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## Reading the Will through the Lens of an Intercultural Jurist <sup>1</sup>

### Abstract

The essay analyses the issues that arise in the drafting and interpretation of the last will and testament, exploring the premise that the meaning of each variable depends on its interactions within its cultural contexts of reference. In multicultural and multi-religious societies, interpreting human behaviour or legal acts means that judges and other legal professionals have to figure out the meaning of objects, facts and words from the point of view of another culture, precisely that which the social actor actually assumes. This operation implies the reconstruction of a specific view of the world. Inside of it, and only within it, will it be possible to determine the meanings of things, gestures and words belonging to that particular culture. This point is particularly important with regard to the issue of interpretations of the will in the regulation of inheritance. The aim of this essay is to demonstrate— including through the analysis of specific legal cases— that certain factors extrinsic to the will, such as the customs, mentality, and living environment of the testator, should be instrumental to the interpretation of the will even when the written text appears to be, or indeed is, clear. Despite the fact that any hermeneutic operation should always start from the written evidence (the text of the will), it deserves to be read in light of the author's culture, according to its anthropological dimensions. From this perspective, the essay will explore the use of an intercultural approach within Italian law in the interpretation and the drafting of the will by “translating” the culturally or religiously connoted values of the testator in order to arrive at his originally intended purposes.

### Keywords

Law of succession – will and testament – inheritance – intercultural law – interpretation.

### 1. Introduction

Contemporary multicultural and multi-religious societies demand effective responses from lawyers, and the world of law in general, to the ever-increasing demands for legal protection resulting from changes in resident populations. Italy is no exception. A topic of great interest in private law is the law of succession. Specifically, with reference to the last will and testament, a key issue is the

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<sup>1</sup> The title of the essay is intended to recall the interdisciplinary style of studies pursued in the past by one of the most important Italian scholars in the field of Law and Religion, Arturo Carlo Jemolo. He wrote a group of essays dealing with his field of study, but using specific cases across a range of legal disciplines. These papers were published at the time in the review, "Gli occhiali del giurista" and were then re-published as a collection in a book of the same title (Jemolo: 1970).

exploration of what methods could and should be adopted by the jurist who is increasingly called upon to come face to face with ways of acting and thinking that are markedly different from those of his own culture, from both a legal as well as an anthropological point of view<sup>2</sup>.

While globalisation has generated an intensification of economic transnational relations, its effects have not been limited to the facilitation of the moving of people, goods and services. It has also highlighted the need to establish a more permanent intercultural-legal approach along with increased inter-religious dialogue directed to promote mutual understanding between the traditions of the world, with inevitable reflections on how to interpret domestic legal relationships within societies which have become, ipso facto, multicultural.

With regard to the concrete answers that this question requires, it must be acknowledged that the Italian legal system—a codified legal system in which judges do not create law, as they do in the Common Law countries—leaves wide open spaces where the legal operator is able to both act and create; this is because it is a so-called multilevel legal system composed of both general and abstract rules. Thanks to these features, the domestic legal system allows jurists to move among several normative “floors,” finding different ways of expressing subjectivities, and exploiting the system’s internal dynamism in order to find adequate protection for them.

The first foothold within the regulatory system of norms is represented by the Constitution. Here, there are multiple references to the recognition of universalist ideals of fundamental rights; if properly decoded, the exigencies of foreign cultures could find protection within the semantic fabric of the constitutional text. This process would promote a (legal) translation, on the one hand, able to carry out an interpretation of legal instances proposed by people of different cultures according to constitutional values and, on the other hand, it would encourage the judge to screen legality through the possibility of bringing questions of constitutionality before the Constitutional Court<sup>3</sup>.

In light of this perspective, we should turn our attention to one important element. The codes of religious behavior, consolidated into models certified by time and custom, are projected onto all areas of life, and their borders merge with those of culture<sup>4</sup>. Culture<sup>5</sup> is composed of signs. It is an entity that produces semiotic meanings open to contamination from the environment, in which contextual

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<sup>2</sup> As a result of the multi-confessional and multi-ethnic composition of the Italian population today mostly due to the migration phenomenon, our society—like that of the majority of the Western states—is often defined as “multicultural.” However, the phenomenon of the simultaneous presence within the territory of individuals belonging to different cultures is not enough to declare Italy, at present, a mature multicultural society. The issues posed by the social phenomenon of the interfacing of religious and cultural pluralism and legal dynamics could be beneficially addressed through the use of an interdisciplinary approach defined as intercultural. By addressing the religious norms and cultural practices followed by individuals, this new intercultural legal approach aims to creatively prepare practical solutions for effective and fair integration through the joint examination of anthropological facts, legal indices, and the cultural affiliations of people from diverse cultures. Such an approach to the law is addressed to those who are interested in translating cultural indices within the legal discourse. For more on intercultural legal methods, see Ricca (2008: 241 ff.).

<sup>3</sup> This is the real advantage that can be reached by using the intercultural law approach. To evoke Norberto Bobbio (See Bobbio (1997: 16) it seems necessary to point out that the purpose of human rights is not to find a “common ground.” Rather, the point is to guarantee real and effective protection to human rights.

<sup>4</sup> See Ricca (2013: 300).

<sup>5</sup> The English anthropologist Edward Tylor (see Tylor (1871) defines the culture—understanding in its wide ethnographic sense—as «that complex whole which includes knowledge, belief, art, morals, law, custom and any other capabilities and habits acquired by man as a member of a society».

networks formed by other signs also reside. Hence the meaning of each factor will depend on its interaction with the cultural context of its own culture of reference<sup>6</sup>. As has been noted, “Interpreting and then understanding the meaning of objects, facts, and words from the point of view of another culture implies the reconstruction of a specific view of the world. Only within this view is it possible to determine the meanings of things, gestures and words belonging to that particular culture.”<sup>7</sup> In this regard, it should be noted that there is a close correlation between meanings, purposes and context. It is possible to say that the aims determine the selection of context, and that the meaning of these aims depends on the context selected. The corollary of this is that if the context changes, the meaning of the aim may also vary<sup>8</sup>. So, it is not possible understand the meaning of words or of human behavior independent of the cultural context. Furthermore, if the interpretation procedure is carried out in this way, completely new meanings may be created which might nevertheless be very far from the intentions of their author<sup>9</sup>.

These considerations can and should be applied to the interpretation of wills, particularly when decoding the language used by the testator, given that his personal identity must be taken into account<sup>10</sup>. It could be useful to attempt to “read” diverse cultures like written texts, equipped with deep structures, built with networks of oppositions and syntactic correspondences, all made possible by the stability of the language<sup>11</sup>. The text is not, in and of itself, the foundation for possible interpretations that complete it or even justify its existence, but it is the formal mechanism by which sense is articulated, revealed, and circulated into society, and thus into culture. Similarly, the identity of each person is inevitably conditioned by the culture to which he belongs, so that the ideas, words and meanings which everyone shares create a sort of subjective cultural heritage<sup>12</sup>. Keeping this cultural “con-text” ever present, the task is to then try to understand the fragments of communication left in the will by the testator.

At this point, therefore, it could be said that what is written in the will does not appear to be “divorced” from its interpretation and from the cultural universe of sense that hosts the formation of

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<sup>6</sup> See Ricca (2013: 179). Usually individuals are not fully aware of all the elements of their own culture. However, they use it in the form of pragmatic knowledge to articulate their own social actions. An inevitable consequence of this fact is that the communication patterns used by people are also marked by unobserved cultural figures. The cultural experience can also be defined as being “multi-perspective” because culture is subject to a continuous process of change. From another point of view, culture is not equipped with reliable and stable attributes, so it cannot function like a legal system. Nevertheless, it helps people to understand the meaning of social factors.

<sup>7</sup> See Ricca (2008: 223).

<sup>8</sup> See Ricca (2008: 220-221).

<sup>9</sup> See Ricca (2008: 222).

<sup>10</sup> For several years the protection of cultural identity has increasingly risen to the rank of a fundamental human right as an expression of human dignity, to which the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of October 20, 2005, was dedicated, and which the European Union supported on December 18, 2006, by virtue of the Council Decision adopted on May 18, 2006 (2006/515/EC). Article 4 of the treaty specifies that cultural diversity refers to “the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.”

<sup>11</sup> On this matter, see Marrone (2010).

<sup>12</sup> See Ricca (2008: 45-46).

the testator's wishes. Each text acts as a mirror for the construction and representation of meanings. The text is *negotiated* within cultural dynamics, and this characteristic denotes its intrinsic potential for self-renewal; in other words, it demonstrates the ability of the text to refigure itself in other textual configurations, or to be translated into other "language". So, just as the semiotician analyses a text trying to reconstruct forms and dynamics, internal and external articulations, at first under a sociocultural configuration and then under an analytical reconfiguration<sup>13</sup>, the jurist who interprets the will must also engage with the text in this way if he is to understand the true meaning intended by the testator<sup>14</sup>. To focus on the language<sup>15</sup> and the words used by the author is to convey his thought and give it a precise semantic shape. This operation can only be performed by first knowing the semantic uses of terms according to the common language (or, better, according to each of the relevant common languages). An emblematic example of such linguistic focus might be the definitions given in dictionaries: as semantic expansions of hyper-concentrated definitions, their historical and cultural justification can provide valuable aid in performing semiotic investigations<sup>16</sup>. In the field of Italian private law, the most common situation where the cultural element acquires relevance and, in particular, where individual freedom finds full expression, is in the legislation of succession when applied to foreigners. This occurs, for several reasons. First, even foreigners born outside of Italy may subsequently acquire<sup>17</sup> Italian nationality, pursuant to Law 91/1992, February 5<sup>th</sup>, 1992 ("New rules on nationality"). Second, decisions applying to foreigners can be made "on condition of reciprocity," pursuant to the provision of general law on the basis of international treaties signed by Italy (Article 16). Third, because the citizen of an extra-European country who legally resides in Italy (pursuant to Article 2, paragraph 2 of Law 286/1998, July 25<sup>th</sup>, 1998), unless otherwise provided by international treaties signed by the Italian State, has the same civil rights as an Italian, as a resident he has the right to draw up a will via *professio juris* pursuant to Article 46, paragraph 2, Law 218/1995, May 31<sup>st</sup>, 1995 ("Reform of the system of private international law") such that he might voluntarily submit his entire inheritance to be determined by Italian law; this choice would remain valid as long as the testator's last residence prior to his death was not abroad. Fourth

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<sup>13</sup> See Marrone (2010: 7).

<sup>14</sup> We can briefly anticipate what will be said below in the fourth part of the essay by recalling the method proposed, among others, by Nicolò Lipari—in his book titled *Autonomia privata e testamento* (Giuffrè, Milano, 1970)—to introduce the topic of the interpretation of the last will and testament. According to the author, this specific kind of interpretation "should be conducted with regard to the relevance of the concrete discipline, beyond a general uncritical reference to specific conceptual categories" (p. 141). Lipari shows agreement with the hermeneutic option that is not strictly based on the letter of testamentary dispositions. In fact, using his words, "the last will and testament must also be interpreted regarding the actual intent of the subject, without stopping at the literal sense of the words, [that] it means to grasp only the fundamental point of the objective consistency of the determination to take it as the assumption of legal qualification" (p. 329).

<sup>15</sup> Regarding the analysis of language in the interpretation of the will, see Rescigno (1952: 27 ff).

<sup>16</sup> See Marrone (2010: 26).

<sup>17</sup> Note that the term "culture" is understood here in a broad sense, where it covers every aspect of traditions and practices settled in a given place for a particular people, including their religious beliefs. Culture often brings to mind the concept of ethnicity and, compared with other cultures from our point of view as citizens, even the concept of what is "foreign." Nevertheless, understanding the religious factor as the one that involves the most intimate sphere of the people of faith according to certain moral assumptions, it could be argued that religion, rather than culture, has no ethnicity, and so could be of interest to members of a group, citizens of a nation, or indeed all human beings.

and finally, in the case of a European Union citizen, pursuant to Article 21 of EU Regulation n. 650 issued by the European Parliament and Council on July 4<sup>th</sup>, 2012, a person's inheritance may be governed by Italian law if he was habitually resident in Italy at the time of his death. Note that under the aforementioned EU Regulation, *professio juris* operates in the opposite manner with respect to how it works according to the similar Italian law provision on the conflict of laws; in fact, once the EU Regulation n. 650/2012 comes into force (August 17<sup>th</sup>, 2015), the assets of an Italian citizen who at the time of death was habitually resident in another EU country will be governed by Italian law only if he has drafted a will specifically expressing *professio juris* be applied according to Article 22 of the EU Regulation.

Culture and religion often have a strong influence on an individual's cognitive propensities<sup>18</sup> and, consequently, his choices concerning the exercise of available rights. When viewed from the perspective of different cultures or religions, objects or human behaviours do not change their meanings *per se*; what changes is how they are conceived and represented. In short, the very elements of a legal case can change, and not only their legal classification<sup>19</sup>. Thus, if the object of interpretation within the will is the author's declaration, then it means *assigning content to a form* which, at the same time, must be acknowledged in two ways. While one part is to be understood as a reflection of an *inner will*, the other must be qualified as a medium for communication containing significant elements.

Traditionally, the word "interpretation" is used to indicate the common assignment of a reference, so that the terms of a representational language would find their sense in relation to a dominant objectivity or within a particular ontology<sup>20</sup>. However, it can be argued that the true meaning of a text is to be found through the epistemological work of semiotics. "Reference" is a product of the process of signification, not an assumption represented from the start or rather, before the process of the production of meaning. Moreover, because sense emerges from a stream of consciousness and through human behaviour<sup>21</sup>, it is essential to evaluate the semantics of a text strictly within a semiotics of cultures. Here again we encounter a method that drives the legal interpreter to obtain a culturalisation of meaning that inspires the need to re-read every description, every analysis and every theory of texts within a cultural background. Such an inclusive semantic textual approach also extends to the resulting social practices from which it is derived, even prior to their meaning and value, to their very genesis. From this point of view, «every text is always either considered within a context or it is not considered to be relevant»<sup>22</sup>. Consequently, the operation of interpreting can no

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<sup>18</sup> See Fabietti (2010: 104)

<sup>19</sup> Most illustrative is the case of the *kirpan*, the ritual dagger of the Sikh religion. The Court of Cremona, ruling on February 19<sup>th</sup>, 2009, did not consider applicable the charge of the unjustified carrying of weapons or objects with intention to cause injury because after investigating the sacramental significance of this object worn in a public place by the accused, a Sikh, the judge deemed the dagger to be a religious symbol and not a weapon, and granted full absolution to the defendant. The judge ruled that the defendant was carrying the sacred dagger only to express, in this way, his sense of belonging to his religion, and as such, exercising his religious freedom. In fact, in the Sikh culture the *kirpan* is not intended as a weapon but rather as an object loaded with emotional significance symbolising grace, personal dignity, and divine protection against injustice, particularly in defense of the weakest.

<sup>20</sup> See Rastier (2000: 258).

<sup>21</sup> See Rastier (2000: 260).

<sup>22</sup> Marrone's expression (2010: 26).

longer be understood as the simple attribution of meaning given to a single expression, but also as an acknowledgment of the expression thereof, the signifier that supports the sense, so that the text is read as a cultural specification<sup>23 24</sup>.

## 2. A legal case study: the so called *institutio ex re certa*

The practical implications of the theory outlined in the previous section may become clearer through an analysis of a peculiar aspect of inheritance law known as *institutio ex re certa*.

Article 588, paragraph 2 of the Italian Civil Code provides that, «the indication of a specific asset or group of assets does not exclude the possibility that the allocation could be qualified as universal when it appears that the testator intended to give those assets as a share of the total». This regulatory provision presents two characteristics: it configures the bequest of a determined asset in the function of a portion of the whole inheritance, and postpones the definition of the single share at the time of testator's death. To configure an *institutio ex re certa*, there must be two components: the first is objective, and is defined as the relevant economic value of the asset assigned to the beneficiary in comparison to the entire hereditary estate value; the second is subjective, and consists in verifying the testator's desire to make a given beneficiary an heir. The two above mentioned criteria must be coordinated in an overall assessment of the will. However great emphasis must be placed on the subjective component. In fact, since the economic value of the asset impacts the determination of the percentage of the share (only known at the time of the testator's death), the testator's true intentions cannot be interpreted until then. The interpretation must consider whether the testator intended the allocation to be a percentage of a whole (heir status) or instead only a single allocation. For this reason, although a purely psychological analysis of the deceased person's intentions at the time of distribution would certainly be unacceptable – largely because it would lead to a reconstruction of the intentions of the testator based only on elements outside of the statements contained in the will – a careful textual analysis of the will designed to better understand the testator's intentions is a necessary step to interpret testamentary allocations accurately.

Comparing the two paragraphs of Article 588 of the Italian Civil Code<sup>25</sup> it can be noted that while in the first – where the general rule is outlined—the language defines the type of heir, the second requires the interpreter to go back to the testator's will in all cases to verify whether the allocations were intended as specific individual allocations (*legato*) or as a share of the global estate (*institutio ex re certa*, depending on the type of heir).<sup>26</sup>

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<sup>23</sup> See Marrone (2010: 40). Here, the author defines semiosis as a «reciprocal presupposition of expression and content» and he outlines the interpretation of its varied instances, within a given culture, from which the relationship of signification can be established. This means that the expression does not come before to then be followed by content that is attributed to it. Instead, it is from previously specified semantic expectations – which advance understandings of sense – that we tend to identify a given expression as support for a text.

<sup>24</sup> On the interpretation of legal documents, see Guastini (2005: 11-12)

<sup>25</sup> Article 588, paragraph 1, prescribes «the wills' dispositions, regardless of the expression used by the testator, are universal and attribute the status as heir if they grant universality or a share of the whole complex of the testator's assets. The other provisions are particular attributes (and they grant the quality of *legato*)».

<sup>26</sup> In this sense, see Bigliuzzi Geri (1982: 126-127).



In order to execute the testator's will and actualize his intentions, it is essential to reconstruct a representation<sup>27</sup> of the surrounding reality that served as the background supporting the assessments made by the deceased when he drafted the will<sup>28</sup>. Translating the prior results achieved in terms of legal classification of testamentary dispositions allows the lawyer to understand the value understood by the testator when attributing his properties to beneficiaries, considered either separately or in relation to total assets. In other words, the exploration of the will includes two different analyses: one of an objective nature, with reference to the statement in the text, the other of a subjective nature, with reference to the deceased's desires; the latter (in coherence with the testator's cultural environment) should guide the interpreter in the assignment of meaning to the allocations of the will.

In the law of succession, *institutio ex re certa* specifies that only when the testator gives a beneficiary the entire estate or a share of the estate can he be qualified as an heir (*erede*); otherwise the allocation is considered to be "particular" (*legato*). Article 588, indeed, requires the interpreter to evaluate each provision according to an informal but substantial logic, so that the awarding of one or more specific assets—which according to the general rule in Article 588, paragraph 1, of the Civil Code should be qualified as *legato*—can be considered as part of a universal bequest, thanks to a "penetrating examination"<sup>29</sup> designed to determine the true intent of the deceased. In order for this tool—considered by the prevailing legal thought to be a mere guide for interpretation—to be successfully applied, it must be understood that the testator intended to assign those assets as a share of the total estate. Since this is a question of the reconstruction of meaning, the answer must be sought not only through an interpretation of rules, but also through the use of particularly important elements traditionally defined as extra-textual (outside the written will) nevertheless significant because they "expand the text" according to the socio-semiotic method previously indicated.

Anthropologists and researchers of comparative law (also in comparative religious law) illuminate the idea that the relationships between people and goods are very different depending on the cultural tradition of reference<sup>30</sup>, and that to ensure the effectiveness of its laws, the national legislation has

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<sup>27</sup> As already made clear above (p. 3), in this paper we accept for the purposes of legal work the idea of an anthropological matrix as developed by Ronald Dworkin (Dworkin, 1985: 229), which specifies that culture must be viewed as the lense through which each of us evaluates his own experiences and the world around him.

<sup>28</sup> Ricca (2013: 120): every culture develops its semiotic encyclopedias, its imaginary landscape of meanings.

<sup>29</sup> According to De Cupis (1990: 1382), «the interpreter must go further behind the text, as far as he must in order to "get" the individual will».

<sup>30</sup> Ricca (2014: 42-44), presents possible solutions when considering the provisions of inheritance for a Ghanaian woman immigrant resident in Italy, who is driven by the desire to reposition her subjectivity within the regulatory sphere of her "new" country, but also to avoid contravening the moral rules governing the family relationships of her community; she feels at the crossroads of an identity conflict with no easy solution. For the purposes addressed in this paper it is interesting to note that the Ghanaian woman informs the lawyer with whom she converses about her cultural context which could lead to possible misunderstanding. According Ghanaian culture, people and things are not two completely separate and distinct entities. Indeed, some goods are considered "part" of the vital relationship existing between the individual (as such) and the physical body, so that that ideal conjunction continues even when the person has died. And again, the same "person" is understood not as an individual but as a "member" of a family strain. A corollary of this view is that even the members' properties are — in some way — "property" of the group. In light of the prior explanation of *institutio ex re certa*, the simple testamentary provision by a Ghanaian mother (in many groups succession follows matrilineal lines) for one of several children of the family's estate where all the relatives have always lived, under the Italian law could be understood as a universal title, and this could be supported by additional evidence extrinsic to the will. For a discussion on the topic of succession in Ghana, with specific regard to customary rules settled within the local

specifically designed local laws upon the basis of this anthropological assumption<sup>31</sup>. The semantic scope of words and gestures is the result of the context in which they are inserted. Thus, in determining the significance of any signs of communication<sup>32</sup> – words and behaviour – of a person according to his intention, it is necessary to place them within a landscape of so called "silent elements" (*parti mute*)<sup>33</sup>. This is self-evident when particular facts or items are provided with specific meanings determined by religion and/or cultural context.

In this regard, there are those who believe that religion is not primarily a matter of facts but of meanings<sup>34</sup>. From a semiotic point of view, however, such a distinction – for the reasons articulated in the discussion of textuality – is relativised considerably. In any case, customs and cultural or moral precepts dictated by a religious faith can play a decisive role in the interpretation of the best way to negotiate an inquiry into the testator's desires. In determining the testator's intended outcomes, the jurists must rebuild the "imaginary reality", in a sense, as well as the semantic platform of meaning on which the division of the assets is articulated *post mortem*. Only by taking hold of these elements, that appear to be extrinsic to the text of the will, is it possible to understand whether a testamentary provision is intended as an inheritance (*erede*) or as a particular bequest (*legato*). To give a straightforward example, it may be noted that in religious circuits as well as within specific ethnic communities, the value associated with sacred things or the property of ancestors varies significantly. Therefore, when facing these kinds of situations in the interpretation of a will – a typical example offered by the legal system, where the contrast between the internal desire and the declaration of said desire<sup>35</sup> is not clearly resolved with a high prevalence of documented thoughts from the person – the jurist will be called upon to give legal assistance adding to his own juridical knowledge other skills which derive from different disciplines, such as anthropology and semiotics as well as any competences related to religious and moral doctrines.

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tribes concerning the devolution of the estate, sometimes according to patrilineal and other times to matrilineal lines, please refer to Kutsoati-Morck (2012: 1-20).

<sup>31</sup> The close relationship between law and culture relating to a certain population was also highlighted by Thibaut - Savigny (1982) and Lo Castro (1997: 115).

<sup>32</sup> On the matter of the close connection between culture and communication see Fabietti (2010: 24).

<sup>33</sup> The law's silent elements have great social importance as dynamic factors in the law making procedure. We must remember Article 15, Law 218/1995 – the reform of private international law – where it is specified that, «foreign law is applied according to its own canons of interpretation and application at the time», thereby referring to all values that, although implicit, play a key role in interpretation of legal rules.

In this essay the expression "silent elements of the legal discourse" ("*parti mute del diritto*") refers to Ricca's thesis (2013: 94 ff). By presenting issues of interpretation and the enforcement of positive law with respect to foreign people who come from traditions that are very far from the Italian tradition and culture, Ricca deals with the so-called "silent elements" ("*parti mute*") and distances this concept significantly from that of "*diritto muto*" to which Rodolfo Sacco alludes (Sacco: 1994 and Sacco: 2015). For Sacco, "*diritto muto*" is every form of law which is expressed without the use of words but instead through legal acts, such as ceremonies and implementations.

<sup>34</sup> See Smith (2011: 26). Religions have their own value codes and through them they show different ways of understanding reality and the ethical principles of life. A common feature of the majority of religions is that reality is immersed in an inescapable mystery. In Christianity, for example, God, who constitutes the horizon and the goal of all truth and justice, is a mystery. Such a view of life permeates the law of the Church, canon law.

<sup>35</sup> For a high-level reflection on legal theory and the legal concept of manifestation, see Falzea (1975: 442 ff).



Throughout the course of history, religions<sup>36</sup> have contributed decisively towards the creation of the “folk knowledge,” of the population because religions have acted as “agents of the production of meaning.” It may be that in some cases this knowledge has been incorporated into regulatory provisions in an unreflective manner. In other cases it has been indicated by the law through express reference to general clauses. The meaning of general clauses is determined on the basis of non-normative elements. Consequently, it would seem highly desirable, if not essential, that in the interpretation of the will – considered by the law to be closely tied to the most intimate convictions of its author – the jurist “put on the hat” of the historian, of the religious scholar, of the anthropologist, of the semiologist or, alternatively, that he request the support of experts specialised in these fields. The unique skills specific to these disciplines—often overlooked by Italian lawyers – may prove extraordinarily useful in decoding those values expressed or implied by a given culture, especially when this culture is different from that of the legal operators tasked with interpreting the will. It is a requirement that seems to be increasingly inevitable, in an age marked, for demographic reasons, by cultural and religious pluralism, that the law becomes a kind of host for the contemporary challenges of secularism<sup>37</sup>.

### 3. Interlocutory excursions in the general theory of will interpretation

Under Italian law, the will is the juridical tool that more than any other – with the exception of limits set by law for the protection of higher level and more general interests<sup>38</sup> – permits individuals’ freedom of self-determination to express its full potential<sup>39</sup>. Nevertheless, the general principle is that internal desire does not have any bearing on legal validity until it finds external expression through a written statement. Unlike the contract, where the desire expressed by each contractor seeks to

<sup>36</sup> The term “religion” used here is meant to intend an inclusive connotation of diverse cultures. In many world traditions, cultures and religions generate circuits of sense that are nearly impossible to separate. On the contrary, in some places, such as the greater part of Europe, in the public sphere culture and religion are considered to be separate entities facing each other. Similar disparities exist when considering the conceptual categories intended by the term “law”. In fact, “law” does not find exact correspondence in all cultures of the world. For example, Islamic *shari’a*, Chinese *fa* and Indian *dharma*, together with their practical and legal schemes, do not express identical meanings. A precise overlapping between categories is not possible. For this reason, uniformly applying the western concept of law, typical of the universalist essentialist approach, seems wrong.

<sup>37</sup> See in particular Italian Constitutional Court (*Corte Costituzionale*) ruling n. 203 on April 12<sup>th</sup>, 1989, focused on the role of the State with regard to “religious feeling.” For the first time, the existence of the principle of secularism (*laicità*) is formally recognised by defining it as «a supreme principle of the constitutional order». This ruling implies a role for the State in safeguarding religious freedom rather than taking a position of simple indifference to religion; although not explicitly mentioned in the Constitution, support for religious freedom can be found in a comprehensive reading of articles 2, 3, 7, 8, 19 and 20 of the Italian Constitution.

<sup>38</sup> Individual freedom in the execution of the will is very broad. However the testator cannot prejudice the legal protection determined by the law for the members of the family (*legittimari*) pursuant to Article 536, et al., of the Italian Civil Code. According to Italian law, these subjects (spouse, children, and if there are no children, also the parents of the deceased) do not automatically have the right to be named heirs of the testator but they do have a right to receive a certain economic portion of the deceased’s assets. This microsystem of legal protection, designed in the interest of protecting the value of the family as shown by Cicu (1947: 371), is evident in several rules of the Code; for example in Article 457, paragraph 3, and in Article 549).

<sup>39</sup> On the topic of testamentary autonomy, see Giampiccolo (1954), Ferri (1959), Lipari (1970) and Bonilini (1990: 64 ff).

establish trust between the two parties<sup>40</sup>, in the law of succession, individual desire enjoys a position of undisputed leadership and it is the only<sup>41</sup> human desire that must be taken into consideration. As a manifestation of the ability to produce legal effects, the will allows for the self-regulation of private interests to be recognised by the legal system at the same level as patrimonial agreements.

A specific aspect of asymmetry between testament law and contract law is readily apparent with regard to interpretation. While for contracts – and also unilateral acts with financial content pursuant to Article 1324 of the Civil Code – the Italian Civil Code devotes a number of rules in Article 1362 and those following, it seems that there is a lack of corresponding regulation in the laws governing wills. This leads jurisprudence to fill the gap by resorting to the analogy of contracts as compatible, to the extent that the rules dedicated to the interpretation of contracts are applied to the will<sup>42</sup>. What is certain is that the aim of the interpretation of the will is to be true to the deepest wishes of the testator<sup>43</sup>. This process can be more or less complex depending on the case, because it seeks to bring out the meaning of the verbal expressions used by the testator in the text of the will in order to arrange for the devolution of his estate (as well as any other provisions without financial character) with a view to a future time when he will have ceased to live. The challenge is in determining how to best achieve this result. Despite the lack of specific rules on the interpretation of wills, it would be wrong to think that legislators as shrewd as the authors of the Civil Code in 1942 simply forgot or knowingly failed to dictate adequate rules governing the interpretation of wills. In fact, on the basis of both systematic indices and statutory provisions scattered throughout the section on inheritance in the Civil Code (Book II), it can be argued that the presence of the general rule of law impacting issues related to the law of succession implies that the interpreter of the will must, above all, seek to understand and pursue the true intentions of the testator.

Putting aside any analogical reference to rules governing the interpretation of contracts, a review of the legal analyses concerning the interpretation of wills<sup>44</sup> reveals that the search for the true meaning expressed in the testament, according to a lexical-psychological analysis, is without limits, and so it could thus be considered permissible to make use of any element that, although outside the document proper, proves useful to clarify the meaning of the text. From this observation it follows that the contents of the last will and testament must be read using a subjective "magnifying lens," which allows the interpreter to filter the meaning of the words used by the testator in order to derive the true meaning of testamentary allocations; to the extent possible, this would be conducted on the basis of real data, or, in the absence of said data, in a manner nevertheless closely engaged with the testator's personality<sup>45</sup>. From this perspective, it seems reasonable to apply Article 1362 of the Civil

<sup>40</sup> On legal statements containing intentions directed at other parties, refer to Santoro Passarelli (2002: 145 ff).

<sup>41</sup> On this point, see the ruling of the Supreme Court (Cass. Civ. February 21, 2007 n. 4022): the goal of interpretation is to bring the testator's actual intentions to light, by coordinating logic and literal interpretation. See also Cass. Civ. July 11, 1951, n. 1899, where it is stated that the interpretation of the will must establish the true intentions of the testator.

<sup>42</sup> See Tamburino (1992: 476), Criscuoli (1994: 31-32) and Capozzi (2009: 758 ff).

<sup>43</sup> In this sense, see Betti (1960: 367) and Grassetti (1938: 59).

<sup>44</sup> See Baralis (2010: 1003)

<sup>45</sup> See Supreme Court ruling n. 1458/1967 (Cass. Civ. June 20<sup>th</sup> 1967, n. 1458) which states that the wishes of the testator may also be «indirect and implicit in the sense that it is sufficient [...] that in the interpretation, using normal hermeneutical rules, the profile demonstrates, unequivocally, the existence of a certain desire on the part of the testator, in a particularly determined way».

Code by analogy, appropriately calibrated to the context of the law of succession in such a way that the "common intention" articulated in this provision of law is understood to mean the actual and personal wishes of the testator. On this point Antonio Cicu writes that, «in interpreting a will, the task is not to determine a common intention to be investigated; but rather the specific intention of the testator. Upon examination, if it is not possible [...] to reconstruct wishes that have not been expressly written, there is no reason not to take into account any elements external to the text that might clarify the text; there is no reason there is no reason to limit ourselves to a strictly 'objective' analysis»<sup>46</sup>. Another part of the body of legal interpretations<sup>47</sup> dealing with the assessment of intentions of multiple parties in contract agreements through the evaluation of their overall behaviour pursuant to Article 1362, paragraph 2 of the Civil Code, highlights the exceptional nature of the hermeneutical principle that must be used in the interpretation of the will and, comparing it with the unilateral act, makes it clear that only in relation to the latter does it appear impossible to evaluate the situational context but instead only the verbal context. Both Article 1362 and the indices of interpretation found in system of the law of succession confirm that the interpreter is pushed beyond the text to the behaviour, linguistic and non-linguistic, exhibited by the parties over time; in the end it can be stated that interpretation revolves around the principle of ultra-literalism.

The written text of the will, therefore, proves necessary but not sufficient. This means that behaviour is a *means* for interpretation and not the final object of interpretation. In other words, «interpretation consists in exploring the common intention of the parties as well as the resulting total verbal perimeter that includes both the words used and the overall demeanor held by the parties, i.e., the situational context»<sup>48</sup>. The verbal context is more than the words, but that does not mean that it goes beyond the linguistic text<sup>49</sup>; and it could not be otherwise because the text is still the object of interpretation. The attitudes before and after the signing of the contract, regarded as a source of the common intentions of the negotiating parties, are to be compared with the language used in the text of the contract so as to guide the selection of meanings objectively attributable to it. The language of the text adopted by the parties (or by the individual, in the case of a unilateral act like the will) are, and remain, the object of interpretation, the borders within which the content of the agreement must be verified.

In light of the considerations elucidated thus far, it seems plausible to say that to ascribe a specific meaning to a word, a phrase, or a complete testament, apart from the fact that the individual elements of the will must be considered as parts of a whole, one cannot fail to take into account factors external to the text itself such as the linguistic semantics and syntax of the language used by the testator, as well as his culture, mentality, environment, and the practical motives and concerns that have guided his actions. That said, it should nevertheless be recalled that the use of extra-textual means to clarify the true intent of the testator and to shape the testamentary statement are not limitless, and the boundary is their consistency with the text, such that the principles that inform inheritance law are always respected.

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<sup>46</sup> Cicu's expression (1947:371).

<sup>47</sup> See Irti (1996: 136).

<sup>48</sup> With this explanation, Irti (1996:2).

<sup>49</sup> The importance of interpreting the text in the light of external factors which create a sort of context is expressed by Mengoni (1992:318).

#### 4. Rethinking the jurisprudential cultural standards used in the interpretation of wills

The consolidated position adopted by the Italian Supreme Court (*Corte di Cassazione*) over the years with regard to the interpretation of the will would seem favourable to the thesis that our legislation provides the necessary conditions for reading legal experience from an intercultural perspective. Following a wave of established case law begun even before the 1950s, the Court<sup>50</sup> points out that when interpreting a will, the testator's wishes must be identified on the basis of their global testamentary context, also availing of extrinsic factors such as the customs, mentality, and living environment of the testator: in a word, the "culture" of the deceased. The core of the ruling was based on a violation and misapplication of Articles 588 and 1362 of the Civil Code.

The High Court, recalling its several previous rulings on the same issue of the interpretation of the will, highlights two primary aspects which deserve specific and further study. First, the Court noted that the interpretation of the wishes of the testator as expressed in the will is to be carried out through a "finding of facts" reserved for the lower tribunals (*giudice di merito*, that is, the *Tribunale*, and *Corte d'Appello*, the Court of Appeals), which therefore are not liable to censure or to modifications by the Supreme Court (also referred to as, *giudice di legittimità*). The Tribunal, also using the rules laid down in articles 1362-1365 of the Civil Code – which, although written for the management of contracts are considered to be an expression of general principles also applicable to wills – is called upon to reconstruct the intention of the deceased through the evaluation of those elements he considers to be reasonable<sup>51</sup>. Second, the Court reaffirmed that «the interpretation of the will differs substantially from that of contracts because it is characterised by a more penetrating search to understand the wishes of the testator, beyond what is stated in the text, and must be identified on the basis of a comprehensive analysis of the document, resolving any eventual doubts with the aid of elements extrinsic to the testament such as the culture, mentality, and living environment of the testator. Through such an operation, the Court may ascribe a different meaning to the text with respect to the literal words used by the testator if the overall evaluation of the will shows that they have been used in a sense that differs from the usual (as long as it is not contrary and antithetical), and lends itself to express in a more adequate and consistent way the true intentions of the deceased»<sup>52</sup>.

The case law aforementioned is salient to the topic at hand because it emphasises the importance of culture in the interpretation of the will. However, this jurisprudence cannot be considered to be fully in line with the approach suggested in this essay. In fact, it serves as an example of treating culture as a subsidiary means of interpretation. In other words, from this judgment, as well as from the previous decisions associated with this topic, a particular point of view emerges – justified by the fear of compromising the formalism typical of succession law – that culture, mentality, and the life environment of the testator must be classified as extrinsic elements which the interpreter may address only if there are reasonable doubts about the meaning of the words in the text of the will. To shift

<sup>50</sup> For recent judgments on the topic, see ruling Cass. Civ. II, October 25<sup>th</sup>, 2013 n. 24163 and Cass. Civ. II, May 30<sup>th</sup>, 2014 n. 12242.

<sup>51</sup> In this sense see, among others, ruling Cass. Civ. January 14<sup>th</sup>, 2010 n. 468, and Cass. Civ. April 17<sup>th</sup>, 2001 n. 5604.

<sup>52</sup> In this sense see, among others, ruling Cass. Civ. December 20<sup>th</sup>, 2011 n. 27773; Cass. Civ. December 3<sup>rd</sup>, 2010 n. 24637; Cass. Civ. September 29<sup>th</sup>, 2000 n. 12950; Cass. Civ. March 15<sup>th</sup>, 1990 n. 2107.

this approach in the opposite direction, and to coordinate it with the today's socio-demographic reality, we can benefit from a contextualised analysis of the expressions used by the Court in legal cases characterised by the demand for interpretation of the will in the light of elements external to the testamentary dispositions.

To date, and in the legal cases cited above, when the Supreme Court has been involved in dealing with issues of a testator's culture, mentality, or living environment, it certainly has not confronted the striking diversity of cultures and religions which manifest in today's multi-ethnic and multi-religious society. Indeed, it is extremely likely that the Court intended to anchor itself to a complex of knowledge gained from common culture and shaped by different anthropological-religious traditions within the national territory. It is equally possible that at times the judges may have also used the concept of culture to refer to the degree of literacy and the social condition of the subject, because, inevitably, these circumstances impact the meaning of the words chosen for the testament. At least within the common language, certified over time and through space, the words of a language system show that it tends to remain stable when shared by a given group of people belonging to an equally delimited area or social community. To clarify this point, it is necessary to go further, and to rely on the historical memory of rural environments. Here, in the countryside and mountain areas – more than in other parts of the country and specifically, cities – the sense of community proves to be more intense, and people seem to experience this feeling more than elsewhere, with the result that the very meaning of words is embedded with local coordinates of sense. Dialects can provide another reference. These ways of communicating, like any language, presuppose a landscape of silent elements necessary to an understanding of what is expressed. Consequently, the ethnographic experience that in the past was understood in the context of the differing geographical areas of the country – naturally in a more conspicuous way than today, given the proximity in time to a pre-unification Italy – was likely to be quite clear to the Supreme Court when it had to rule for the first time on the issue of the interpretation of the will.

All of the above suggests a return to a point already highlighted in the opening of the essay. This operation must now be done by using an intercultural perspective that is able to reveal previously hidden additional potential. The reading of legal documents and of deeds related to them outside of their proper context does not constitute “interpretation” but rather an arbitrary creation of sense obtained by attributing meaning that may be different or even opposite to that intended by its author. In this regard, it may be noted that meaning is not coextensive with language and words are not self-sufficient with respect to their sense, because the meaning of words depends on a whole universe of semiotic reference. In the words of Benedetto Croce, «the word no longer has meaning, or a determined meaning, if we disregard the circumstances, the overtones, and the emphasis of gesture with which it was conceived and pronounced»<sup>53</sup>. As a container of “words”, the “text,” the testament, can only be interpreted with the objective of investigating any meaning not already made evident by the objective symbols used, but also including all the circumstances in which the document was created, assessing at the same time the process of drafting and deliberating through which individual freedom of negotiation is obtained and ultimately made explicit<sup>54</sup>.

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<sup>53</sup> These are the words used by Croce (1947: 72).

<sup>54</sup> See Schlesinger (1964: 1349). The author, making it clear that the first thought summarised above refers generally to any process of the creation of consensus, noted in particular that the legal assessment of the attitude ascribed to a person

In terms of proposals, then, in the drafting of a will – which, ultimately, is the other side of the coin of its interpretation – cultural difference finds a place and gains a decisive role in the regulation of the succession of a person belonging to a different culture because it translates the culturally or religiously connoted values of the testator. Since these aspects are intrinsic to personal identity, the legal system must listen to them, at least to the extent that they are attributable to the concept of human rights as laid out in the Italian Constitution. A similar result could also be pursued in the case of wills drafted by people of other cultures, if only the jurist, in the guise of a translator, attempted to consider the conceptual schemes of others when reviewing wills. The goal is to effectively transpose a particular meaning within different contexts.

The overlap between different cultural groups, and more generally between cultures, always gives rise to transformation. Somehow, it generates a settlement process, similar to the creation of metaphor, developing new categories entirely distinct from those initially articulated by the social actors of differing cultural backgrounds. That metaphorical transaction, though it simultaneously indicates both the acquisition and the loss of something – as in all translations – may arrive at a pluralistically inclusive solution.

At this point it seems necessary to review some legal cases so as to test the practical implications of the reasoning elaborated thus far. We might, in the first instance, ask whether the testament of a Chinese, Russian, Arab, or South American person resident in Italy for a long period and with established interests and family, presents anomalies to the typical process of drafting a will, and, if so, what these might be. Should these wills perhaps be assessed differently than the wills of other Italian citizens? A similar question could be formulated with regard to the faith professed by the testator. Does religion, especially in the case of non-Catholic faith, play a role in the drafting and interpretation of the will?

The proposed questions, as often happens, cannot be simply answered. Yet it is possible to formulate some hypotheses – based on observed professional situations – elaborated in the context of applicable normative data and characteristics of the law and of the cultural education often seen in the average migrant.

Let us consider a first case. Imagine a Muslim man (Italian or foreign-born, it doesn't matter), a widower and the father of two children, a boy and a girl. This family, perfectly integrated into Italian society, may have an interest in planning the allocation of property assets (should the father pass away) to benefit the children, in a manner that does not infringe on either the legal protection provided by the Italian legal system for the children<sup>55</sup> – including equal treatment for each child – or the (legal) Islamic tradition in which the male of the family enjoys a prominent position. In actual

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involved in a specific negotiation changes in the context of the will, as well as generally in all unilateral acts, where it finds the maximum breadth.

<sup>55</sup> The reference is to the rights that the law reserves to the “*legittimari*” who are not necessarily legal heirs. On this topic see Mengoni (2000). More generally, in the Italian system under the principle of equality laid down in Article 3 of the Constitution, there can be no distinction on the basis of sex. Also, now, there may be no discrimination on the sole ground that the child was born to unmarried parents. The equalisation of the status of the child before the parent was for some time already underscored by the intervention of the Constitutional Court. However, the full equalisation as compared to the entire family of the parent was obtained only recently as a result of the reform of filiation, implemented by ruling n. 219, December 10, 2012, and the Law 154/2013 on December 28<sup>th</sup> 2013, which newly transformed the definition of relationship defined in Article 74 c.c..



fact, the seeming inequality in the Islamic tradition is misleading because the situation is balanced by the male heir's role as a "head of household", which places upon him the responsibility and corresponding obligation to guarantee that respect is paid to all members of the family circle. This is supported by the Islamic law provision requiring the husband to provide for his spouse in the form of a *mahr*.

The *mahr*, a fundamental element of Islamic marriage, represents a guarantee for the wife (right to support) for livelihood or maintenance in the form of a legal obligation on the part of the male spouse to the female spouse. It consists of a mandatory payment, in the form of money or possessions provided by the groom, or the groom's father, to the bride at the time of marriage. These goods legally become her property.<sup>56</sup> Given that the economic responsibility for the *mahr* typically applies to the husband's family of origin, this obligation, even if it concerns the legal position of the testator's child, could be a decisive factor in drafting the Muslim father's testament, who might wish to allocate his properties in a manner that respects both his religious/cultural tradition and the Italian legal system. If the Muslim father wished to provide his son with the means to set up the *mahr* for his own future wife, he could certainly make use of the Italian legal provision for donations related to marriage, referred to as "*donazione obnuziale*".

Apart from the legal qualification of the contribution<sup>57</sup>, governed by article 785 of the Civil Code, this legal transaction is completed at the moment in which the donor gives the gift to one or both spouses (or those to be married, if they are not yet married) without requiring that they accept such a gift. Its legal effects, however, are not produced until the wedding is celebrated (*condicio facti sospensiva*) so that if the marriage does not occur, the offering will remain ineffective and the inheritance will not be realised.

More questionable, on the contrary, is the possibility of achieving the same results with the will. The admissibility of a will with effects equivalent to those of the "*donazione obnuziale*" based on the same assumptions, in fact, requires the successful completion of a comprehensive assessment of the case – not without conflicts of interpretation – assuring that it pertains to the legal category under conditions that can be applied to testamentary allocations. In particular, what concerns us here is whether the testamentary provisions subordinate to the celebration of marriage should be regarded as lawful and, as such, admissible. In order to verify the legality of this condition, the interpreter cannot limit his judgment to the conclusion of the event (the celebration of the wedding), but must also assess the intention of the testator. As reported earlier, the issue was repeatedly put under the magnifying glass of the Court (*Corte di Cassazione*), which has taken a position on testamentary conditions with regard to prohibitions of marriage. Substantially, the Supreme Court has ruled that a testator cannot make a bequest dependent upon whether the recipient marries, doesn't marry, or marries/doesn't marry a particular person. Relating to the condition of not getting married in order to receive a given allocation, the illegality is certain. According to Article 636, first paragraph, of the Civil Code, «the condition that prevents a first or subsequent marriage is unlawful». The Supreme

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<sup>56</sup> It is, however, a reading that is not always supported by current uses in Muslim communities. For an operating framework of the legal nature and discipline of *mahr*, see Spencer (2011: 1-20).

<sup>57</sup> For an introduction to *donazione obnuziale*, see Capozzi (2009: 1614 ff.).

Court took a restrictive approach in this case<sup>58</sup> and thus on the illegality of every form of conditioning, more or less intense (even when placed in the interests of the same hereditary beneficiary), because such conditioning eventually results in personal assessments of the character of the beneficiary, which are precisely those impacting his exercise of freedom. This, however, did not prevent the High Court from subsequently changing its point of view on this issue, showing signs of openness in cases in which the testamentary review showed that the testator's intention was not to charge to the beneficiary with an intolerable psychic limitation. Here, then, we see that nearly thirty years ago the Court admitted the possible legitimacy of specific cases of marital conditions including: (i) the condition to marry, (ii) the condition to not marry, or (iii) the condition to marry/not marry a certain person<sup>59</sup>, or to marry a person of the same social class<sup>60</sup>. The judgment granted permission to a testamentary condition to marry, however, recently the High Court has overruled this opinion and censured it sharply<sup>61</sup>. The Court, wanting to refute the legality of imposing a testamentary condition to marry – the same motive behind the wedding gift (*donazione obnuziale*) Art. 785 c.c. – stated that the testamentary condition to marry cannot be treated in the same manner as the *donazione obnuziale*. This is because the latter refers to a particular future marriage according to which both spouses are identified by the document. Furthermore, the *donazione obnuziale* aims to satisfy a choice already made by the spouses<sup>62</sup>. The Supreme Court in particular has argued the illegality of a testamentary condition of marriage derived from Article 634 and not from Article 636 of the Civil Code because it contrasts with the general principle of imperative rules (*norme imperative*) and public order (*ordine pubblico*). In fact, the aforementioned condition limits the individual's freedom in relation to fundamental life choices in which his personality is expressed, in accordance with Article 2 of the Italian Constitution<sup>63</sup>. The rigidity demonstrated most recently by the Supreme Court is certainly due to the persuasiveness of the rulings of the Constitutional Court (*Corte Costituzionale*) which, in fact, does mention these rulings in the body of the judgment last cited. On several occasions the Constitutional Court has established the principle that the marriage bond is, and must remain, the result of an autonomous choice as regards the rights inherent and essential for the human person and his fundamental values; therefore, it is exempt from any form of conditioning,

<sup>58</sup> About this jurisprudential line, see ruling Cass. Civ., May 30<sup>th</sup>, 1953, n. 1633; Cass. Civ., June 24<sup>th</sup>, 1959, n. 1990; Cass. Civ., January 11<sup>th</sup>, 1986, n. 102; Cass. Civ., February 21<sup>th</sup>, 1992, n. 2122.

<sup>59</sup> See ruling Cass. Civ. 150/1985. The prohibition, in this case, would be permissible and therefore safe as relative and not absolute as already assuming art. 636 c.c.

<sup>60</sup> See ruling Cass. Civ. 102/2986.

<sup>61</sup> See ruling Cass. Civ., April 15<sup>th</sup> 2009, n. 8941 and Genovesi (2010: 935-940).

<sup>62</sup> Ruling Cass. Civ., April 15<sup>th</sup> 2009, n. 8941.

<sup>63</sup> Articles 2 and 29 of the Italian Constitution would prevent any person from obliging another person to marry as a testamentary condition. The Court, however, recalls that the inviolability of the freedom of matrimonial self-determination is also reflected in Article 16 of the Universal Declaration of Human Rights of 1948, Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which became effective for Italy by Law 848/1955 on August 4<sup>th</sup>, 1955, and now also via Article 9 of the Charter of Fundamental Rights of the European Union. The Supreme Court also stated that even if it is determined that no coercion of the beneficiary of the bequest has taken place, it is not enough to claim the beneficiary's freedom to accept heredity or to renounce the particular prevision (*legato*) as sufficient protection; testamentary attempts at coercion of beneficiaries with regard to personal freedom cannot be tolerated under any circumstances.

even indirectly applied<sup>64</sup>. In conclusion on this point, the Supreme Court considers that the coercion of the wishes of the beneficiary, even if only indirect, impugns upon the dignity of the individual. The Court stated, «the condition, affixed to a testamentary disposition, which makes the effectiveness of the testamentary allocation subordinate to the celebration of the beneficiary's wedding—under the provisions of Article 634 of the Civil Code—is contrary to the specific individual right to marry, provided by Articles 2 and 29 of the Italian Constitution. Consequently, this type of testamentary condition regarding marriage is not taken into consideration unless it is found to be the only reason for the testator's allocation, in which case the allocation becomes invalid»<sup>65</sup>.

The new course of the Court's ruling on legitimacy, although it merits due attention and consideration, does not seem entirely acceptable for two reasons. First, in light of the circumstances of the specific case, and taking into consideration the wishes of the testator, the testamentary condition of contracting a marriage could overlap with the *donazione obnuziale*—already established under similar circumstances by the legislature, and therefore legitimate—the selfsame ratio that is used to determine an enhanced allocation in the event of marriage. Both the preceding condition to marry and the *donazione obnuziale* can be useful tools to facilitate the marriage of two persons who, individually, have already determined their own convictions on a choice that touches upon a fundamental freedom: both are liberal powers related to a marriage not yet celebrated and therefore, as such, both have an impact on the fundamental freedom of self-determination in family life. There is no reason, then, to preclude the a priori use in testaments of the condition concerning the celebration of a marriage, provided that such event remains undefined (and, in the example shown, the male child will be free to marry whomever he likes) or in the event that a determined long term relationship should lead to the creation of a family. In these situations, any encroachment in the sphere of the individual beneficiary on the part of the testator should always be ruled inappropriate. Second, the condition of eligibility to marry may find support also in the comparison of the structure of the two legal figures. It is not clear why the *donazione obnuziale*, which is a unilateral act, valid even without the acceptance of the couple, should be immediately valid and take effect as a result of the occurrence of an event originating from the exercise of the fundamental right to marry, while the testamentary disposition conditioned to the wedding is always illicit *a priori*. Nonetheless, the judges of legitimacy hit the mark when they identified the source of possible conflict as being between the conditions of marriage and the general clause of public order, rather than with the prohibition of Article 636 of the Civil Code.

Based on these assumptions, the Muslim father might be advised to appoint his children as legal heirs with equal shares, and then to give the son another testamentary provision with a particular asset ("*prelegato*") that is subject to the condition of the celebration of his wedding. As seen, such a testamentary disposition could be sanctioned for possible illegality of the condition. However, the contrast is only apparent, because the true intention which led the individual to establish the condition in question must be specifically assessed. It is important to understand whether he has merely carried out the effects of the allocation to allow for (free) choice by the beneficiary that he might exercise a fundamental freedom (to form a family), or if he intended to "impose" a condition

<sup>64</sup> See rulings of the Constitutional Court n. 1/1992, n. 450/1991 e n. 189/1991.

<sup>65</sup> See ruling Cass. Civ., 15<sup>th</sup>, April, 2009, n. 8941. The new jurisprudential line on this topic accepts the position of a part of the Italian doctrine. In this regard, see Di Mauro (1995: 94).

upon him. In this sense, the action would have to be qualified as one whose intended purpose was to coerce the recipient, in which case the action cannot escape censure as per Article 634 of the Civil Code. In the case that the testator simply wanted to pander or show favour to a recipient (this is the case foreshadowed here) based on a previously established relationship, the use of the condition, it is believed, should not be qualified as unlawful.

The intercultural legal approach allows the legal operator to fully understand the religious-cultural reasons behind the Muslim father's wishes and on the basis of these, it could be useful to assess the legality of this kind of compliance. The *mahr* is a transaction that occurs upon the successful completion of the marriage. At the same time, however, it is a constitutive act which is thus essential. By putting it into place, the husband fulfils his obligation to provide adequate property in support of his wife. For this reason, in the absence of a *mahr*, the marriage is not consummated and the agreement of the engaged couple remains without effects. At this point, assuming that the son does not have personal property (as long as he is part of the family of origin, the assets belong to the nuclear family through the head of the family), and the decision to marry has already been made freely by him, a testamentary provision as "*prelegato*" subject to the condition to marry would give greater economic entitlement to the male. This, according to Islamic tradition, would allow the person to carry out his plan for married life. At the same time, the cultural-identitarian conflict of the Muslim father would be resolved because he will have bequeathed his estate to the children equally, subject to the possibility of the marriage of the male. In the unique case of the non-celebration of marriage, in fact, the additional assets allotted to the male would return to the common ownership of all siblings and would be divided once again into equal shares.

In conclusion, it cannot be denied that given the current state of case law in this matter, the dependence of the testamentary allocation upon the consummation of marriage does not protect the testator from risk. The legal orientation which seems most appropriate to follow professionally implies moving away from the aforesaid testamentary condition, which has been deemed illegal. Hence the inclination, despite what has been expressed above, to favour a solution, of greater caution which nevertheless obtains the same result for succession planning by means of a *donazione obnuziale*. An alternative for the Muslim father could be the establishment of a specific form of allocation (*atto di destinazione*), similar to a trust, through a public testament under Article 2645-ter of the Civil Code<sup>66</sup> in pursuit of the same interest, certainly worthy of protection as well as intended for the purpose of sustaining the daughter-in-law (beneficiary) and fulfilling a moral duty, which is itself an expression of the constitutionally guaranteed right of religious freedom.

The theoretical issues illustrated thus far, in other areas and for different interests, could prove valuable to imagining the use of intercultural law within the legal system as concerns the allocation of assets for a particular purpose of social utility. To this end, referencing Islamic tradition, we could envisage the creation of a testamentary foundation, or the establishment of the aforementioned constraints of allocation (*atto di destinazione*) under Article. 2645-ter of the Civil Code with the objective of introducing a *waqf*<sup>67</sup>. The same result could be achieved also by means of a testamentary provision with compulsory fees imposed on the heirs or on the beneficiaries of particular

<sup>66</sup> For an introduction to the main problems raised from this legal situation, see Bianca - D'Errico - De Donato - Priore (2006).

<sup>67</sup> About *waqf* see Abbassi (2012: 121-153).

testamentary provisions (*sublegato*). But unlike in the previous case, here the wishes of the testator would not be sufficient to produce the imagined effect since the cooperation of the obliged party would be required.

Let us examine a second case. Remaining within the category of the possible ways religious interests can emerge in the will, intercultural law allows us to highlight the suitability of certain provisions of our legislation to obtain a simultaneously constitutional and intercultural interpretation. An example can be found in the provisions of Article 629 of the Civil Code which, in fact, could take on the same meaning assigned to it by the legal system, although with reference to non-Catholic faiths. This provision, that clearly refers to the sums of money left by the deceased to fund the celebration of Holy Mass for the repose of his soul, must be read in concordance with Article 628 of the Civil Code where the necessary determination or determinability of the recipient's testamentary provisions is captured. As has been well highlighted by careful legal analysis<sup>68</sup>, here the law protects, on the one hand, respect for the testator's last wishes, and on the other, the religious beliefs of the settlor such that they should be understood as different by virtue of religious pluralism underpinning the system of guarantees for religious freedom in conformity with the combined provisions of Articles 8, paragraphs 1<sup>st</sup> and 3<sup>rd</sup>, and Article 19 of the Italian Constitution.

Now we turn to a third case. The intercultural approach might also be useful when applied to the many non-economic provisions that the law allows the last will and testament to cover, including not only the validity of those provisions which are not expressly provided for (called "typical") but also, according to the prevailing legal thinking on the subject, whose most illustrious scholar is Giampiccolo<sup>69</sup>, those which are not specified by law ("atypical") even in cases where the text of the will does not include other (economic) provisions. Among these are included provisions regarding the funeral and the treatment and final destination of the body (including cremation and the dispersion of ashes, if desired), burial (*ius sepulchri*), the post-mortem publication of new works or private correspondence, and so many others, because all these issues must be dealt with following a careful assessment of how best to comply with the perception of the body and its coextensive objects, with respect to the culture of the deceased.

Finally, within the discourse on testamentary technique a general observation may be of use. Among the relevant elements useful to construct the testamentary will with regard to the testator's culture and religion, we can of course make use of various elements of legal transaction: the condition (*condizione*)<sup>70</sup>, the duration (*termine*), and the obligation (*onere* or *modus*). This last institution in particular, indicates the legal device predisposed to translate, in juridical terms, the reasons that support the regulation desired by an individual who engages in an act of private autonomy, even if it is a gift.

## 5. Conclusions

The cultural component can profitably guide the selection of possible and legally relevant meanings, by means of a necessary, and perhaps even indispensable reference to the sense sedimented into "cultures," also identifiable as encyclopaedias of knowledge and practices. In the field of private law,

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<sup>68</sup> Fuccillo (2005: 116 ff).

<sup>69</sup> Giampiccolo (1954: 12 ff).

<sup>70</sup> It has been extensively discussed above with reference to the condition of marriage.

this result demonstrates its importance in two key ways, which can be seen as two sides of the same coin. On one side, understanding an individual's wishes within legal acts – in order to guide the negotiating process with a creative use of rights – and on the other side, interpreting the declaration of intention expressed by the testator, metaphorically empowered by the force of the law.

The so-called “extrinsic” elements with respect to the testamentary document should be used for subjective interpretation even when the text is clear<sup>71</sup>. The textual component of culture – even if not explicitly inscribed in the will – revolves around the manner of expression of the testator and draws on his knowledge, enriching it. Investigating the cultural dimension, thus, means recovering, in some way, the roots of his desires. Despite the fact that a hermeneutic operation should always start from written evidence – the will – the text can only be read in the light of the author's culture, according to its anthropological dimensions. In fact, culture – understood here in its broadest sense and, therefore, including specific religious articulations – is the source and operator, producing texts that acquire value and function upon its background of meanings. As far as the “heir function” of a given recipient of benefits, pursuant to Article 588, paragraph one, of the Civil Code, «testamentary provisions, *no matter what expressions are used by the testator*<sup>72</sup>, are universal, and they bestow heir status whether they concern universality or a specific share of the assets of the testator (...); this applies to the legal figure of *institutio ex re certa* (as determined by paragraph two of the same Article) as well.

The literal meaning of a word is the meaning it is given by the language used. Yet even if language is the clearest embodiment of culture, it is certainly not the only one. Culture not only generates the meanings of terms that are part of its lexical dictionary, it also creates the cognitive background essential for people to exchange understanding and to summon words to their minds with connected meanings. Words have a social visibility to the extent that they are shared by a given community of people: they host a plurality of general or particular codes of content which are traceable with a greater or lesser degree of visibility; they represent the historical deposit of a social community whose cultural experience is consolidated in the objectivity of a language. Because texts are formal filters through which social groups access a system of sense that by definition precedes them, using semiotic-cultural analysis it is possible to re-build the textual network, sometimes bringing it to light – when hidden – sometimes making it explicit it when it is implicit and unconscious<sup>73</sup>.

Moreover, even religion, understood as a moral guide for the conduct of those who choose to follow the precepts and teachings of a creed, acquires a special significance in juridical contexts as well as in its interpretation by the law as a circumstance that exists “prior” to the law. In light of this

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<sup>71</sup> The Supreme Court (Cass. Civ. on July 11<sup>th</sup>, 1951, n. 1889) in an important ruling has stated that «interpretation of the will must be focused on the intention of the testator foremost in the literal meaning of the written text, returning to *mens testantis*, i.e., the subject's personal views». A sole ruling issued by the Supreme Court (Cass. Civ. 7<sup>th</sup> May 1955, n. 1306) has remained without response, in which it was stated that in interpreting the testator's wishes, «when the words of the will are absolutely clear, such that there is no question as to their meaning, it is not permissible to consult external elements [for interpretation]».

<sup>72</sup> While the expressions used by the testator are not decisive for the legal classification of testamentary provisions, it is also true – as highlighted in this essay – that an understanding of the words contained in the will cannot be separated from the culture of the person who conceived of them.

<sup>73</sup> See Marrone (2010: 41). The same author page 70 chooses the figure of the archaeologist to explain metaphorically the activity of interpretation. Archaeologists from small fragments of objects gradually reconstruct a whole age and a culture, also analyzing the texts, which document a survey of socio-semiotics.



conception, and heeding the admonishment given by an eminent Italian scholar of law and religion<sup>74</sup>, it seems plausible to conclude that when reading a will, it cannot be seen as a simple declaration of intent but rather as an act performed in contemplation of death. Understanding its meaning requires paying heed to the author's cultural resources as well as the characteristics of the community to which he belongs, including the ethical and religious values of he who imagines the world after his last exit from the stage of life.

### Bibliography

- Abbassi Z., *The Classical Islamic Law of Waqf: a concise introduction*, in *Arab Law Quarterly*, 2012, 26, pp. 121-153.
- Baralis G., *L'interpretazione del testamento*, in *Trattato breve delle Successioni e Donazioni*, I, P. Rescigno, Cedam, Padova, 2010, p. 1002 ff.
- Betti E., *Teoria generale del negozio giuridico*, in *Trattato di Diritto Civile Italiano*, F. Vassalli, Utet, Torino, 1960.
- Bianca M. - D'Errico M. - De Donato A. - Priore C., *L'atto notarile di destinazione. L'art. 2645 ter del codice civile*, Milano, Giuffrè, 2006.
- Bigliazzi Geri L., *Successioni*, in *Trattato di diritto privato*, P. Rescigno, Utet, Torino, 1982.
- Bobbio N., *L'età dei diritti*, Einaudi, Torino, 1997.
- Bonilini G., *Autonomia testamentaria e legato. I legati così detti atipici*, Giuffrè, Milano, 1990, p. 64 ff.
- Capozzi G., *Successioni e Donazioni*, I, Giuffrè, Milano, 2009, p. 758 ss.
- Cicu A., *Testamento*, Milano, 1947.
- Criscuoli G., voce *Testamento*, in *Enciclopedia Giuridica*, XXXI, Treccani, Roma, 1994, pp. 31-32.
- Croce B., *Logica*, Laterza, Bari, 1947.
- De Cupis, voce *Successione testamentaria*, in *Enciclopedia del Diritto*, XLIII, Giuffrè, Milano, 1990.
- Dieni E., *Symbol/Diabolon. Simboli e tensione "simbolica" nel testo del codice canonico latino*, in E. Dieni-A.Ferrari-V.Pacillo, *Symbol/Diabolon. Simboli, religioni, diritti nell'Europa multiculturale*, Il Mulino, Bologna, 2005.
- Di Fabio M., *Manuale di notariato*, Giuffrè, Milano, 2007.
- Di Mauro N., *Condizioni illecite e testamento*, ESI, Napoli, 1995, p. 94.
- Dworkin R., *A Matter of Principle*, Cambridge University Press, Cambridge, 1985.
- Eco U., *Trattato di semiotica generale*, Bompiani, Milano, 1975.
- Fabietti U., *Culture in bilico*, Bruno Mondadori, Milano-Torino, 2011.
- Fabietti U., *Elementi di antropologia culturale*, Mondadori Università, Milano, 2010.
- Falzea A., voce *Manifestazione (teoria generale)*, in *Enciclopedia del Diritto*, XXV, Giuffrè, Milano, 1975, p. 442 ff.
- Ferri L., *L'autonomia privata*, Giuffrè, Milano, 1959.
- Finocchiaro F., *Art. 19*, in *Rapporti Civili. Commentario della Costituzione*, G. Branca, Zanichelli, Bologna-Roma, 1977.
- Fuccillo A., *L'attuazione privatistica della libertà religiosa*, Jovene, Napoli, 2005, p. 116 ff.

<sup>74</sup> C. A. Jemolo, *Gli occhiali del giurista*, Padova, 1970, p. 322.

- Genovesi G, *Libero di non (ri)sposarsi: la Cassazione sulla condizione testamentaria di contrarre matrimonio*, in *Corriere giuridico*, 7/2010, p. 935 ff.
- Giampiccolo G., *Il contenuto atipico del testamento. Contributo ad una teoria dell'atto di ultima volontà*, Giuffrè, Milano, 1954.
- Grassetti C., *L'interpretazione del negozio giuridico con particolare riguardo ai contratti*, Cedam, Padova, 1938.
- Guastini R., *L'interpretazione dei documenti normativi*, in *Trattato di diritto civile e commerciale*, A. Cicu-F. Messineo-L. Mengoni and continued by P. Schlesinger, Giuffrè, Milano, 2005.
- Irti N., *Testo e contesto. Una lettura dell'art. 1362 c.c.*, Cedam, Padova, 1996.
- Jemolo A.C., *Gli occhiali del giurista*, Cedam, Padova, 1970.
- Lipari N., *Autonomia privata e testamento*, Giuffrè, Milano, 1970.
- Lo Castro G., *Il Mistero del Diritto. Del diritto e della sua conoscenza*, Giappichelli, Torino, 1997.
- Kutsoati E. - Morck R., Family ties, inheritance rights and successful poverty alleviation: evidence from Ghana, at [www.nber.org](http://www.nber.org), 2012, pp. 1-20.
- Magni C., *Teoria del diritto ecclesiastico civile*, Cedam, Padova, 1952, p. 24 ff.
- Marrone G., *L'invenzione del testo*, Laterza, Roma-Bari, 2010.
- Maoz A., *La luna e la maimonide. La tradizione giuridica ebraica tra simboli naturali, ermeneutica dei comandi divini e kabbalah*, in AA.VV., *Symbol/Diabolon. Simboli, religioni, diritti nell'Europa multiculturale*, E. Dieni-A.Ferrari-V.Pacillo, Il Mulino, Bologna, 2005.
- Mengoni L., *Interpretazione del negozio e teoria del linguaggio*, in AA.VV., *Il contratto – Silloge in onore di G. Oppo*, I, Cedam, Padova, 1992, p. 318 ff.
- Mengoni L., *Successioni per causa di morte. Parte speciale. Successione necessaria.*, IV edizione, in *Trattato di diritto civile e commerciale*, diretto da A. Cicu - F. Messineo, L. Mengoni, Giuffrè, Milano, 2000.
- Santoro Passarelli F., *Dottrine generali del diritto civile*, Jovene, Napoli, IX edizione, 2002.
- Rastier F., voce *Interpretazione*, in *Dizionario di scienze cognitive*, Editori riuniti, Roma, 2000.
- Rescigno P., *Interpretazione del testamento*, Jovene, Napoli, 1952.
- Pugliatti S., voce *Conoscenza*, in *Enciclopedia del Diritto*, IX, Giuffrè, Milano, 1961, pagg. 45 ff.
- Ricca M., Art. 19, in *Commentario alla Costituzione*, R.Bifulco-A.Celotto-M.Olivetti, Utet, Torino, 2008.
- Ricca M., *Culture interdette*, Bollati Boringhieri, Torino, 2013.
- Ricca M., *Intercultural Law, Interdisciplinary Outlines: Lawyering and Anthropological Expertise in Migration Cases: Before the Courts*, in [www.ec-aiss.it](http://www.ec-aiss.it), 2014, pp. 42-44.
- Ricca M., *Oltre Babele. Codici per una democrazia interculturale*, Dedalo, Bari, 2008, p. 241 ff.
- Sacco R., *Il diritto muto*, in *Scintillae iuris. Studi in memoria di Gino Gorla*, Giuffrè, Milano, 1994.
- Sacco R., *Il diritto muto. Neuroscienze, conoscenza tacita, valori condivisi*, Il Mulino, Bologna, 2015.
- Schlesinger P., *Complessità del procedimento di formazione del consenso e unità del negozio contrattuale*, in *Rivista di diritto e procedura civile*, 2/1964, p. 1349 ff.
- Smith H., *Le religioni del mondo*, Campo dei Fiori, Roma, 2011.
- Spencer K., *Mahr as contract: Internal pluralism and External perspectives*, in *Oñati socio-Legal series*, Vol. 1 n. 2, 2011, pp. 1-20.
- Tamburino G., voce *Testamento*, in *Enciclopedia del Diritto*, XLIV, Giuffrè, Milano, 1992, pag. 476
- Thibaut A.F.J. - Savigny F.C., *La polemica sulla codificazione*, G. Marini, ESI, Napoli, 1982.

Trimarchi P., *Interpretazione del testamento mediante elementi estranei*, in *Giurisprudenza Italiana*, 1956, I, p. 445.

Tylor E., *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Language, Art and Custom*, London, 1871.

(Published online on July 30.2015)