ossia agli atti della rappresentanza – nonché dei soggetti ai quali questa abbia legittimamente conferito delega di esercizio della funzione legislativa – dal momento che soltanto delle disposizioni di legge può effettivamente postularsi che, corrispondendo al menzionato vincolo di mutuo impegno tra consociati, siano parte integrante del fatto sul quale l'attore (e, sul fronte opposto, il convenuto) basa la propria postulazione di giudizio*».

13) Resta peraltro fermo un "dovere funzionale" dei giudici di merito e di legittimità di non discostarsi dalla giurisprudenza della Cassazione se non per gravi e giustificati motivi: Gorla, *Postilla su «l'uniforme interpretazione della legge ed i tribunali supremi»*, in *Foro italiano*, 1976, V, 127 e 134 ss., che fonda questo "dovere funzionale" sul combinato disposto dell'art. 111 Cost. e dell'art. 65 della legge sull'ordinamento giudiziario (*ivi*, 133 ss.). Nel medesimo senso v. Chiarloni, *Un mito rivisitato: note comparative sull'autorità del precedente giurisprudenziale*, in *Rivista diritto processuale*, 2001, 623 s., che postula altresì un bilanciamento alquanto approfondito dei valori coinvolti nelle situazioni confliggenti, affinché il contrasto possa risultare adeguatamente giustificato; Evangelista, *La professionalità dei magistrati della Corte suprema di cassazione*, in *Foro italiano*, 1999, V, 171; con accenti in parte diversi anche Taruffo, *La Corte di Cassazione e la legge*, in *Il vertice ambiguo*, Bologna, 1991, 96 s.; di esplicito «dovere di fedeltà ai propri precedenti», discendente dalle due suddette norme, parla anche Cass., sez. un., 4 luglio 2003, n. 10615.

operano in primo grado o in appello, né questi ultimi sono in qualche modo soggetti ai primi.

Tutte le decisioni relative alla carriera ed allo stipendio dei magistrati vengono infatti prese non dai giudici della Corte Suprema, bensì da un organo speciale, che deve preservare quell'indipendenza e quell'autonomia del giudice rispetto agli altri poteri dello Stato, ivi compresi altri giudici, che costituisce la pietra angolare dello Stato di diritto, della *rule of law*: ossia del primato della legge rispetto a qualunque soggetto dell'ordinamento[14], a prescindere dal fatto che sia coinvolto un "potente", sul piano economico o politico[15].

Questo organo speciale è il Consiglio Superiore della Magistratura, composto per 2/3 da giudici e per 1/3 da professori od avvocati eletti dal Parlamento, ed in aggiunta con la partecipazione dal Presidente della Repubblica, del Primo Presidente della Corte di cassazione e del Procuratore Generale presso la Corte di cassazione[16]. Si tratta di un organo di garanzia,

14) V. anche Borré, *Indipendenza e politicità della magistratura*, in P. L. Zanchetta (a cura di), *Governo e autogoverno della magistratura nell'Europa occidentale*, Milano, 1987, pp. 145 ss.: «Il principio costituzionale secondo cui "i giudici sono soggetti soltanto alla legge"… non è la riedizione del vecchio mito illuministico della subalternità del giudice alla legge… Se così fosse, infatti, la formula direbbe "i giudici sono soggetti alla legge", mentre l'art. 101 della Costituzione contiene in più la parola "soltanto", che dà alla frase non un significato di conformità, di adeguamento, ma piuttosto la forza di una provocazione polemica. Che i giudici siano non semplicemente soggetti alla legge, ma soltanto ad essa soggetti, significa che la fedeltà alla legge è anzitutto "cultura della disobbedienza". Disobbedienza a tutto ciò che la legge non è: e dunque, in primo luogo, ai poteri dominanti, politici o economici, pubblici o privati che essi siano; alle improprie gerarchie interne allo stesso apparato giurisdizionale; e infine alla giurisdizione di vertice, se essa sia mediamente non condivisa. In questa luce, la fedeltà alla legge diventa un elemento non di passività, ma di responsabile scelta ispirata ai valori della Costituzione e al principio pluralistico, fuori del quale non sarebbe concepibile la stessa indipendenza della magistratura».

15) Il principio risale all'insegnamento fondamentale del Baron de Montesquieu, *De l'esprit de lois*, Ginevra, 1748: «La libertà politica, in un cittadino, consiste in quella tranquillità di spirito che proviene dalla convinzione, che ciascuno ha, della propria sicurezza; e, perché questa libertà esista, bisogna che il governo sia organizzato in modo da impedire che un cittadino possa temere un altro cittadino. Quando nella stessa persona o nello stesso corpo di magistratura il potere legislativo è unito al potere esecutivo, non vi è libertà, perché si può temere che lo stesso monarca o lo stesso senato facciano leggi tiranniche per attuarle tirannicamente. Non vi è libertà se il potere giudiziario non è separato dal potere legislativo e da quello esecutivo. Se esso fosse unito al potere legislativo, il potere sulla vita e la libertà dei cittadini sarebbe arbitrario, poiché il giudice sarebbe al tempo stesso legislatore. Se fosse unito con il potere esecutivo, il giudice potrebbe avere la forza di un oppressore. Tutto sarebbe perduto se la stessa persona, o lo stesso corpo di grandi, o di nobili, o di popolo, esercitasse questi tre poteri: quello di fare leggi, quello di eseguire le pubbliche risoluzioni e quello di giudicare i delitti e le liti dei privati». V. anche Pizzorusso, *Principio democratico e principio di legalità*, in *Questione giustizia*, 2, 2003; Pitto, *"*Unpacking the courts*": prevenzione e reazione agli attacchi all'indipendenza dei giudici. Brevi riflessioni a partire dal Convegno "Giudice e stato di diritto"*, in www.giustiziainsieme.it

16) V. l'art. 104 Costituzione: «Il Consiglio superiore della magistratura è presieduto dal

dove la prevalente presenza dei giudici assicura una sufficiente separazione dal potere politico, e dove la presenza minoritaria di componenti eletti dal Parlamento evita che le decisioni siano corporative ed auto-referenziali, sensibili solo agli interessi della categoria, ed impedisce così che questo organo si trasformi in una sorta di sindacato.

3. – La natura creativa dell'attività di ogni interprete ed il "diritto vivente" come parametro di costituzionalità e di legittimità di leggi retroattive

L'impostazione che ho sin qui esposto – in Italia come in molti altri Paesi di *civil law* – sta entrando però in crisi. In particolare l'esplosione del contenzioso civile, che si è avuta a partire dagli anni '70 con la "scoperta" di nuovi diritti economici e sociali, ha determinato l'esigenza che le leggi approvate dal potere legislativo venissero soggette ad una interpretazione il più possibile uniforme, per fare in modo che il principio di uguaglianza ("la legge è uguale per tutti", la *equal protection of the law*) venisse confermato non solo sul piano formale, ma anche nel momento dell'applicazione della norma da parte del giudice chiamato a risolvere un conflitto tra privati o tra privati e la Pubblica Amministrazione.

La piena libertà riconosciuta al giudice, in altri termini, non può diventare una cacofonia di strumenti che, pur suonando la stessa musica, finiscono con l'emettere suoni diversi.

Nello stesso periodo è stata definitivamente superata l'illusione – ancora affermata dai filosofi illuministici nel '700 – per cui il giudice è "bocca della legge", si limita cioè ad enunciare meccanicamente un comando, contenuto nella legge, che è chiaro, di agevole comprensione e suscettibile di essere applicato al caso concreto senza dubbi, in modo quasi matematico[17].

Presidente della Repubblica.

Ne fanno parte di diritto il primo presidente e il procuratore generale della Corte di cassazione.

Gli altri componenti sono eletti per due terzi da tutti i magistrati ordinari tra gli appartenenti alle varie categorie, e per un terzo dal Parlamento in seduta comune tra professori ordinari di università in materie giuridiche ed avvocati dopo quindici anni di esercizio».

Il successivo art. 105 prevede appunto che «Spettano al Consiglio superiore della magistratura, secondo le norme dell'ordinamento giudiziario, le assunzioni, le assegnazioni ed i trasferimenti, le promozioni e i provvedimenti disciplinari nei riguardi dei magistrati». Analogamente l'art. 107, co. 1, conferma che: «I magistrati sono inamovibili. Non possono essere dispensati o sospesi dal servizio né destinati ad altre sedi o funzioni se non in seguito a decisione del Consiglio superiore della magistratura, adottata o per i motivi e con le garanzie di difesa stabilite dall'ordinamento giudiziario o con il loro consenso».

17) Le dottrine dell'Illuminismo, sulla base dei principi della separazione dei poteri e del "primato della legge" sulle altre fonti del diritto (consuetudinarie, giurisprudenziali e dottrinarie), avevano teorizzato la realizzazione di un sistema normativo che consentisse l'applicazione della norma senza necessità di sua "interpretazione". Il riferimento va

Questa concezione, che risale al Digesto di Giustiniano e che trova tuttora espressione nell'art. 5 del *Code civile* di Napoleone Bonaparte (che proibisce ai giudici di formulare principi generali nel decidere le cause di loro competenza[18]), è oramai ritenuta superata proprio dai filosofi del diritto, ed in particolare dagli studiosi della scienza dell'esegesi, che hanno dimostrato come ogni atto di applicazione della legge sia atto di interpretazione, e come ogni atto di interpretazione sia un atto attributivo di significato: l'interpretazione è sempre "creazione del diritto", poiché seleziona uno tra i molteplici possibili significati che può avere l'espressione generale ed astratta della norma confezionata dal potere legislativo, che per definizione non è mai univoca e dotata di un unico possibile significato.

Ciò significa che il giudice, quando decide una controversia, comunque "crea diritto", perché contribuisce a determinare il significato della norma che applica[19].

immediatamente ai grandi autori quali Montesquieu, Voltaire, Beccaria, Pietro e Filangieri. Ciò prevedeva per il giudice un'attività meramente meccanica di applicazione della norma al caso oggetto del giudizio, con esclusione di qualunque attività interpretativa. Unica interpretazione ammessa era *l'interpretazione autentica*, perché fornita dal legislatore stesso. Tali teorie costituirono il fondamento delle dottrine giuridiche dominanti negli anni della Rivoluzione francese (cfr. Paolo Alvazzi del Frate, *Il Code civil e l'interpretazione della legge*, in *Lezioni di storia della codificazione e delle costituzioni*, a cura di Ascheri, Torino, 2008, p. 142) e furono a base della stessa creazione del *Tribunal de Cassation*: costituito "presso" il potere legislativo con la finalità di reprimere le usurpazioni della propria funzione da parte dei giudici, che si fossero permessi di interpretare la legge anziché chiedere chiarimenti al riguardo tramite l'istituto (presto divenuto desueto ed abbandonato) del cd. *référé législatif*, ossia del rinvio all'Assemblea dei rappresentanti, unica depositaria della volontà popolare (v. sempre Halperin, *op.cit.*).

18) V. sempre Alvazzi del Frate, *Il* Code civil *e l'interpretazione della legge*, cit., 141 ss.

19) La tesi contraria muove da un presupposto culturalmente obsoleto e teoricamente insostenibile: secondo il quale le parole (e le disposizioni con esse formulate) conterrebbero in sé stesse uno o più significati "veri", a contenuto costante, capaci dunque di evocare sempre certe realtà, in qualunque momento e contesto le parole stesse vengano invocate. In questa prospettiva i significati dei termini linguistici vengono assimilati ad una serie di oggetti rinchiusi in un contenitore che possono, certo, venire estratti all'occorrenza e in tempi successivi, ma non possono venire sostanzialmente mutati da chi li trova. Né il presupposto di cui sopra (ingenuamente razionalistico) viene sostanzialmente abbandonato da chi riconosce alle disposizioni di legge una "plurivocità del significante testuale": potendosi infatti ancora intendere la molteplicità dei significati come un insieme di oggetti racchiusi entro confini precisi, rispetto ai quali sia possibile con esattezza stabilire cosa sta fuori e cosa stia dentro, anzi cosa sia sempre stato dentro anche se progressivamente messo in evidenza in circostanze diverse.

In realtà tutte le sentenze rappresentano una determinazione della disposizione di legge; infatti i termini di questa sono sempre vaghi e generali, insufficienti a considerare tutti gli elementi caratteristici della fattispecie concreta come si presenta nell'esperienza; perciò il giudice, per far rientrare un certo accadimento in una previsione normativa, deve comunque considerare alcune caratteristiche (e non altre) dell'accadimento e aggiungerle a quelle esplicitamente, o meno, menzionate dalla disposizione di legge. È possibile solo distinguere tra sentenze che confermano e sentenze che innovano la precedente giurisprudenza. È possibile infatti che, nel susseguirsi di casi che pur avendo caratteristiche simili restano

Tutte le sentenze rappresentano una determinazione della disposizione di legge; infatti i termini di questa sono sempre vaghi e generali, insufficienti a considerare tutti gli elementi caratteristici della fattispecie concreta come si presenta nell'esperienza; perciò il giudice, per far rientrare un certo accadimento in una previsione normativa, deve comunque considerare alcune caratteristiche (e non altre) dell'accadimento e aggiungerle a quelle esplicitamente, o meno, menzionate dalla disposizione di legge[20)].

Certo, in un ordinamento di *civil law*, il giudice e la giurisprudenza, quando vengono ad individuare il contenuto della norma – eventualmente mutando nel tempo il suo significato ed adattandolo alle nuove esigenze sociali – si muovono necessariamente «entro il limite dei significati possibili del testo» della legge[21)]. L'atto di interpretazione ed applicazione della legge è dunque bensì "attributivo di nuovi significati", ma ha pur sempre una funzione di accertamento di una potenzialità già racchiusa nella norma, in funzione della sua "tolleranza ed elasticità"[22)]: opera pertanto solo sulle

comunque difformi uno dall'altro, prima rilevino i caratteri che permettono di ascriverli ad una certa serie e poi, col mutare del contesto e della morfologia dell'esperienza, rilevino i caratteri che li rendono estranei alla medesima serie. Resta però che l'area semantica della disposizione che prevede una serie di casi viene comunque modificata ad opera di una determinazione: v. Cavalla-Consolo-De Cristofaro, *Le Sezioni Unite aprono (ma non troppo) all'errore scusabile: funzione dichiarativa della giurisprudenza, tutela dell'affidamento, tipi di* overruling, in *Corriere Giuridico*, 2011, 1409.

20) Già Portalis, nel *Discours Prèliminaire* che accompagnava il progetto di codice civile del 1^ Anno IX (21 gennaio 1801) osservava: «*per quanto si faccia, le leggi positive non saprebbero mai sostituire interamente l'uso della ragione universale nelle cose della vita. I bisogni sono così diversi, la comunicazione degli uomini così attiva, i loro interessi sono così numerosi, e i loro rapporti così estesi, che è impossibile per il legislatore provvedere a tutto (...) Un codice per quanto completo possa apparire, non è compiuto che già mille questioni inattese si presentano al magistrato. Perché le leggi, una volta emanate, restano così come sono state scritte. Gli uomini, invece, non si riposano mai e questo movimento (...) produce, in ogni istante, qualche combinazione nuova, qualche fatto nuovo, qualche risultato nuovo*» (v. Fenet P.-A. *Recuel complet des travaux prèparatoires du Code civil*, 15 vv., Paris, 1827, I, p. 469).

21) Sul punto v. Cass., 2.10.2018, n. 23950 «*Ove una norma, o un sistema di norme, si prestino a diverse interpretazioni, tutte plausibili, dovere primario dell'interprete, e specie del giudice, è di perseguire l'interpretazione più corretta e non una qualsiasi di quelle che il testo consente; certo essendo, altresì, che il giudice non crea il diritto, ma opera secondo i criteri ermeneutici noti ed entro i limiti del diritto positivo*»

22) Principio espresso in Cass., Sez. Unite, Sent., 29.1.2021, n. 2143, che ribadisce il compito del giudice di tentare di colmare l'eventuale lacuna dell'ordimento rispetto alla disciplina di un caso concreto attraverso il procedimento analogico. Questo esige, ai sensi dell'art. 12, co. 2, preleggi, che fra la disposizione (*analogia legis*) o lo stesso "principio generale dell'ordinamento" (*analogia iuris*) e la fattispecie alla quale forniranno la *regola iuris*, si possa ravvisare la medesima ragione giustificativa che legittima il ricorso al procedimento stesso. Ciò implica il riconoscimento a monte di un rapporto di similitudine fondato sulla comunanza di elementi (giuridici o fattuali), strutturali e/o funzionali, che devono essere presenti all'interno dell'ordinamento (quali norme frutto dell'attività interpretativa svolta) nel momento in cui il giudice si trova a doverli applicare, non potendo egli fare opera creativa.

zone grigie di quel significato, per cercare di aderire meglio ai principi, creati dalla dottrina, in un dialogo con il legislatore[23)].

Questo vincolo fondamentale al testo della norma, in realtà, è proprio dell'opera di qualunque interprete: non solo dell'operato del giudice, ma anche di quello della dottrina e degli avvocati che cercano di persuadere il giudice della correttezza di una certa interpretazione nell'interesse della parte che difendono. L'opera dei giudici vanta però un "tasso di effettività" più immediato nel determinare i comportamenti dei cittadini e degli operatori del diritto.

Non è un caso che l'interpretazione della giurisprudenza è stata individuata, in Italia, quale parametro del giudizio di costituzionalità[24)]. La Corte costituzionale è infatti chiamata a giudicare della legittimità di una norma non per il suo tenore letterale, bensì per come essa è interpretata dalla giurisprudenza e, in particolare, dalla Corte Suprema. È l'interpretazione della Corte di cassazione (e non il testo scritto) che dà luogo al "diritto vivente", ossia al diritto come vive nella realtà sociale e che rappresenta il precetto effettivo di cui va determinata la compatibilità alla Costituzione[25)].

23) In dottrina Bifulco, *Il giudice è soggetto soltanto al «diritto». Contributo allo studio dell'art. 101, comma 2, della Costituzione italiana,* Napoli, 2008, 117 s.: «tra l'ordine giudiziario e il potere legislativo non deve esserci, come è stato notato, una *Spannungsbeziehung*, un rapporto di conflitto, bensì la prima deve indirizzarsi verso la realizzazione, quanto più neutrale (e trasparente, grazie alla motivazione) possibile del vincolo legislativo. Il che significa che il giudice è tenuto a stabilire cosa è giusto a partire dal diritto vigente, anche quando questo è lacunoso, indeterminato o poco chiaro. Il vincolo alla legge non costituisce dunque, in nessun modo, un'eccezione all'indipendenza del giudice».

24) «*Testo e comportamento sono sempre equivoci [...] data l'inevitabile astrattezza della norma che poi non è che l'altra faccia della medaglia della sua costanza; è appunto questa necessaria equivocità che ne permette tuttavia un'applicazione a una realtà concreta e mutevole [...] La norma così è sempre e solo quella interpretativamente formulata e in funzione di una sua applicazione e in realtà non esiste se non nella sua applicazione, compiuta la quale la formulazione data passa ad essere testo, punto di partenza per nuove formulazioni, e per nuove posizioni di norme*». Così rifletteva e scriveva, in una "lettera" al Suo maestro Francesco Carnelutti, T. Ascarelli, *In tema di interpretazione ed applicazione della legge (lettera al prof. Carnelutti)*, in *Rivista Diritto Processuale*, 1958, p. 15, poi in *Problemi giuridici*, vol. I, Milano, Giuffrè, 1959, pp. 153-154.

25) Il "diritto vivente" è diventato il criterio di risoluzione del problema che disturbava il rapporto fra la Corte costituzionale e gli altri giudici, sulla spettanza del potere di interpretare le norme sottoposto al giudizio di costituzionalità. Fin dai primi anni infatti, infatti, la Corte costituzionale ha spesso rivendicato quel potere, reinterpretando le norme impugnate, in termini diversi da quelli indicate nelle ordinanze di rimessione; mentre la Cassazione ha più volte contrastato un tale sforzo, mantenendo od imponendo la propria interpretazione, anche in presenza di contrarie decisioni interpretative di questa Corte. È soltanto a partire dagli anni '70 – con particolare evidenza nel periodo più recente - che un criterio risolutivo è stato rinvenuto, su entrambi i versanti, proprio nel c.d. "diritto vivente", cioè nelle interpretazioni giurisprudenziali prevalenti e consolidate, alla cui formazione entrambe le Corti concorrono, recependo molto spesso le rispettive indicazioni ed anche reagendo - ma in modi ormai costruttivi e pienamente collaborativi - alle rispettive decisioni, ciascuna adottata nell'ambito delle rispettive competenze (queste le parole di Livio Paladin, nel suo discorso tenuto in

Al contempo l'interpretazione giurisprudenziale della norma costituisce il termine di riferimento per la valutazione di ammissibilità degli interventi del potere legislativo volti ad introdurre norme di applicazione retroattiva ovvero norme che contengano una interpretazione autentica dei testi di legge. Infatti, secondo la giurisprudenza della Corte Europea dei Diritti dell'Uomo (su cui torneremo), è vero che il divieto di retroattività della legge ha una forza pregnante soprattutto nel diritto penale (in ossequio al principio *nullum crimen sine lege*, non si può essere condannati per una condotta che, al momento in cui è stata tenuta, non era prevista come reato dalla legge); tuttavia anche nelle materie extra-penali il potere legislativo non è libero di prevedere norme di applicazione retroattiva, perché deve essere rispettata la garanzia della certezza del diritto e la tutela dell'affidamento dei consociati.

Gli interventi del legislatore che vogliano introdurre delle interpretazioni autentiche di norme oscure, con efficacia retroattiva, sono stati considerati legittimi solo in presenza di lacune o di incertezze applicative invincibili (v. sentenza del 7 giugno 2011, C-43549/08, 6107/09 e 5087/09, *Agrati e altri c. Italia*[26)]) e sono stati così ritenuti illeciti quando il potere legislativo – per realizzare un interesse economico dello Stato (risparmio di spesa sulle pensioni di dipendenti pubblici) – ha voluto riscrivere una norma in senso

occasione dei trent'anni della Corte Costituzionale, a Palazzo della Consulta il 5 giugno 1986).

Il principio del "diritto vivente" è riconosciuto dalla Corte Costituzionale, che lo adotta quale criterio decisorio, v. sentenza n. 338 del 2011, ove la Corte ha affermato «*in presenza di un orientamento non univoco, le Sezioni Unite civili della Corte di cassazione, hanno ritenuto, nell'esercizio della propria funzione nomofilattica, di cui questa Corte deve tenere conto, di superare in tal modo il contrasto. Siffatta interpretazione costituisce, pertanto, "diritto vivente", del quale si deve accertare la compatibilità con i parametri costituzionali evocati*».

Non solo la Corte costituzionale (a partire da Corte cost. n. 276 del 1974) pronuncia l'incostituzionalità della norma legislativa per come applicata dalla Cassazione, ma anche la Corte di Strasburgo assume il diritto vivente quale termine di riferimento per la valutazione di ammissibilità – a fronte della garanzia della certezza del diritto sottesa all'art. 6 Cedu – degli interventi di interpretazione autentica del legislatore diretti ad incidere sui processi in corso (v. subito nel testo).

26) Sul tema della giurisprudenza della Corte Edu in materia di leggi di interpretazione autentica e di loro conformità al requisito di legalità, in particolare sulle pronunce Agrati c. Italia, in riferimento alla vicenda del personale ATA di enti locali trasferito nei ruoli statali ad opera della legge finanziaria per il 2006, e Arras c. Italia, relativamente al trattamento economico sfavorevole ai pensionati del Banco di Napoli introdotto dalla L. n. 234/2004, si richiamano R. Caponi, *Giusto processo e retroattività di norme sostanziali nel dialogo tra le Corti*, in *Giurisprudenza costituzionale*, 2011, 5, 3753-3777; G. Lavagna, *L'interpretazione autentica nella giurisprudenza costituzionale. Da persistente causa di contrasto a dialogo potenziale tra Corte Costituzionale e Corte Edu*, in *Nomos*, 2020, 2, 40, 23-27; A. Valentino, *Il principio d'irretroattività della legge civile nei recenti sviluppi della giurisprudenza costituzionale e della Corte europea dei diritti dell'Uomo*, in *Rivista AIC*, 2012, 3, 32.

contrario alla interpretazione consolidata accolta dalla Corte di cassazione, così influenzando negativamente le controversie al riguardo pendenti e con ciò superando i limiti all'ingerenza del potere legislativo nell'amministrazione della giustizia con lo scopo d'influenzare l'esito giudiziario di una lite («*à l'ingérence du pouvoir législatif dans l'administration de la justice dans le but d'influer sur le dénouement judiciaire d'un litige*»[27]).

4. – La necessità di uno sviluppo uniforme della giurisprudenza ed il "vincolo" delle Sezioni semplici della Cassazione alle decisioni delle Sezioni Unite

L'importanza della giurisprudenza della Corte Suprema è dunque oggi divenuta oggetto di riconoscimento comune e ha reso centrale il problema dell'uniformità della giurisprudenza.

Questo è un tema non solamente, ma tipicamente italiano. Nel nostro ordinamento infatti esso risulta particolarmente acuto per il fatto che la Corte di cassazione civile è raggiunta da oltre 30.000 impugnazioni all'anno e, successivamente al 2000, ha depositato altrettante decisioni ogni anno nella sola materia civile, arrivando, nel 2021, al numero di 42.000 (cui si aggiungono altre 45.000 decisioni circa in materia penale).

È evidente che è ben più facile mantenere l'uniformità dei precedenti

27) Ripudiando il principio espresso da C. cost., 23 luglio 2002, n. 374, per cui «*il legislatore può porre norme che precisino il significato di altre norme non solo ove sussistano situazioni di incertezza nell'applicazione del diritto o siano insorti contrasti giurisprudenziali, ma anche in presenza di indirizzi omogenei, se la scelta imposta per vincolare il significato ascrivibile alla legge anteriore rientri tra le possibili varianti di senso del testo originario*».

In commento critico a detta sentenza v. M. Esposito, *Brevi considerazioni sui rapporti tra legge e giurisdizione*, in *Rivista trimestrale di diritto e procedura civile*, 2004, 165 ss., che così conclude (172): «la legge di interpretazione autentica che voglia mutare il corso dei giudizi già pendenti non è legge rispetto a tali giudizi, è atto del legislatore nel senso di una volontà che aspira a surrogare quella del giudice. Il che non è possibile, prima di ogni altra cosa, alla stregua dell'ordine costituzionale delle competenze».

Così C. cost., 5.4.2012, n. 78, ha finalmente dichiarato costituzionalmente illegittima una norma "di interpretazione autentica" con la quale il legislatore aveva stabilito un particolare *dies a quo* del decorso della prescrizione nei rapporti tra banca e cliente. I giudici costituzionali hanno richiamato il principio per cui il legislatore «può emanare norme retroattive, anche di interpretazione autentica, purché la retroattività trovi adeguata giustificazione nell'esigenza di tutelare principi, diritti e beni di rilievo costituzionale, che costituiscono altrettanti "motivi imperativi di interesse generale", ai sensi della Convenzione europea dei diritti dell'uomo e delle libertà fondamentali (CEDU)». Nel caso della norma in questione, la Corte costituzionale ha osservato che la stessa doveva ritenersi incostituzionale poiché «è intervenuta sull'art. 2935 c.c. in assenza di una situazione di oggettiva incertezza del dato normativo, perché, in materia di decorrenza del termine di prescrizione relativo alle operazioni bancarie regolate in conto corrente, a parte un indirizzo del tutto minoritario della giurisprudenza di merito, si era ormai formato un orientamento maggioritario in detta giurisprudenza, che aveva trovato riscontro in sede di legittimità ed aveva condotto ad individuare nella chiusura del rapporto contrattuale o nel pagamento solutorio il *dies a quo* per il decorso del suddetto termine».

giurisprudenziali da parte di Corti Supreme – come quella statunitense ed inglese – che rendono circa 80 o 120 decisioni all'anno, tanto in materia civile che penale, di quanto possa essere per la Corte di cassazione italiana, che è autrice di un numero di decisioni di 600 volte superiore. Così tante decisioni non possono provenire da solo 9 o 15 giudici (come negli Stati Uniti o in Inghilterra), ma richiedono l'impiego di quasi 150 giudici nella materia civile; e l'impiego di un così elevato numero di giudici rende probabile che qualche decisione esprima principi difformi da altre, così cagionando dei contrasti di giurisprudenza che nuocciono all'immagine della Corte Suprema e che creano un problema di uguaglianza di trattamento dei cittadini.

Per questa ragione il potere legislativo ha cercato di promuovere istituti che garantiscano l'uniformità della giurisprudenza quanto meno della Corte di cassazione: sul modello di altri ordinamenti che sono molto sensibili all'uniformità dell'applicazione della legge, quale quello tedesco, che per evitare problemi quali quelli italiani è riuscito a ridurre il numero delle decisioni (circa 1.200 all'anno le sentenze della Corte Suprema civile), e che ha addirittura previsto nella Costituzione una legge chiamata ad assicurare l'uniformità degli orientamenti delle 5 Corti Supreme federali[28)].

Va premesso che la Corte di cassazione è divisa in cinque sezioni: tre sezioni nelle materie civili in generale, una sezione che si occupa di diritto del lavoro ed una sezione che si occupa della materia fiscale. Quando decide in Sezione ordinaria semplice, la Corte decide con la partecipazione di 5 giudici. Quando però si presenta una questione di diritto di massima importanza o appunto vi è da risolvere un contrasto negli orientamenti delle Sezioni semplici, la Corte di cassazione decide a Sezioni Unite.

Ciò non significa che viene convocata una riunione di tutti i circa 150 giudici nel settore civile, per affrontare il caso entro un'assemblea che finirebbe per somigliare all'Assemblea generale delle Nazioni Unite, con tutti che parlano e pochi che comprendono. Piuttosto la Corte di cassazione decide in un collegio di 9 giudici, guidati dal Primo Presidente e con altri due Presidenti di Sezione semplice, per dare una maggiore autorevolezza al principio che verrà espresso nel decidere la questione giuridica portata

28) *Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes (RsprEinhG)*, del 19.6.1968, appunto emanata sulla base dell'art. 95, co. 3, della Costituzione federale, che esplicitamente richiama il valore dell'uniformità della giurisprudenza quale obiettivo da perseguire con l'istituzione di questa particolare istituzione. Le Sezioni Riunite delle 5 Corti Supreme federali (quella civile e penale, BGH; quella laburistica; quella previdenziale; quella amministrativa; quella tributaria) sono composte dai presidenti delle rispettive Corti Supreme, dai giudici che presiedono le diverse Sezioni delle Corti Supreme e da un giudice aggiuntivo per ciascuna Sezione.

all'attenzione delle Sezioni Unite[29].

Nondimeno era capitato negli anni che, nonostante l'intervento e l'autorevolezza della decisione delle Sezioni Unite, una Sezione ordinaria semplice avesse respinto il principio così affermato, "ribellandosi" e proponendo una propria soluzione della questione di diritto.

Il legislatore ha voluto impedire questo rischio e ha introdotto, nel 2006, una specie di "vincolo" delle Sezioni semplici alle decisioni delle Sezioni Unite entro l'art. 374 del codice di procedura civile[30]. Quando cioè le Sezioni Unite hanno reso una decisione, e la Sezione semplice è in disaccordo, quest'ultima non può più "ribellarsi" ed offrire una soluzione diversa, ma è obbligata a chiedere un nuovo intervento delle Sezioni Unite. La Corte di cassazione può dunque rivedere un principio affermato dalle Sezioni Unite solamente per il tramite di una nuova decisione delle Sezioni Unite, altrimenti tutti i giudici della Cassazione sono obbligati a rispettare il precedente giurisprudenziale che proviene dalle Sezioni Unite.

Ci si può chiedere se questo meccanismo sia compatibile con il principio – che abbiamo ricordato all'inizio – per cui "i giudici sono soggetti soltanto alla legge". La dottrina ha ritenuto di rispondere in senso affermativo, ritenendo che questo principio sia comunque rispettato in presenza della possibilità per i giudici delle Sezioni semplici di contestare i principi affermati dalle Sezioni Unite provocando una nuova decisione di queste. Si realizza così non una soggezione di giudici alla decisione di altri giudici, bensì un meccanismo che assicura che la Corte Suprema si esprima in modo coerente ed uniforme, offrendo ai cittadini la garanzia della uniformità di trattamento, senza però costringere la libertà degli altri giudici della Cassazione; ed ancor meno dei giudici di primo grado o di appello, che non hanno nessun obbligo di rispettare i principi affermati dalle Sezioni Unite.

Certo è che, in questo modo, l'importanza e l'autorevolezza delle decisioni della Corte Suprema rese a Sezioni Unite è diventata molto maggiore, e – nonostante le raccomandazioni che aveva formulato un tempo l'art. 5 del codice di Napoleone Bonaparte – abbiamo avuto per questa ragione

29) Art. 67 legge ordinamento giudiziario.

30) Un obiettivo omologo è stato perseguito dal "filtro" *ex* art. 360 *bis* c.p.c., che assume la giurisprudenza della S.C. a parametro di inammissibilità del ricorso (*recte*, di manifesta infondatezza: Cass., sez. un., 6 settembre 2010, n. 19051, su cui Consolo, *Dal filtro in cassazione ad un temperato* stare decisis*. La prima ordinanza sull'art. 360* bis *c.p.c.*, in *Corriere giuridico*, 2010, 1405; in arg. cfr. già De Cristofaro, in Consolo-De Cristofaro, *La riforma del 2009*, Milano, 2010, *sub* artt. 360 *bis*-392, numeri a margine 31 ss.

Cfr. al riguardo anche Carbone, *Le difficoltà dell'interpretazione giuridica nell'attuale contesto normativo: il diritto vivente*, in *Corriere giuridico,* 2011, 2, 153; Giusti, *Il precedente nel rapporto tra sezioni unite e sezioni semplici: l'esperienza della Cassazione civile*, in *Questione giustizia*, 2018, fasc. 4, p. 126.

una serie di decisioni che non si sono limitate a decidere il caso singolo sollevato dalla specifica controversia, bensì hanno enunciato un'ampia serie di principi generali, destinati ad influenzare l'applicazione delle norme processuali in modo molto più intenso di un intervento del potere legislativo.

In ogni caso, in diverse ipotesi, il dialogo tra Sezioni Unite e Sezione semplice ha provocato effettivamente un cambiamento dei principi affermati dalle Sezioni Unite, anche in tempi molto brevi, che ha consentito di elaborare un principio di diritto ancora più convincente[31)]: e questo

31) Si considerino, al riguardo, almeno tre casi.

Il primo è quello riguardante il regime di impugnazione del provvedimento del Presidente del Tribunale che, *ex* art. 814 c.p.c., liquida il compenso e le spese dovuti agli arbitri, in caso di mancato accordo con le parti. All'improvviso, dopo decenni che la decisione del Presidente del Tribunale era stata ritenuta impugnabile direttamente in Cassazione, Cass., sez. un., 3.7.2009, n. 15586, aveva escluso questa possibilità. La Sezione II della Cassazione tornava ad investire le Sezioni Unite sulla base di una serie di argomenti che queste ultime, nella successiva sentenza 31.7.2012, n. 13620, dichiaravano espressamente essere "meditati rilievi" e tali da ripercorrere in maniera critica tutti i principali passaggi della pronuncia menzionata: nondimeno le Sezioni Unite ritenevano di dover confermare l'orientamento contestato per l'esigenza di assicurare un sufficiente grado di stabilità agli indirizzi giurisprudenziali formatisi riguardo alla interpretazione della norma processuale («benché non esista nel nostro sistema processuale una norma che imponga la regola dello *stare decisis*, essa tuttavia costituisce un valore o, comunque, una direttiva di tendenza immanente all'ordinamento, in base alla quale non ci si può discostare da una interpretazione del giudice di legittimità, investito istituzionalmente della funzione nomofilattica, senza delle forti ed apprezzabili ragioni giustificative»). Nuovamente investite della questione, questa volta dalla Sezione I della Cassazione, le Sezioni Unite hanno finalmente abbandonato la decisione extra-vagante del 2009 e, con la sentenza 7.12.2016, n. 25045, sono tornate ad affermare la possibilità di impugnare direttamente in Cassazione il provvedimento di liquidazione degli onorari degli arbitri pronunciato dal Tribunale e (a partire dall'entrata in vigore della riforma del 2006) reclamabile altresì in Corte d'appello.

Il secondo caso attiene ai limiti oggettivi del giudicato nei giudizi in materia contrattuale. In un primo momento, Cass., sez. un., 4.9.2012, n. 14828, aveva ritenuto che in un ogni giudizio avente ad oggetto un diritto nascente da un contratto la sentenza finale avrebbe sempre risolto – se del caso in via implicita – la questione dell'esistenza, efficacia e validità del contratto, quand'anche fosse stata una pronuncia di rigetto della domanda soffermatasi, in ipotesi, solo sul tema della prescrizione del diritto di credito azionato in quel primo giudizio. Sollecitate a tornare sulla questione dall'ordinanza della Sezione seconda, secondo la quale in tal modo non si dava adeguato riscontro al principio del primato della "questione più liquida" (ossia alla possibilità per il giudice di respingere la domanda sulla base della questione più facilmente risolvibile, senza dover necessariamente affrontare tutti i temi prospettati dalla causa: Cass., Sez. II, 3.7.2013, n. 16630), le Sezioni Unite, con la sentenza 12.12.2014, n. 26242, hanno rimeditato la teoria del giudicato implicito sul contratto limitandola alle sentenze di accoglimento della domanda concernente un diritto di fonte contrattuale. È solo la sentenza di accoglimento, dunque, che estende sempre la propria forza di giudicato all'accertamento dell'esistenza del vincolo contrattuale (con ciò richiamandosi le tesi di Zeuner, *Die objektiven Grenzen der Rechtskraft im Rahmen rechtlicher Sinnzusammenhänge*, Tübingen 1959; v. anche Consolo, *Oggetto del giudicato e principio dispositivo. I*, in *Rivista trimestrale di diritto e procedura civile*, 1991, 226 s.; Dalla Bontà, *Una «benefica inquietudine». Note comparate in tema di oggetto del giudicato nella giurisprudenza alla luce delle tesi zeuneriane*, in *Giusto processo civile*, 2011, 895 ss.

dimostra che il meccanismo di dialogo ideato nel 2006 effettivamente funziona, anche se ha elevato il ruolo delle Sezioni Unite quasi al pari di una vera e propria fonte del diritto.

5. – La problematica dell'*overruling* specie in materia processuale

Anche tenendo conto di questo nuovo ruolo delle Sezioni Unite, resta comunque intatto il principio per cui la giurisprudenza si limita a svelare una potenzialità di significato del testo, senza porsi quale vera e propria fonte di "nuovo" diritto. Il precedente giudiziario crea dunque delle regole di comportamento che hanno dei caratteri del tutto peculiari: caratteri che vengono messi in luce da quegli autori che parlano della giurisprudenza come "fonte-fatto", che è sempre suscettibile di verifica o contestazione, poiché la sua legittimazione è diffusa (non esistendo un vincolo per gli altri giudici) ed è fondata sulla sua razionalità e persuasività[32)].

Le "norme" ricavabili dai precedenti giudiziari sono pertanto per definizione "instabili" poiché rivedibili in base a nuove giustificazioni ermeneutiche, e così vivono in una realtà "mutevole", sempre esposta al rischio di smentita[33)].

Il terzo caso attiene alla possibilità di proporre un'azione revocatoria (la *pauliana* degli artt. 2901 e seguenti c.c.) nei confronti del terzo acquirente, ove questi sia stato destinatario di una sentenza dichiarativa di fallimento o di apertura della liquidazione giudiziale. Dapprima Cass., sez. un., 23.11.2018, n. 30416, aveva statuito che, in siffatte ipotesi, non vi fosse alcuna possibilità per i creditori del disponente di recuperare dal patrimonio del fallito/liquidato alcuna risorsa: essendo la revocatoria una sentenza costitutiva, un suo accoglimento successivamente all'avvio della procedura sarebbe stato contrastante con il principio della cristallizzazione del patrimonio del fallito. Un ripensamento veniva sollecitato da Cass., Sezione prima, 23.7.2019, n. 19881, che a tal fine addirittura metteva in discussione la natura costitutiva della *pauliana*, sostenendo che la stessa ha invece natura di accertamento e, pertanto, i suoi effetti vengono solamente dichiarati dopo l'apertura della procedura concorsuale, ma debbono ritenersi già prodotti anteriormente ad essa. Alla fine Cass., Sez. Un., 24.6.2020, n. 12476, dopo aver ribadito che la domanda di revocatoria (ordinaria o fallimentare) ha natura costitutiva. ha precisato che il suo oggetto non è costituito dal bene in sé, ma dalla reintegrazione della garanzia patrimoniale generica dei creditori mediante l'assoggettabilità del bene ad esecuzione; ove l'azione costitutiva non sia stata dai creditori dell'alienante introdotta prima del fallimento dell'acquirente del bene che ne costituisce oggetto, essa – stante l'intangibilità dell'asse fallimentare in base a titoli formati dopo il fallimento (cd. cristallizzazione) – non può essere esperita con la finalità di recuperare il bene alienato alla propria esclusiva garanzia patrimoniale, ma i creditori dell'alienante (e per essi il curatore fallimentare ove l'alienante sia fallito) restano tutelati nella garanzia patrimoniale generica dalle regole del concorso, nel senso che possono insinuarsi al passivo del fallimento dell'acquirente per il valore del bene oggetto dell'atto di disposizione astrattamente revocabile, demandando al giudice delegato di quel fallimento anche la delibazione della pregiudiziale costitutiva.

32) Pizzorusso, *Delle fonti del diritto*, II ed., in *Comm. al codice civile* a cura di Scialoja e Branca, *Disposizioni sulla legge in generale*, Bologna-Roma, 2011, 171 ss.

33) D'altra parte, osserva Consolo, in *Spiegazioni di diritto processuale civile*. I. *Le tutele: di merito, sommarie ed esecutive*, Torino, 2010, 93: «negli stessi ordinamenti a base legislativa … si avrà un diritto posto a mo' di progetto vincolante, proiettato verso il futuro,

Carattere tipico dei precedenti giurisprudenziali è quello per cui essi possono essere abbandonati a favore di una regola ritenuta migliore e più adatta ai tempi. Persino negli ordinamenti di *common law* è possibile il fenomeno del superamento di un precedente, per quanto storico ed oramai radicato nei comportamenti sociali. Ciò succede con molta frequenza negli Stati Uniti, dove la Corte Suprema – con il mutare delle maggioranze politiche – non si sente particolarmente vincolata al rispetto dei propri precedenti: la dimostrazione più eclatante la si è avuta con la revisione della storica decisione *Roe v. Wade* in materia di aborto, avvenuta due anni fa. Tuttavia anche la Corte Suprema inglese, all'epoca un comitato della House of Lords, già nel 1966 ha elaborato un *Practice Statement* nel quale ha indicato le condizioni in presenza delle quali avrebbe potuto violare il principio dello *stare decisis* ed accogliere un orientamento giurisprudenziale diverso da quello seguito sino a quel momento.

Se dunque la giurisprudenza può essere innovata e cambiata, poiché fonte instabile e mutevole, ma se al contempo essa non costituisce fonte di diritto paragonabile alle leggi del potere legislativo, è chiaro che le innovazioni giurisprudenziali non equivalgono alle modifiche della legge: queste – come abbiamo visto – in linea di principio valgono solo per il futuro e non per il passato e per i comportamenti già tenuti[34)].

Dalla funzione essenzialmente accertativa della giurisprudenza consegue che l'*overruling* dei giudici – l'abbandono di un principio a vantaggio

di regolazione degli snodi critici della vita sociale. L'attuazione di questo progetto, onde farne un ordinamento giuridico vitale, risiede … nello sviluppo giurisdizionale ... Questo carattere decentrato nella specificazione – a seconda dei casi più o meno visibile ed intensa (è questione solo quantitativa) – della norma è, ovviamente, il riflesso del fenomeno per cui la norma esige sempre una interpretazione e ne è, a ben vedere, essa stessa il risultato e questa interpretazione dell'enunciato legislativo non può essere mero rinvenimento di senso giuridico preesistente, ma attribuzione di senso in virtù di un apporto ricostruttivo non privo di (più o meno evidenti o preminenti) componenti creative».

34) Che le regole ricavabili dalle decisioni giudiziarie, ai fini di una loro possibile invocazione in casi analoghi, sono sempre suscettibili di essere disattese, per quanto provenienti dalla Corte Suprema, è stato ribadito dalla Corte costituzionale allorché ha escluso che l'*overruling* giurisprudenziale favorevole alla parte la cui condanna è già passata in giudicato possa assurgere a ragione di revocazione della sentenza penale (quale ipotesi di *abolitio criminis*): V. Corte cost. 12 ottobre 2012, n. 230, in *Giurisprudenza costituzionale*, 2012, p. 3440 ss., con nota di Rescigno: «L'orientamento espresso dalla decisione delle Sezioni Unite "aspira" indubbiamente ad acquisire stabilità e generale seguito, ma si tratta di connotati solo "tendenziali", in quanto basati su una efficacia non cogente, ma di tipo essenzialmente "persuasivo". Con la conseguenza che, a differenza della legge abrogativa e della declaratoria di illegittimità costituzionale, la nuova decisione dell'organo della nomofilachia resta potenzialmente suscettibile di essere disattesa in qualunque tempo e da qualunque giudice della Repubblica, sia pure con l'onere di adeguata motivazione; mentre le stesse Sezioni Unite possono trovarsi a dover rivedere le loro posizioni, anche su impulso delle sezioni singole, come in più occasioni è in fatto accaduto».

dell'applicazione di un principio nuovo e diverso – vale necessariamente anche per il passato. Questa conclusione però pone un problema notevole per le parti del processo e per i loro avvocati.

Dobbiamo infatti tener conto che i processi hanno una loro durata non proprio breve: anzi l'Italia si distingue per essere un ordinamento ove tradizionalmente i processi sono tra i più lenti d'Europa. Per questa ragione i finanziamenti che sono stati garantiti al nostro Paese dal programma *Next Generation EU*, elaborato alla fine della pandemia Covid-19, sono stati condizionati anche al raggiungimento di risultati significativi in tema di riduzione della durata dei processi civili (ed anche penali).

Questo può significare che, all'inizio di un processo, gli avvocati abbiano tenuto una certa condotta processuale confidando in un precedente delle Sezioni Unite della Cassazione. Nel corso degli anni, nell'attesa che il processo si concluda con il giudicato, le Sezioni Unite cambiano orientamento, e scelgono un nuovo principio in base al quale la condotta processuale tenuta anni prima risulta essere invalida o viziata da nullità. Posto che l'*overruling* ha sempre efficacia retroattiva, questo pone il problema di come e fino a che punto "salvare" le parti dalle conseguenze negative che verrebbero a colpirle per aver confidato in buona fede sulla stabilità degli indirizzi pregressi, cristallizzati magari da decenni in regole di condotta precise, come accade in particolare in materia processuale, e poi smentiti all'improvviso[35)].

6. – L'*overruling* applicabile solo per il futuro

La questione si è posta nell'ordinamento italiano una decina d'anni fa, quando – in tre occasioni ravvicinate nel tempo – si è avuto l'abbandono improvviso da parte delle Sezioni Unite di orientamenti consolidati nell'interpretazione di norme procedurali in materia di lunghezza o decorrenza di termini o di forma dell'atto d'impugnazione: orientamenti sostituiti da nuove regole di segno più rigoroso, destinate a sfociare in nullità od inammissibilità delle attività processuali compiute sino a quel momento.

È sorto immediatamente l'interrogativo sulla possibilità di tutelare la parte ed il suo difensore, che avevano tenuto una determinata condotta processuale conforme ai dettami dell'orientamento originario, ma risultata *ex post* inadeguata o tardiva[36)]. Il dibattito si è sviluppato con velocità e la

35) V. anche Turatto, Overruling *in materia processuale e principi del giusto processo*, in *Nuove Leggi Civili Commentate*, 2015, 149 ss.

36) Prima a confrontarsi con tale problematica è stata la Sezione II che, in una coppia di sentenze di inizio estate 2010 (pronunce del 17 giugno 2010, n. 14627, e del 2 luglio 2010,

Cassazione a Sezioni Unite è infine intervenuta con la sentenza n. 15144 del 2011 ad elaborare una teoria per cui l'*overruling* della giurisprudenza, quando incide su norme processuali in modo tale da violare l'affidamento che gli avvocati hanno riposto nella stabilità del precedente abbandonato e superato, non può determinare un pregiudizio violando l'affidamento di chi abbia riposto fiducia nel precedente principio e nella sua stabilità.

La Cassazione invero ha accolto una distinzione tra le ipotesi in cui il mutamento giurisprudenziale esprime un'interpretazione nuova tendenzialmente imprevedibile, da quelle in cui esso è invece il frutto di un'interpretazione "evolutiva": allorché cioè l'*overruling* discenda vuoi dalle diverse connotazioni che l'interesse sostanziale protetto ha assunto nella coscienza sociale, vuoi da innovazioni della legge che disciplina questioni vicine.

Secondo la Suprema Corte, la tutela dell'affidamento si impone nei diversi casi di *overruling* imprevedibile, capace di sfociare in un totalmente inaccettabile effetto preclusivo del diritto della parte, che aveva riposto la propria fiducia nella stabilità del precedente, ad avere una decisione nel merito delle proprie ragioni o torti. Non risulta infatti compatibile né con la garanzia di effettività della tutela giurisdizionale, né con quella di pari trattamento che la parte venga privata della possibilità di accedere ad un giudizio di merito per aver tenuto una condotta conforme alla legge per come da quasi tutti intesa nel momento dell'elaborazione strategica delle condotte processuali, sulla base di una interpretazione ripudiata solo a distanza di anni[37)].

n. 15811), ha valorizzato il rimedio della rimessioni in termini quale mezzo coessenziale al canone *self executing* del giusto processo ed alla garanzia dell'effettività della tutela giurisdizionale, onde non far sopportare alla parte conseguenze decadenziali irreversibili quando ad essa non possa farsi risalire alcuna colpa, se non quella di aver fatto affidamento su di una giurisprudenza (pressoché) unanime, prima di aver conseguito adeguata notizia del sopravvenire dell'*overruling*. La rimessione in termini è stata così intesa come riferibile non solo alle ipotesi eccezionali di materiale impedimento, rientrante nell'onere di allegazione e di dimostrazione ad opera della parte interessata; ma anche a quelle della «scelta difensiva dipendente da indicazioni sul rito da seguire provenienti dalla consolidata giurisprudenza del tempo del promosso ricorso, solo *ex post* rivelatesi non più attendibili».

37) Principi riaffermati di recente da Cass., Sez. Unite, 12.10.2022, n. 29862, che ha sentito la necessità di ribadire il seguente principio: «*l'interpretazione di una norma processuale consolidata può essere abbandonata solo in presenza di forti ed apprezzabili ragioni giustificative, indotte dal mutare di fenomeni sociali o del contesto normativo, oppure quando l'interpretazione consolidata risulti manifestamente arbitraria e pretestuosa o dia luogo a risultati disfunzionali, irrazionali o "ingiusti", atteso che l'affidabilità, prevedibilità e uniformità dell'interpretazione delle norme processuali costituisce imprescindibile presupposto di uguaglianza tra i cittadini e di "giustizia" del processo; ne consegue che, ove siano compatibili con la lettera della legge due diverse interpretazioni, è doveroso preferire quella sulla cui base si sia formata una sufficiente stabilità di applicazione nella giurisprudenza della Corte di cassazione*»

Per queste ipotesi la Suprema Corte ha ritenuto ineludibile l'utilizzo dello strumento della rimessione in termini. Si avrà una vicenda di sanatoria vuoi sub specie di assegnazione di un termine per regolarizzare le attività processuali già compiute senza il dovuto rispetto delle forme; vuoi sub specie di "convalidazione oggettiva" dell'atto, ossia – pur sempre in conformità con i principi di cui è intessuto l'art. 153, comma 2, del codice di procedura civile– sottraendo la condotta della parte ad una valutazione secondo la norma come intesa dal nuovo *overruling*[38)].

D'altronde quando si agisce in un contesto di probabilità, la frequenza degli accadimenti tiene luogo di verità. Il che significa che, quando non è possibile prevedere con assoluta certezza un accadimento futuro, è bene ipotizzare che esso avrà la forma più frequentemente assunta nel passato. Sicché, non essendo mai possibile prevedere con certezza come si comporterà un uomo in una data circostanza, è opportuno ritenere che, probabilmente, egli si condurrà nei modi consolidati nel suo passato.

Perciò, se un avvocato, basandosi sul criterio dei precedenti, nel caso specifico sbaglia previsione, la sua azione appare sicuramente sostenuta da una evidente buona fede oggettiva, che merita di essere tutelata[39)].

38) Così semplicemente escludendo l'operatività della decadenza a salvaguardia dell'affidamento riposto nella precedente consolidata esegesi della norma stessa, senza necessità di dare corso ad una rinnovazione dell'atto da ritenersi comunque inutile, quando non addirittura priva di qualsivoglia razionalità. Tale sarebbe la richiesta – da parte di un giudice d'appello o della stessa S.C. – che l'attore in opposizione a decreto ingiuntivo rinnovi la propria costituzione *in primo grado*, con conseguente azzeramento del giudizio in ossequio ad una prescrizione di forma intrinsecamente ininfluente sulla bontà e correttezza degli esiti "meritali" sin lì attinti.

39) L'errore "scusabile" meritevole di tutela tuttavia, non è quello di chi ha continuato a riporre affidamento in un'interpretazione della cui obsolescenza vi erano state ripetute avvisaglie: così, quando l'*overruling* risulti "preparato" da un lungo lavorio dottrinal-giurisprudenziale, nonché da epocali mutamenti nel sistema ordinamentale, il giurista deve essere capace di soppesare le *guidelines* evolutive del diritto vigente e "predire" l'evoluzione della giurisprudenza in particolare delle Sezioni Unite.

V. Cass., sez. un., 28 gennaio 2011, n. 2067,: «*La sentenza n. 24883 del 2008, emessa in punto di giudicato implicito sulla giurisdizione dalle Sez. un., non ha rappresentato una svolta inopinata e repentina rispetto ad un diritto vivente fermo e consolidato, ma ha solo portato a termine un processo di rilettura dell'art. 37 c.p.c., pervenendo ad un esito interpretativo da tempo in via di elaborazione; ne consegue che la parte la quale, proponendo appello in epoca precedente a tale pronuncia, non abbia contestato la giurisdizione implicitamente affermata dal giudice di primo grado, così da non impedire il formarsi del relativo giudicato, non può invocare il ricorso a rimedi ripristinatori quali la rimessione in termini o la semplice esclusione della sanzione di inammissibilità della questione*».

V. anche Consolo, *Le Sezioni Unite tornano sull'*overruling*, di nuovo propiziando la figura dell'avvocato «*internet-addicted*» e pure «veggente»*, in *Giurisprudenza costituzionale*, 2012, p. 3168: «L'affidamento delle parti su di una interpretazione giurisprudenziale consolidata di norme processuali è valore che va preservato, quantomeno ove l'interpretazione abbia ad oggetto norme schiettamente, diremmo "nudamente", procedurali non innervate da valori. L'impegno profuso nella ricerca della soluzione interpretativa astrattamente più corretta si

7. – Il diritto giudiziario, la pluralità delle fonti sovranazionali, la tutela multi-livello dei diritti fondamentali

L'importanza del giudice non si limita però al ruolo del precedente giurisprudenziale nello specificare il significato delle norme approvate dal potere legislativo, al punto da orientare i comportamenti dei cittadini e degli avvocati difensori e da porsi quale presupposto per l'efficacia solo *pro futuro* di eventuali *overruling*.

Abbiamo visto che i giudici, quando applicano la legge in un determinato caso, compiono un'attività che non è solamente interpretativa, ma è essa stessa creatrice di significato. Questa creazione di significato è tanto più rilevante quanto più il caso singolo – portato all'attenzione del giudice – non sia stato oggetto di disciplina espressa da parte del legislatore.

Abbiamo ricordato che il Codice di Napoleone, all'art. 5, vieta ai giudici di pronunciarsi enunciando principi generali. Tuttavia lo stesso Codice, all'art. 4, proibisce ai giudici di rifiutarsi di giudicare con il pretesto del silenzio, dell'oscurità o dell'incertezza della legge: vietando quell'istituto, che invece avevano voluto i rivoluzionari del 1792, dell'obbligo per il giudice, in caso di oscurità od incompletezza della legge, di rivolgersi al potere legislativo per chiedere a questo di colmare la lacuna (v. *supra*).

Il Codice di Napoleone cancella questa regola e ne pone un'altra tutta nuova, in base alla quale, se anche il Codice risulta non completo ed incapace di disciplinare una particolare vicenda della vita, il giudice deve comunque offrire una soluzione: e questa soluzione la dovrà ritrovare nelle norme che regolano dei casi simili o, in mancanza, nei principi generali dell'ordinamento. Il giudice acquista così un potere indefinito di risolvere le liti, non solo con l'applicazione pura e semplice o con l'interpretazione della legge, ma anche tramite la creazione di un diritto giudiziario tutte le volte che è indispensabile supplire al silenzio della legge[40)].

La particolarità degli ultimi decenni è che questi principi generali, che possono diventare fonte del diritto giudiziario, possono essere ritrovati non

rivela qui in ultima istanza inutilmente laborioso, poiché attiene a profili procedurali che non modificano la qualità della tutela delle parti (né sostanziale né processuale)».

40) Cfr. Lombardi, *Saggio sul diritto giurisprudenziale*, Milano, 1967, p. 245 s., il quale sottolinea come il fatto che l'*analogia legis* e l'*analogia iuris* soddisfino solo nominalmente il dogma della completezza dell'ordinamento giuridico (cfr. Conte, *Saggio sulla completezza degli ordinamenti giuridici*, Torino, 1962, p. 111: «giacché non necessariamente tutti i comportamenti inqualificati sono analoghi a comportamenti qualificati») provochi un «immancabile momento giurisprudenziale del diritto, cioè una fase di lavorazione inventiva da parte della giurisprudenza», anche «all'interno di un ordinamento legale tendente o pretendente alla completezza, qual è la nostra legislazione codificata», nel quale sussiste un largo spazio vuoto che l'interprete è chiamato a colmare con mezzi propri.

solo nell'ambito dell'ordinamento nazionale e nella Costituzione[41], poiché – negli anni successivi alla creazione dell'ONU – sono state elaborate una serie di convenzioni internazionali sui diritti dell'uomo. Queste contengono, appunto, una serie di principi che gli Stati, che hanno approvato tali convenzioni, sono obbligati a rispettare ed a promuovere dapprima tramite il potere legislativo ma, in caso di inerzia o di attivazione insufficiente o lacunosa di questo, anche per il tramite dei loro giudici.

In questo contesto i giudici italiani, pur nel silenzio del legislatore, hanno ad es. introdotto la possibilità per i parenti di un malato in stato vegetativo da molti anni di chiedere l'interruzione dell'alimentazione o della respirazione forzata, se vi sono prove che quella persona – quando era sana – aveva dichiarato che avrebbe desiderato morire piuttosto che sopravvivere senza possibilità di muoversi, parlare, agire. Nel silenzio della legge, la Corte di cassazione ha ritenuto che le convenzioni internazionali sulla tutela dei diritti e sul rispetto della dignità del malato "creassero" il diritto dei parenti ad ottenere l'interruzione delle cure e la "liberazione" del proprio caro dalla gabbia del suo corpo e dal dovere di continuare a vivere (caso *Englaro*)[42].

41) È proprio la Costituzione che, tramite il costituzionalismo giuridico e la legalità costituzionale, ha aperto un autonomo spazio di valutazione critica nei confronti delle leggi e del diritto prodotto dal legislatore, da parte di chi, come il giudice, rappresenta il solo e unico organo che può attivare il controllo di costituzionalità delle leggi, sottoponendo al giudizio della Corte costituzionale una questione di costituzionalità.

Tale punto di vista critico consegna al giudice il compito di esercitare una costante valutazione delle leggi ordinarie, operata indossando le lenti critiche costituite dalle norme costituzionali, e fa della giurisdizione il luogo privilegiato di affermazione così della Carta costituzionale come della sua superiorità gerarchica nell'ordinamento, che sarebbe di contro negata e disattesa, qualora il giudice restasse ancorato alla acritica e incondizionata soggezione alla legge, anche là dove di questa sospetti il contrasto con la Costituzione e con i diritti, le libertà e i principi fondamentali in essa sanciti: v. Spina, *Stato costituzionale e ruolo della giurisdizione. Il giudice quale primo critico della legge*, in www.questionegiustizia.it/articolo/stato-costituzionale-e-ruolo-della-giurisdizione-il-giudice-quale-primo-critico-della-legge

42) Cfr. Cass., Sez. Un., 13.11.2008, n. 27145, in Foro Italiano, 2009, I, 786, con nota di Mazzarella; ivi, 2009, I, 983, con nota di Caponi-Proto Pisani-Maltese; in Nuova giurisprudenza civile commentata, 2009, I, 223, con nota di Santosuosso; in Diritti dell'uomo, 2008, 2, 95, con nota di Tria; in Rassegna di diritto civile, 2009, 538, con nota di Paesano; in Diritto della famiglia, 2009, 115, con nota di Dano; cfr. anche Cass., Sez. I, 16.10.2007, n. 21748, in Foro italiano, 2007, I, 3025, con nota di Casaburi; ivi, 2008, I, 125, con nota di Maltese; in Diritto della famiglia, 2008, 592, con nota di Virgadamo; Cetto, *La dignità oltre la cura*, Milano, 2009, 139 ss., Englaro Eluana, 119 ss.

In quel caso, appunto, i giudici hanno fondato le proprie conclusioni sul principio del "consenso informato", che sta "alla base del rapporto medico paziente" e costituisce "norma di legittimazione del trattamento sanitario" (altrimenti illecito), non solo secondo il consolidato orientamento delle Sezioni civili e penali della Cassazione, ma anche in quanto previsto dalle fonti sovranazionali (Convenzione di Oviedo sui diritti dell'uomo e sulla biomedicina, Carta dei diritti fondamentali dell'Unione Europea adottata a Nizza il 7 dicembre 2000.

Si parla al riguardo di tutela "multi-livello" dei diritti, che viene vivificata anche dal dialogo tra le Corti Supreme nazionali e le Corti sovranazionali preposte a sorvegliare l'uniforme applicazione delle convenzioni, in particolare la Corte di giustizia dell'Unione Europea e la Corte Europea dei Diritti dell'Uomo, che comunque rivestono un ruolo istituzionale diverso e distinto[43].

8. – Corte di giustizia dell'Unione Europea e Corte Europea dei Diritti dell'Uomo

La Corte di giustizia è sovraordinata ai giudici degli Stati dell'Unione, perché – in base ai Trattati – ha il compito di interpretare il diritto dell'Unione con efficacia vincolante per tutti quei giudici. Tuttavia la Corte di giustizia non è un giudice di impugnazione (come, ad es., la Corte Suprema degli Stati Uniti): essa può essere attivata solamente su iniziativa di un giudice nazionale, che ha la facoltà di rivolgere un quesito pregiudiziale su una questione di diritto da risolvere ai fini della decisione di una determinata causa. Nel caso la questione si ponga davanti ad una Corte Suprema, questa ha il dovere, e non solo la facoltà, di richiedere l'intervento della Corte di giustizia.

Le pronunce interpretative della Corte di giustizia, rese sull'interpretazione di una norma europea, debbono essere rispettate da tutti i giudici degli Stati dell'Unione, come una vera e propria fonte del diritto al pari delle norme del Parlamento Europeo e del Consiglio Europeo.

La Corte Europea dei Diritti dell'Uomo ha invece una collocazione diversa. Neppure essa è un giudice d'impugnazione, ma non è neppure

43) Sul "dialogo tra le Corti" quale elemento propulsivo della tutela dei diritti fondamentali, per il combinato operare del catalogo della Costituzione interna e della Carta dei diritti fondamentali dell'Unione Europea, v. – con riferimento ad un rinvio pregiudiziale con cui la Corte costituzionale italiana interrogava la Corte di giustizia sulla correttezza di una propria interpretazione a salvaguardia del diritto di rimanere in silenzio nell'ambito dei procedimenti sanzionatori amministrativi a carattere penale condotti dalla Consob (C. Cost. n. 117 del 2019, seguita da Corte di giustizia 2 febbraio 2021 nella causa C-481/19 – cfr. Ruggeri, *Ancora un passo avanti della Consulta lungo la via del "dialogo" con le Corti europee e i giudici nazionali (a margine di Corte cost. n. 117 del 2019)*, in *Consulta OnLine*, n. 2/2019; Scaccia, *Alla ricerca del difficile equilibrio fra applicazione diretta della Carta dei diritti fondamentali dell'Unione europea e sindacato accentrato di legittimità costituzionale. In margine all'ordinanza della Corte costituzionale n. 117 del 2019*, in *Rivista AIC*, n. 6/2019; Catalano, *Rinvio pregiudiziale nei casi di doppia pregiudizialità. Osservazioni a margine dell'opportuna scelta compiuta con l'ordinanza n. 117 del 2019 della Corte costituzionale*, in Osservatorio AIC, n. 4/2019; Anzon Demmig, *Applicazioni virtuose della nuova "dottrina" sulla "doppia pregiudizialità" in tema di diritti fondamentali (in margine alle decisioni nn. 112 e 117/2019)*, in *Osservatorio AIC*, n. 6/2019; Galimberti, *La quiete dopo la tempesta? I diritti fondamentali alla prova della doppia pregiudizialità nella recente giurisprudenza costituzionale*, in Dirittifondamentali.it, n. 2/2019.

una Corte cui si possano rivolgere i giudici nazionali per far risolvere in modo vincolante per tutti gli Stati membri un quesito circa l'applicazione delle norme della Convenzione Europea dei Diritti dell'Uomo. Alla Corte Europea si possono rivolgere in via diretta coloro che ritengono che un proprio diritto fondamentale sia stato violato nel corso di un processo che si è svolto in un ordinamento nazionale, ma solo una volta che questo processo sia stato concluso e solamente per richiedere un risarcimento del danno allo Stato nazionale i cui giudici si sono resi responsabili della violazione denunciata.

La decisione della Corte Europea non ha efficacia sulla sentenza definitiva che ha chiuso il processo nazionale, è irrilevante nei rapporti tra le parti di quel processo, però offre un indennizzo monetario a chi è stato vittima della violazione.

È soprattutto per effetto della Corte di giustizia dell'Unione Europea, e della forza del diritto europeo che essa porta con sé, che in tempi recenti si è visto erodere anche il principio, che abbiamo ricordato all'inizio di questa relazione, per cui al giudice ordinario non è attribuito un potere diffuso di controllo di validità delle leggi né un potere di loro disapplicazione.

In realtà sin dalla sentenza *Simmenthal* del 9 marzo 1978, C-106/77, la Corte di giustizia ha affermato il dovere dei giudici nazionali di disapplicare le norme interne contrastanti con quelle europee direttamente applicabili, ammettendo così quel controllo diffuso di validità delle leggi – in quanto contrastanti con il diritto europeo – che gli ordinamenti interni di *civil law* prevalentemente non conoscono. Se dunque il giudice italiano non può disapplicare di sua iniziativa una legge ritenendola contraria alla Costituzione, invece ha il dovere di disapplicare una legge interna se la ritiene contraria al diritto europeo.

È vero che si potrebbe ritenere che il giudice italiano, prima di disapplicare la norma interna, dovrebbe investire la Corte di giustizia di una questione interpretativa pregiudiziale circa il significato e l'interpretazione del diritto europeo. Tuttavia è anche vero che la Corte di giustizia, nella nota sentenza Cilfit, ha stabilito che non vi è un obbligo di sollevare una questione interpretativa se la soluzione della questione è chiara e nitida e non lascia alcun dubbio[44)].

44) In particolare, la sentenza citata concludeva: «*L'art. 177, co. 3, del Trattato CEE, va interpretato nel senso che una giurisdizione le cui decisioni non sono impugnabili secondo l'ordinamento interno è tenuta, qualora una questione di diritto comunitario si ponga dinanzi ad essa, ad adempiere il suo obbligo di rinvio, salvo che non abbia constatato che la questione non è pertinente, o che la disposizione comunitaria di cui è causa ha già costituito oggetto di interpretazione da parte della Corte, ovvero che la corretta applicazione del diritto comunitario si impone con tale evidenza da non lasciar adito a ragionevoli dubbi;*

La Corte costituzionale italiana ha riconosciuto, nella sentenza *Granital* del 5 giugno 1984 n. 170, che questa regola è stata correttamente affermata dalla Corte di giustizia poiché trova fondamento nella supremazia del diritto europeo rispetto al diritto degli Stati membri. Più di recente, nel 2017, tanto la Corte di giustizia quanto la Corte costituzionale hanno riconosciuto che, se vengono in considerazione diritti fondamentali, il giudice interno ha sempre la facoltà di disapplicazione diretta della norma nazionale in contrasto con quella europea, in alternativa alla possibilità di provocare l'intervento della Corte costituzionale nazionale[45)].

Quel che rileva, in ogni caso, è che la sempre maggior rilevanza delle fonti sovranazionali ha dato luogo ad un sistema "multi-livello" di tutela dei diritti: sia dei diritti fondamentali della persona umana riconosciuti in convenzioni internazionali, sia di quelli che trovano la loro fonte nei Trattati istitutivi dell'Unione Europea, che a loro volta si fondano sul principio di rispetto della dignità umana e sul divieto di discriminazione in qualunque situazione[46)].

In questo sistema il ruolo del giudice è sempre più importante, perché non solo nei trattati internazionali può trovare le risposte che l'ordinamento interno non è in grado di offrire per la lacunosità della disciplina e delle leggi interne, ma anche perché in quei trattati può trovare la forza per disapplicare la volontà del potere legislativo, quando la stessa si pone in

la configurabilità di tale eventualità va valutata in funzione delle caratteristiche proprie del diritto comunitario, delle particolari difficoltà che la sua interpretazione presenta e del rischio di divergenze di giurisprudenza all'interno della Comunità».

45) V. da ultimo C. cost., 19.11.2024, n. 181: «entrambi i rimedi garantiscono il primato del diritto dell'Unione, uno dei capisaldi dell'integrazione europea, riconosciuto fin dalle prime pronunce della Corte di giustizia e poi dalla giurisprudenza di questa Corte (sentenza n. 170 del 1984 e, più di recente, sentenza n. 67 del 2022).Anche negli Stati membri in cui esiste, come in Italia, un sindacato accentrato di costituzionalità, tutti i giudici possono controllare la compatibilità di una legge con il diritto comunitario (Corte di giustizia, sentenza 9.3.1978, C-106/77, Simmenthal). Né le competenze delle Corti costituzionali possono ostacolare o limitare il potere dei giudici di proporre un rinvio pregiudiziale alla Corte di giustizia e di non applicare la legge statale incompatibile con il diritto dell'Unione (Corte di giustizia, Grande Sezione, sentenza 22.2.2022, C-430/21, RS), quando esso sia provvisto di efficacia diretta (Corte di giustizia, Grande Sezione, sentenza 24.6.2019, C-573/17, Popławski)». V. in arg. il commento di Ruggeri, *La doppia pregiudizialità torna ancora una volta alla Consulta, in attesa di successive messe a punto (a prima lettura di Corte cost. n. 181 del 2024)*, in *Consulta On-Line*, 2024, fasc. III, 21.11.2024.

46) Vi è un contributo delle norme sovranazionali alla ricostruzione della portata dei diritti costituzionalmente garantiti, poiché le tutele approntate a livello europeo «si riverberano sul costante evolvere dei precetti costituzionali, in un rapporto di mutua implicazione e di feconda integrazione»: così C. Cost., ord. di rinvio alla Corte di giustizia n. 182/2020; v. nel senso della alimentazione reciproca tra le diverse Carte dei diritti Ruggeri, *Rapporti interordinamentali, riconoscimento e tutela dei diritti fondamentali, crisi della gerarchia delle fonti*, in *Diritti Comparati*, n. 2/2019, p. 24 e, ancor prima, Ruggeri, *Maggiore o minor tutela nel prossimo futuro per i diritti fondamentali?,* in *Consulta OnLine*, p. 60.

contrasto con i valori dell'Unione Europea o della comunità internazionale. È appunto quello che sta accadendo in questi mesi in Italia, dove la volontà del potere legislativo di deportare in campi di concentramento situati in Albania i rifugiati, se provenienti da Stati inseriti in una lista generale di "paesi sicuri", sta venendo disapplicata dai giudici per il suo contrasto con i principi affermati dalla Corte di giustizia dell'Unione Europea circa la necessità di verificare in concreto, con riguardo al singolo caso, se la persona rifugiata sia in pericolo nel Paese di provenienza.

Si ha qui la conferma che, negli Stati moderni che hanno una Costituzione rigida e sono vincolati da obblighi internazionali liberamente assunti, i giudici – oltre ad applicare la legge – continuano a rappresentare la pietra angolare dello Stato di diritto, della *rule of law*, perché sono il baluardo della salvaguardia dei diritti e della dignità della persona umana.

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