# *The Banking Bail-in and Constitutional Rights*

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**Abstract**

Lo scritto evidenzia che l'intero impianto della BRRD e la disciplina italiana di recepimento si pongono in contrasto con diverse disposizioni costituzionali e con principi fondanti dell'ordinamento giuridico interno. Ad essere violata non è solo la norma di cui all'art. 47 che impone alla Repubblica di tutelare il risparmio in tutte le sue forme, ma anche vari altri disposti costituzionali, quali l'art, 42 e l'art. 3 Cost. In particolare poi, ed in connessione poi alla frustrazione dell'ultima norma costituzionale citata, si evidenzia il mancato rispetto di un principio fondante quale la par condicio creditorum, che cede a fronte del riferimento al pari passu, mero principio contabile piuttosto che strumento di tutela giuridica dei creditori. Infine, ma non certo per ultimo, si evidenzia il contrasto con il diritto alla tutela giurisdizionale dei diritti, sancito dall'art. 24 della Costituzione italiana, così come a livello europeo e sovranazionale. La BRRD e la relativa disciplina interna sembrano sacrificare sull'altare della stabilità finanziaria e di quanto sembra tecnicamente più idoneo a garantirla un patrimonio di garanzie e valori che gli autori ritengono invece non compromettibili.

**1. Introduction**. There is a clear interaction between, on the one hand, shareholder and creditor rights of a bank which is subject to one of the resolution

tools,[1] and, on the other, the constitutional principles.[2] The Italian Constitution, which is 'dissected' in this paper as parameter as well as case study, is very responsive to economic profiles, so much so that part of its own body of law is dedicated to this field[3]. Italian constitutionalists themselves did not allow much time to pass by before commenting on the constitutional impact of the BRRD.[4]

Many are the principles to emerge with regard to this: the legal provision of Art. 41 on the subject of freedom of economic initiative; the law of Art. 42 on property rights; and Art. 47 on protection of savings. Art. 42(1) is based on a

[1] It is an extremely painstaking task to recollect all the "oceanic" literature existing in the area of the bail-in and resolution tools. As far as manuals in English are concerned, bail-in and resolution tools are analysed by: Matthias Haentjens & Pierre de Gioia Carabellese, *European Banking and Financial Law* (2nd edn Routledge, London and New York 2020) Chapter 8; Kern Alexander, *Principles of Banking Regulation* (Cambridge University Press, Cambridge 2019) 163-206; Ross Cranston, Emilios Avgouleas, Kristin van Zwieten, Christopher Hare & Theodor van Sante, *Principles of Banking Law* (3rd edn Oxford University Press, Oxford 2018) 171-186; Matteo De Poli, *European Banking Law* (Wolters Kluwer CEDAM, Milan 2017) 199-250; Matthias Haentjens & Pierre de Gioia Carabellese, *European Banking and Financial Law* (Routledge, London and New York 2015) Chapter 7. For a full account on the subject, extending to treatises, monographs and journal articles, reference is made to my recent works and relevant footnotes, where such literature is recalled in detail. More specifically, in English, see Pierre de Gioia Carabellese, 'Bail-in: Directive 2019/879 (TLAC/MREL) and Amendments to the BRRD' (2019)30 International Company and Commercial Law Review 669-694; Pierre de Gioia Carabellese & Daoning Zhang, 'Bail-in Tool and Bank Insolvency: Theoretical and Empirical Discourses around a New Legal (or Illegal) Concept' (2019)30 European Business Law Review 487-511; Isabel Fernadez Torres & P de Gioia Carabellese, The *Resolution Tools: a Legal Analysis and an Empirical Investigation*, in Alberto Ruiz Ojeda & José María López Jiménez (eds), *Estudios Sobre de Entidades de crédito – Enfoques Interdisciplinare*, Madrid, 2019, in Alberto Ruiz Ojeda & José María López Jiménez (eds), *Estudios Sobre la Resolución Bancaria*, 2019, Aranzadi, Pamplona , 845-900.
In Italian, see Pierre de Gioia Carabellese, *Bail-in, diritti dei creditori e Costituzione italiana*, in *Giurisprudenza Commerciale*, 2020, forthcoming publication; Pierre de Gioia Carabellese, *La BRRD (o Direttiva bail-in) "Atto Secondo"*, in *Studi sull'Integrazione Europea,* 2020, pp. 89-112; Pierre de Gioia Carabellese, *Crisi bancarie e aiuti di stato. La sentenza Tercas: Brussels versus Italy?*, in *Ordine Internazionale e Diritti Umani*, 2019, 15 October 2019, pp. 686-718; Pierre de Gioia Carabellese, *Bridge bank e decisum della UK Supreme Court su Banco Espirito Santo: dal Bonus Argentarius al Coactus Argentarius*, in *Banca impresa società*, 2019, pp. 377-425.
In Spanish, see Pierre de Gioia Carabellese, 'Insolvencía y Strumentos de Resolución Bancaria' [Insolvency and Banking Resolution Tools] (2019)31 Revista de Derecho Consursal y Paraconsursal 143-160.

[2] Not much research has been carried out on interaction between the bail-in tool and the Constitution in English language literature. However, recent in-depth analyses can be found in Stefan Grundmann & Hans-W Micklitz, *The European Banking Union and Constitution. Beacon for Advanced Interaction or Death-knell for Democracy?* (Hart, Oxford – London – New York – New Delhi – Sydney 2019).

[3] Among others we refer to S. Cassese, *La Nuova Costituzione Economica* (Laterza, Bari-Roma 2019); P. Bilancia, *'L'Effettività della Costituzione Economica nel contesto dell'Integrazione Sovrannazionale e della Globalizzazione'* (2019) Federalismi, special edition no. 5, online.

[4] Maria Maddalena Semeraro, *Rischio d'impresa bancaria e discipline recenti*, in *Giustizia civile*, 4, 2016, p. 849.

fundamental law which acknowledges public as well as private property. The law proclaims that *"economic goods belong to the State, to institutions or private entities".*

Art. 42(para 2) continues by stating that *"private property is acknowledged and guaranteed by the law, which determines the acquisition process, the use of it, and the limits, in order to ensure its social function and to make it available to everybody".* Lastly, as is well known, private property *"can be, in cases provided for by law, except for indemnity, dispossessed to serve the public interest.*" (translation by the authors)

It is also well known that there is a long-standing dispute, of ideological nature, between those who consider private property the main pillar of freedom and those who historically acknowledge it only because it is compatible with its social role. According to this logic, there is a need to ensure a balance between private property and the public interest, a responsibility given to the legislator.[5]

In practice, the right to private property is regulated by Art. 832 of the Italian Civil Code, which provides a detailed definition: *"The right to property is the right to use and own assets fully and exclusively, within the limits and in compliance with the obligations set out by the legal system."* (translation by the authors)

The Italian Constitution, echoing with regard to the present subject the supranational regulatory provisions,[6] therefore protects property rights and regulates the process of expropriation[7]. Here, two principles are synthesised: property can be expropriated only if there is a reason of public interest and if it is

[5] For a general introduction to the theme, see Roberto Bin & Giovanni Pitruzzella, *Diritto costituzionale*, Turin, 2019. Among others, we refer to Stefano Rodotà, *Art. 42*, in G. Branca (eds), *Commentario della Costituzione*, Tomo II, Bologna – Roma, 1982, 102; C. Macario, *Art. 42*, in R. Bifulco, A. Celotto, M. Olivetti (eds), *Commentario alla Costituzione*, vol I, Torino, 2006, 865 s.

[6] See Art. 17, Charter of Nice. In this respect, amongst others, see, more recently, Pierre de Gioia Carabellese, *Banking Resolution Tools, Bail-in and Fundamental Rights*, Wolters Kluwer, Madrid, 2019. The right of ownership (or *diritto di propretà*) is encapsulated within art. 42, Italian Constitution, as well as in art. 117, paragraph 1, therewithin, , in relazione all'art. 17 della Corte dei diritti fondamentali dell'Unione europeo (Corte di Nizza).

[7] As far as the peculiarities of the bail-in are concerned, see Diego Rossano, *La nuova regolazione delle Crisi Bancarie. Risoluzione e Tecniche di intervento*, Milano, 2017, 105. The Author refers to a concept of quasi dispossession (*"paraespropriativi"*) of art. 52, para 5, Legislative Decree 180/2015.

in compliance with the provisions of law; and furthermore, the expropriation must be matched with an appropriate indemnity.[8]

In this respect, it is worth noting that the Court of Justice of the European Union, with its own court decision dated 10July 2012, no 34940, 10, (the "Grainger case) concerned about the the "Northern Rock financial collapse, has held lawful the expropriation without indemnity. More specifically, for exceptional reasons of general interest, the indemnity could be missed. However, the court decisions is extremely criticised by Scholars.[9]

**2. Art. 47 of the Italian Constitution.** Undoubtedly, in view of what has been said above, the BRRD marks a *"sea change",* an epochal shift, but a forced rather than a voluntary one, in the costs that the rescue of a bank imposes on creditors, and in this case, on savers in particular. In the event of a crisis, due to the presence of public interest, the bank must be subject to resolution, with ensuing loss for creditors of the whole credit or part of it, depending on the decisions made by the administrative authority, which in the present work are described as "highly discretional".

This scenario would not be so traumatic, from a legal point of view, in common law countries, including the United Kingdom, where there is no tradition of written constitution.[10]

Italy is completely different from the Anglo-American model, as well as diverging from traditional constitutions of other European countries, from the point of observation discussed in this contribution. This is due to a specific legal provision, found in Art. 47, par. 1, of the Italian Constitution, which prescribes:

*"The Republic encourages and protects saving in all its forms; and regulates, coordinates and controls the provision of credit."* (translation by the authors)

[8] This should be a "material remedy" (or *"serio ristoro"* in Italian) pursuant to the Constitutional Court, decision no. 90, 22 April 2016, n. 90, Among Scholars, see Tommaso Ariani & Leonardo Giani, *La tutela degli azionisti nelle crisi bancarie*, in *Rivista di diritto societario*, 2013, p. 727.
[9] F. Salmoni, *cited*, 201 ff.
[10] This is a situation that, as is well known, became reality with a legal instrument aimed at finding a compromise, namely Directive 1994/19.

Paragraph 2, of the same art. 47, keeps on stripulating as follows:

*"[The Republic] favours the access to the public savings, to the home, to the farming direct ownership and the direct and indirect share investment in major industrial businesses of the Country."*

This law, particularly paragraph 1, has been interpreted as a type of "constitutionalisation" of the model regulating structural surveillance, referred to in the 1936 banking law.[11] It is also stated[12] that at the top of the detailed regulations, two political institutions were positioned: a committee of economic ministers (finance, agriculture, national economy) led by the Prime Minister, and an "Inspectorate for credit and saving" at the Treasury. A corollary of this was that the Bank of Italy[13]qualified as a public institution, and operatively not only an issuing institution but also as the central bank.[14] With the implementation of the 1993 Single Text, the model changed completely. With the removal of structural surveillance, Art. 47 should be read while bearing in mind other provisions of the Constitution, especially Art. 81 on the financial budget of the State and on the way it balances the laws concerned with the expenses. Artt. 81, 97m 117 and 119 of the Italian Constitution have been modified by the Constitutional Law no. 1 of 2012, which has introduced the principle of "balanced budget within the same Constitution. This has been achieved in adherence to the International Treaty on the Fiscal Compact.[15]

[11] Massimo Severo Giannini, *Diritto pubblico dell'economia*, 1977, 205; Franco Belli, *Legislazione bancaria italiana (1861-2003)*, Turin, 2004. An analysis of Art. 47, para. 1, of the Italian Constitution, can be read in Italian in the recent contribution of Carola Pagliarin, *'La tutela del risparmio e l'identità costituzionale italiana'*, forthcoming.

[12] Andrea Pisaneschi, *La regolamentazione bancaria multilivello e l'art. 47 della Costituzione*, in Mario P. Chiti & Vittorio Santoro (eds), *L'Unione bancaria europea*, Pacini Giuridica, Pisa, 2016, p. 166.

[13] Stefano Ortino, *Banca d'Italia e Costituzione*, Pisa, 1979, passim.

[14] That was said for the last time by Andrea Pisaneschi, *op. cit.* p. 167, referring to Renzo Costi, *L'ordinamento bancario*, Bologna, 2002.

[15] Among the different commentaries, see Antonio Brancasi, *L'introduzione del c.d. pareggio di bilancio: un esempio di revisione affrettata della Costituzione*, in *Forum Quad. Cost.*, 2012, online; Francesco Bilancia, Note critiche sul c.d. "pareggio di bilancio", in Rivista AIC, n. 2, 2012, online; Guido Rivosecchi, *Il c.d. paraggio di bilancio tra Corte e legislatore, anche nei suoi riflessi sulle regioni: quando la paura prevale sulla ragione*, in *Rivista AIC*, n. 3, 2012 (online).

As noted by scholars,[16] in this context Art. 47 is interpreted in a different way. Given that savings and credit are terms expressing money supply, the subject of protection should be the value of money itself.[17] A third phenomenon which has played a role since the financial crises is the shifting of regulations to a supranational level.[18]

That being said, in order to explain the theoretical and historical context, in Italy the importance given to saving is a unique feature in the framework of the Constitutional Charters of the European Union, where it is not present, but also with regard to Charters of EU Treaties.[19]

An examination of the subject has revealed that, at a glance, the Portuguese Constitution may encapsulate a principle similar to the Italian one[20], although upon a closer scrutiny the outcome of the investigation may be not be completely corroborated.

Since its first version, this Constitution has had a section (Part II) where it has defined an area called “economic organisation”. Today this is Art. 101, where it is declared that the economic system should be shaped in order to “[..] guarantee the establishment, the culture and the safety of saving, as well as the implementation of economic resources needed for economic and social development”.[21]

However, from a legal-positive point of view, no other provision is mentioned in the Portuguese Constitution on the subject of “protection of savings”, even though Art. 62, already mentioned in the section “Fundamental rights and

[16] Andrea Pisaneschi, *op. cit.* p. 167, with reference to Fabio Merusi, *Art. 47,* in Branca (ed.), *Commentario della Costituzione*, Bologna-Rome, 1980.
[17] Fabio Merusi, *Art. 47*, in Branca (ed.), *Commentario alla Costituzione*, Il Mulino, Bologna-Rome, 1980.
[18] Andrea Pisaneschi, *op. cit.* p. 167.
[19] Clearer forms of protection at Union law level are provided for the “*consumer*”, the “*depositor*” and the “*investor*”.
[20] Giuseppe Guizzi, *Le azioni a tutela del risparmio nel diritto interno e nell’Unione Europea*, in *Bancaria*, 2016, p. 40. Anna Ciammariconi, *"Costituzione economica", sistema finanziario e tutela del risparmio in Portogallo: dalla "tentazione" socialista alla progressiva attrazione nell'Europa comunitaria"*, in Ginevra Cerina Feroni (ed), *Tutela del risparmio e vigilanza sull'esercizio del credito. Un'analisi comparata*, Torino, 2011, 183 s (203).
[21] Translation from Portuguese by the authors.

obligations", can (and must) be interpreted also to encompass creditor claims, which are ultimately the "savings" connected to the banking system.

In any case, provisions which are more or less connected can be pointed out, such as those referred to in Art. 81 on the subject of "main duties of the State", where Section (f) imposes a guarantee for "protection of consumer interests and rights".

At any rate, it would be, in the Portuguese legal system, a matter of purely programme provisions which regulate the financial system, or rather something that has nothing to do with a kind of consecration of the fundamental right of protection of "savings" – an expression that, in itself, has no precise legal content. Indeed, it can be a bank deposit, but it can also be any sort of financial product, or shares of an anonymous company, or even a rented property.[22] All things considered, saving is only the option-destination that is given to an asset, whatever its legal nature of "thing" or right.[23]

Apart from the Portuguese case, in the Italian law arena it is also underlined that the idea of savings has been evolving from an objective dimension to a subjective one and then again to an objective one[24]. According to the former dimension, promoted and accepted by *"Assemblea Costituente"*, therefore the Parliament who approved the Italian Constitution, the Constituents in literally translating from Italian, savings were accumulated wealth, to be put into service and to be used in a productive way. This would have led to a better functioning of the economic system. According to the latter dimension, established after the

[22] See Jorge Coutinho Abreu, *Cattedra di diritto societario*, Universidade de Coimbra, Conversation, 15 September 2019.

[23] Such a claim is substantiated by the observation that the Deposit Guarantee Fund does not exist only for reasons of "micro-personal protection" (as in general with national and European regulations on bank surveillance), but also in order to protect the public interest. The purpose is to avoid paralysis of the financial and credit system, in the event of mayhem breaking out in the system. On the other hand, at this point we can add that a depositors' safety net ensures that local savings, such as those of Italians, Portuguese, and Greeks, etc, do not escape to Germany, Switzerland, Luxembourg or the United States (in this case, the system guarantees up to 250,000 Euros).

[24] Filippo Zatti, *La dimensione costituzionale della tutela del risparmio. Dalla tutela del risparmio alla protezione dei risparmiatori/investitori e ritorno?*, in *Forum. Quad. cost.,* 2010; Filippo Scuto, *La tutela costituzionale del risparmio negli anni della crisi economica. Spunti per un rilancio della dimensione oggettiva e sociale dell'art. 47 Cost., in* federalismi.it, numero speciale 5/2019.

promulgation of the Constitutional Charter, protection is aimed not so much at savings, but rather at the saver,[25] although this is usually regarded as small saver, as inferable from art. 47, paragraph 2 ("collective savings" or *"risparmio popolare"*)

In other words, savings, if not spent but entrusted to a credit institution, are assets protecting the future of the depositor. If, in order to rescue the bank in crisis, the asset, namely the money in the depositor's bank, is sacrificed, it is clear that there is a violation of the principle referred to in Art. 47 of the Constitution. Not only is there direct damage towards the saver, whose liability is cancelled, if the sum exceeds 100,000 Euros, but there would also be a negative effect on the whole savings system, and hence on savers' trust in the ability of banks to refund the amount deposited. This trust is inherent in banking activity in Italy, because Italian banks, unlike other European banks, must operate in compliance with Art. 47 of the Constitution.[26] As a consequence, the BRRD regulation stating that the restoration of financial brokers in crisis must be achieved by means of savers' sacrifices in all viable forms, referring to shareholders,[27] subordinated bondholders and unprotected depositors,[28] would turn out to be against the Constitution. This group of *stakeholders*, according to the Constitution, but only the Italian one, would undoubtedly be compromised by regulations embraced in the resolution tools.

However, there are also those who, in the Italian literature itself, are against this configuration,[29] in a very categorical, direct and authoritative manner. It is worth highlighting the most important points in their approach:

[25] Giuseppe Guizzi, *Le azioni a tutela del risparmio nel diritto interno e nell'Unione*, in *Bancaria*, 2016, No. 6, p. 40.
[26] Fiammetta Salmoni, *Crisi bancarie e incostituzionalità del bail-in*, in *Percorsi costituzionali*, Napoli, 2017, p. 307: Fiammetta Salmoni, *Stabilità finanziaria, Unione Bancaria europea e Costituzione* (Padua 2019).
[27] In legal systems different from the Italian system where savings are not protected, shareholders, even those of banks, do not qualify as savers.
[28] The last category being savers protected directly in compliance with the Constitution.
[29] Renzo Costi, *Tutela del risparmio e Costituzione, storia e attualità dell'art. 47*, in *Banca impresa società*, 2018, p. 398.

"[..] Both the banking market organisation and the estate market organisation in force shall prescribe a regulation promoting and protecting saving, only as an indirect consequence to market stability and efficiency; the latter being objectives whose pursuit can entail the sacrifice of saving itself. That is possible because the 1st paragraph of Art. 47 does not prescribe a 'supreme principle' of the […] [Italian] Constitution."

Likewise, some believe, to support this idea, that "[..] the changing instruments progressively prefigured in order to guarantee saver protection never concerned bank problems so much as to generate a sort of widespread expectation that, in the event of a proved failure or risk of failure, depositors and creditors can be protected against loss (entirely or partially) of their assets",[30] translation by the present authors.

It is also worth mentioning that Italian constitutional law should give way to the European Union law, as a consequence of the complex mechanism regulated by the combined provision as provided for in Art. 11 and Art. 117, par. 1, Italian Constitution. On this basis, as is well known, the legislator should comply with the obligations deriving from the European Union. The Italian Constitutional Court held that the European legal provisions cannot impinge on a derogation from the fundamental principles of the Italian Constitution (the so called *theory of the counter-limits*).

**3. The theory of counter limits.** The counter-limits operate as if they were constraints to the principles of primacy of the law of the European Union and are aimed at preventing that both the European legal provisions - and the "domestic" ones whereby the latter are implemented - shall apply in the legal system of the Member State, in this case Italy, in cases where these contract with the fundamental principles and the inalienable rights of the human being, recognised and safeguarded by the Italian Constitution.[31]

[30] Vincenzo Carriero, *Crisi bancarie, tutela del risparmio, rischio sistemico*, in *Analisi giuridica dell'economia*, 2016, pp. 369 ff., in particular p. 395.
[31] *Ex plurimis*, see Italian Constitutional Court, no. 228 of 2010; no. 283 of 2014; no. 111 of 2017.The Italian scholars' approach to the theory of the counter-limits is extensive and not totally

With regard to the connection between bail-in/resolution tools and the principle provided for in Art. 47 of the Constitution, it seems appropriate to ask whether the principle of the above law is a supreme one of the constitutional law, as eminent scholars believe,[32] or whether it is not, as equally eminent scholars have suggested in more recent works,[33] underlying that the legal provision merely sets forth principles, rather than being strictly prescriptive.

Thus, it is of the utmost importance to analyse whether, with the implementation of the new banking crisis management laws, Italy relinquished sovereignty to the EU, thereby violating the theory of counter limits. The Constitutional Court has not yet carried out this evaluation, although it has every right and prerogative to do so.[34]

**4. The CariFerrara Case and the ruling of the Italian State Council.** It appears that the Italian Constitutional Court may judge the matter of compliance with the Constitution of Art. 47, par. 1, Italian Constitution, at a later time. However, it must be noted that the State Council, called to pass judgment on the cancellation of the resolution initiation by Ferrara's Savings Bank, which took place in November 015, rejected the first appeal, based upon the alleged constitutional illegitimacy of BRRD law. Censorship was judged manifestly unfounded, and therefore the question was not entrusted to the Court

consistent, as far as the relevant inferenced are concerned. For an overview of the different theories, from a standpoint of both the Italian and European literature, we refer to the contributions encompassed with Alessandro Bernardi (ed), *Il controlimiti. Primato delle norme europee e difesa dei principi costituzionali* (Napoli, Jovene 2017).
The Italian "Constitutional Judges", in the last years, have strongly claimed that they play a leading role with regard to the protection and safeguard of fundamental rights. Moreover, the Italian Constitutional Court has reinforced the central role of the Italian Constitution. See the Italian Constitutional Court *decisa* no. 20, 63 and 112, of 2019. See also the order of preliminary ruling no. 117 of 2019.

[32] Fabio Merusi, Art. 47, in Branca (ed.), *Commentario della Costituzione*, Il Mulino, Bologna-Rome, 1980.

[33] Renzo Costi, *Tutela del risparmio e Costituzione, storia e attualità dell'art. 47*, in *Banca impresa società*, 2018, p. 398.

[34] Ruling No. 238 of 22 October 2014.

**4.1. The facts and the narrative.** With a decision of this nature,[35] the judge of Palazzo Spada, therefore the *Consiglio di Stato*,[36] was called to pass judgement on the cancellation of the judicial order of November 2015,[37] regarding the implementation of the resolution concerning Ferrara Savings Bank (in Italian "Cassa di Risparmio di Ferrara", referred to here as "CRF"). This was one of the first Italian banks to fall prey to the BRRD, in that it fell into crisis when the BRRD directive had only recently come into force. With regard to its main issues, which also figure in the ruling issued by the supreme administrative judge, the situation is described in the following paragraphs of this article.

The Ferrara Savings Bank – which was a party to the judgment, while the appellants were bondholders – was put under inspection by the Bank of Italy in the period from 24 September 2012 to 15 February 2013, resulting in the confirmation of the presence of various criticalities: inadequate credit management, deterioration of the credit portfolio, erosion of income and capital

[35] State Council, Ruling, Section 6, Judicial Order 201900475, Section VI, 18 January 2019, No. 475.

[36] Palazzo Spada is the metonym of Consiglio di Stato, as it is the place where this Italian judicial body is headquartered. The Consiglio di Stato shall be referred to in this article as "Italian State Council" too or "ICS".

[37] Economic problems of some Italian banks, including CariFerrara, raised the interest of scholars not only in Italy, but also in other countries. See Sido Bonfatti, *Crisi bancarie in Italia 2015- 2017*, in *Rivista di diritto bancario*, 2018, April, www.dirittobancario.it; Edoardo Rulli, *Prevenire l'insolvenza. Dal salvataggio pubblico alla risoluzione bancaria: rapporti con i principi della concorsualità e prime esperienze applicative*, in *Rivista trimestrale di diritto dell'economia*, 2015, 3-supplemento, pp. 284 ff.; Marco Lamandini, Giuseppe Lusignani, David Ramos Muñoz, *Does Europe Have What It Takes to Finish the Banking Union? Non-Performing Loans (NPLs) and Their Hard Choices, Non-Choices and Evolving Choice*, in EBI Working Paper Series, No. 17, 2017; Edoardo Lener & Edoardo Rulli, 'Liabilities Excluded from Bail-in: Implications under Italian and EU Law' (2017) 32 Journal of International Banking Law and Regulation 428-438; Francesco Capriglione, *Luci ed ombre nel salvataggio di quattro banche. Scritto per il convegno «Salvataggio bancario e tutela del risparmio»*, in *Rivista di diritto bancario*, 2016, February, www.dirittobancario.it; Ewa Miklaszewska, 'The Application of the Bail-in Tool in the Bank Resolution Framework: The Evidence from the Italian Local and Regional Banks' (2017)69 Safe Bank 168-182; Miriam Cassella & Alexandra D'Onofrio, 'L'applicazione della disciplina della risoluzione delle banche in crisi nell'Unione europea' ASSONIME Note e Studi, 2016, 16/2017, 25 <http://www.assonime.it/attivita-editoriale/studi/Pagine/Note-e-Studi-16-2017.aspx> accessed 27 June 2019; Nikoletta Kleftouri, 'European Union Bank Resolution Framework: Can the Objective of Financial Stability Ensure Consistency in Resolution Authorities' Decisions?' (2017)18(2) ERA Forum 263–279.
Rossella Locatelli, Cristiana Schena, Elisa Coletti e Fabrizio Dabbene, *Gestione e costi delle crisi bancarie dopo la BRRD*, in *Banca impresa società*, 2018, No. 1, pp. 27 ff.; Diego Rossano, *Di tutta l'erba un fascio, il caso CARIFE e delle altre tre banche*, in *Rivista trimestrale di diritto dell'economia*, 2017, pp. 1 ff.

margins, and tensions concerning available liquidity. More specifically, the inspection underlined the fact that CET 1 coefficient was reduced to 4%, that is, half of the minimal acceptable value.[38] With an MEF Decree of 27 May 2013,[39] the CRF was put under special administration. Commissioners appointed for this purpose, starting from 30 May, put great effort into rationalising the business operational activities and, above all, into seeking the funding necessary to recapitalise the bank, albeit at times failing and causing the postponement of the procedure, resulting in the issue of a further MEF Decree on 26 May 2014.

During this period, the CRF Commissioners also established relations with the Interbank Deposit Protection Fund,[40] which is known to be the White Knight or *deus ex machina* which helps banks in crisis to recover, by taking action with its private funding collected in advance from its sister banks.[41] The hypothetical intervention, which was then formalised with a resolution on 6 May 2015 with the purpose of offsetting losses registered before 31 March 2015 and restoring the capital necessary for sound management, should have been organised as follows, with regard to three main pillars: i) coverage of losses by employing all resources and capital reduction, from 217,213,868.76 Euros to 11,484,881.92 Euros; ii) capital restoration by means of inseparable capital increase, reserved

[38] On CET 1 characteristics, see Matthias Haentjens & Pierre de Gioia Carabellese, *European Banking and Financial Law* (Routledge, London and New York 2015) Chapter 6; Matthias Haentjens & Pierre de Gioia Carabellese, *European Banking and Financial Law* (2nd edn Routledge, London and New York 2020) Chapter 7.

[39] The Italian Ministry of Economy and Finance.

[40] It is well known that the Deposit Protection Fund is a mandatory consortium amongst Italian banks, established in order to protect, above all, clients' deposits in the event of a bank crisis, i.e. in a situation in which the bank is not able to pay them back. Under certain conditions, it can take action in order to recapitalise a failing bank. Depositors' protection schemes in other European countries can be more or less dynamic, in that they are basically developed with the purpose of collecting funds in order to refund depositors. See, in recent literature, Pierre de Gioia Carabellese, *Crisi bancarie e aiuti di stato. La sentenza Tercas: Bruxelles versus Italy?,* in *Ordine internazionale e diritti umani*, 2019, pp. 686-719.

[41] In general, on the subject matter of depositor protection schemes, see Rym Ayadi and Rosa Maria Lastra, 'Proposals for Reforming Deposit Guarantee Schemes in Europe' (2010)11 Journal of Banking Regulation 210-220; Pierre de Gioia Carabellese & Corrado Chessa, 'The So-Called Pan-European Depositors' Protection Scheme: a Further Euro Own-goal? A Critical Analysis of Directive 2014/49' (2016)23 Maastricht Journal of European and Comparative Law 241-260; Nicoletta Kleftouri, *Deposit Protection and Bank Resolution* (Oxford University Press, Oxford 2015). For contributions in Italian, see Corrado Chessa & Pierre de Gioia Carabellese, *Il cosiddetto sistema paneuropeo di protezione dei depositanti: un ulteriore Euro autogol? Un'analisi critica della Direttiva 2014/49*, in *Banca, borsa e titoli di credito*, 2016, pp. 332-352.

to the Fund, for an amount of a few cents less than 300 million Euros, evidently for accounting purposes; iii) in the event of success in the above reserved increase, the issue of warrants for a further amount of approximately 57,348,000 Euros, reserved for old shareholders, for a further increase, in terms of money, of social capital, this time separable.

The rescue operation[42] encountered serious obstacles from beyond the Alps, when authorisation was requested from the EU authority.[43] Indeed, in a letter sent in August 2015 to the MEF, the European Commission raised doubts about the legitimacy of the intervention by the Fund, noting that the use of funds coming from the deposit guarantee system could be a violation of the State Aid ban.[44] Meanwhile, the situation of the CRF deteriorated even further: equity which on 31 March 2015 had amounted to 11 million Euros was already, by 30 September 2015 at the negative value of 24.5 million Euros, owing to a liquidity crisis. In the light of this situation, the CRF was put under resolution, with creditor rights being converted into shares. With this aim, the Resolution Authority resorted to the specific tools provided for in Legislative Decree 180/2015, which came into force in the same period, causing the cancellation of CRF shares and conversion of shares into a series of liabilities, and thus in counterparty credits.

Among the various causes of the appeal, creditors and shareholders, contesting the decision made by the TAR (Italian Regional Administrative Court),[45] the administrative juridical body holding competence because of the

[42] Approved by the Bank of Italy with the provision of 7 July 2015 and by the Special CRF Assembly (30 July 2015).
[43] On 22 October 2015 it announced the implementation of the procedure and, at the same time, disclosed that the necessary request for authorisation had been sent to the ECB.
[44] A rather debatable statement, being in contrast with the specific characteristics of the Italian Depositor Protection Fund. The recurring theme, almost obsessive for the Commission, i.e. funding coming from the fund, in contrast with the body of laws regarding State aid, was ultimately rejected by the Administrative Court in the "landmark case" *Tercas*. See EU Court, 19 March 2019. For opinions concerning this ruling, see, in Italian, Sandro Amorosino, *Aiuti di stato e interventi di sostegno del FITD*, in *Diritto della banca e del mercato finanziario*, 2019, pp. 364 ff. See also Pierre de Gioia Carabellese, *Crisi bancarie e aiuti di stato. La sentenza Tercas: Bruxelles versus Italy?,* in *Ordine internazionale e diritti umani*, 2019, pp. 686-719.
[45] The administrative jurisdiction in Italy is carried out by both the *Tribunali amministrativi regionali* (Regional Administrative Tribunals) and by the *Consiglio di Stato* (the State Council) (art. 4 of Legislative Decree no 104 of 2010). In each Italian region a Regional Administrative Tribunals instituted, each headquartered in the "capital city" of that region. Art. 1, Law no. 1034 of 1971 has created detached sections in some regions. Moreover, the Decree of the President of the

area, which in the first instance had rejected their demands, highlighted *"the illegitimacy of all provisions contested due to illegitimacy of the regulation they were based on, that is regulations of the Legislative Decree 180/2015 which dictate resolution",* because they would lead to *"a form of expropriation without indemnity of involved shareholder and bondholder rights, thus, in the above case, write-down",*[46] thereby violating Articles 42 and 47 of the Italian Constitution.

Within this scenario, in which the Commission firmly rejected rescue plans by means of the "Fund", the Bank of Italy, with the provision of 21 November 2015, approved by the MEF on the following day, authorised the resolution of the CRF, resorting to instruments provided for in Art. 32 of Legislative Decree 180/2015. These instruments were as follows: complete reduction of stock and share value, including those belonging to the major shareholders (appellant authority); writing-off of the nominal value of *"Tier 2 elements computable in equity capital"*, the value, in a nutshell, of part of the subordinated bond;[47] transfer of the restored bank to a bridge institution, whose duty was to later re-transfer it on the market, with the creation of bridge institution capital, through intervention

Republic, no. 426 of 1984 has incorporated the *Tribunale regionale di giustizia amministrativa* (Regional tribunal of administrative justice) which operates for the partly German speaking autonomous region of Trentino – South Tyrol (see now art. 5, Legislative Decree no. 104 of 2010). The autonomous section of Bozen (the prevailingly German speaking province within the autonomous Italian region of Trentino – South Tyrol), beyond the denomination, shall be regarded as autonomous tribunal and its sui generis composition is aimed to ensure that judges are both Italian and German speaking.

The *Consiglio di Stato* (or State Council) is the last resort body of administrative jurisdiction (art. 6, para. 1, Legislative Decree no. 104 of 2010). The *Consiglio di giustizia amministrativa* (or *Council for the administrative justice*) has been incorporated with *Legislative Decree* no. 654 of 1948 with jurisdictional as well as consultative function, and it is now governed by Legislative Decree no. 373 of 2003.

Based on art. 6 of Legislative Decree no. 104 of 2010, the appeals against the decisions of the TAR located in Sicily are lodged with the *Consiglio di giustizia amministrativa per la Regione siciliana*, pursuant to the legal provisions of the special law applicale to this Italian region (Sicily) and the relative implementing rules, namely art. 6, para. 6, Legislative Decree no. 104 of 2010. For all the different appeals lodged with the State Council against the decision of the Autonomous Section of Bozen of the Regional Tribunal of Administrative Justice, the legal provisions of the Special Law (Statuto Speciale) of that area will apply (art. 6, para. 5, of Legislative Decree no. 104 of 2010). See Fabrizio Figorilli, *Il giudice amministrativo*, in Franco Gaetano Scoca (ed), *Giustizia amministrativa*, Torino, 2017, particularly Part. 2, Chapter 143 s. See also Elio Casetta, *Manuale di diritto amministrativo*, edited by Fabrizio Fracchia (Giuffrè Editore Milan, 2018) pp. 866.

[46] Translation from the Italian of the authors.

[47] It was also ruled that the remaining subordinated bonds should have been included in the assets of the bank subjected to winding-up, as they were at the beginning.

by the Resolution Fund;[48] and transfer of non-performing loans to a designed entity, the *bad bank*, against payment of credit in favour of the bridge institution. The payment had to be made at market rates and had to be repaid with the proceeds of the progressive transfer, i.e. profits originating from the failure itself.[49].

**4.2. Critical analysis of the Court's decision.** The State Council rejected the accusation of constitutional illegitimacy, following logical steps that are worth analysing, due to the level of dubiety they raised. The judges of Palazzo Spada referred to the ruling of the Italian Constitutional Court of 8 June 1984, No. 170, which dictates that controlling compliance with the Constitution of a national regulation with the force of law must not be avoided for the sole reason that the Legislative Decree 180/2015 complies with the European Law (in this case, the BRRD itself). The syndicate examining compliance with the Constitution is always entitled to act with reference to the founding principles of the Italian legal system and the founding rights of the individual; and thus, more generally, the BRRD, according to the Italian State Council, is not exempt from an examination carried out by the judge with regard to compliance with the Constitution.

However, it seems that the ISC has renounced to rule, as it has been stated that *"between the two legal systems* [Italian and European] *there is no contradiction, for property protection is provided for in Art. 42 of the Italian Constitution as well as in Art. 17 of the Charter of Nice on fundamental rights."*

Essentially, the Italian State Council, based on the existence of a non-proven EU regulation on property protection, decided to ignore the contradictions between European regulations (BRRD) and the Italian Constitution, although the latter, according to the Council itself, is part and parcel of the founding principles of the Italian State. At first appearance, it is clear that the highest Italian administrative institution interprets the ruling of the Constitutional Court of 1984

[48] A special fund established in compliance with Art. 78 of Legislative Decree 180/2015 and financed by mandatory contributions in accordance with the above Article, at the expense of banks operating in Italy.
[49] With regard to the last stage of the intervention, the European Commission made no exception.

in a partial, or rather symbolical way, above all as concerns the relationship with the European Union Law. In the opinion of the authors of the present article, it is clear that the judgment of the regulation provided for in Art. 17, Charter of Nice, is the task of the judge of the relevant body of law, i.e. the Court of Justice of the European Union. This judge, however, does not discuss national rights and laws concerning property, much less whether these principles are constitutional pillars, because the syndicate falls under the power of the judge of the national legal system, if present.[50] The same argument is valid as regards appeals to the European Court of Human Rights, specifically the ruling of 10 July 2012 *"Grainger"*. Similarly, a possible judgment of the European Court in Strasbourg concerns only the principle of the legal system in question, and at most its repercussions for the national Civil Law, while never addressing the substance of constitutional principles.

In passing, we should note that the reference to *"Grainger"* by the judges of Palazzo Spada also raises a point regarding the ruling, not only the method. The ISC, after acknowledging that, in the body of law in question, property rights are protected as a fundamental right, and similarly with regard to securities, such as shares and bonds, seems satisfied that there is no contradiction with constitutional principles. However, this statement can be rejected on the basis of recent comments in the literature regarding the European Convention.[51] The *"Grainger"* case, connected with the principle discussed in the *"Marckx"* case,[52] produced an unprecedented *sui generis* bail-in ruling, decided by the British Government with reference to the insolvency of a bank (Northern Rock) in north-east England, which occurred in summer 2007. The bank in question, as explained elsewhere,[53] shares with the Royal Bank of Scotland (RBS) the sad

[50] In Great Britain, which is leaving the European Union, this syndicate falls under the responsibility of the Westminster Parliament itself.
[51] Pierre de Gioia Carabellese, *Bridge bank e decisum della UK Supreme Court su Banco Espírito Santo: dal bonus argentarius al coactus argentarius*, in *Banca impresa società*, 2019, pp. 377-425.
[52] Case 6833/74, *Marcks v Belgium*, 1979, 13 June 1979.
[53] See Pierre de Gioia Carabellese, *Banking Resolution Tools, Bail-in and Fundamental Rights*, Wolters Kluwer, Madrid, 2019.

distinction of being one of the two financial institutions to which the outbreak of the 2007/2008 financial crisis can be attributed, at least in Europe.[54]

When comparing the *"Grainger"* case with the ruling by the ISC with regard to Ferrara Savings Bank, it seems difficult to observe any difference. Moreover, it seems as though the judges of Palazzo Spada committed a blunder. *"Grainger"* is connected with the Northern Rock case, which took place a long time before the BRRD was issued. Indeed, in 2007, during the earliest days of the crisis, Great Britain, where the Northern Rock case occurred, did not even have laws regulating bank insolvency. Thus, the two reference parameters are, or rather must be, different: on the one hand, the principles of the Constitution, and on the other, an international body of laws; and also, there are entirely different judges: on the one hand, the Italian judge, and on the other, the judge of Strasbourg.

When analysing the ruling issued by the Italian State Council, it should be noted that, in terms of the relationship between the European Convention and the principles of the European Law, it generates unidirectional cooperation, known as 'provision of equivalence'. As provided for in Art. 52, par. 3, Charter of Nice, the latter must be implemented with the aim of making the protection level guaranteed by the Charter of Nice to the rights protected also by the European convention, at least match the level of protection of rights guaranteed by the Convention itself; by contrast, the Charter of Nice may guarantee a more comprehensive protection. A kind of provision of equivalence seems to be literally "created" by the Italia State Council between Convention and domestic constitutional law, as it seems to be making reference to the provision of convention. Nevertheless, the problem is that a provision of equivalence apparently does not exist between domestic legal systems and European Law, but only between European Convention and European Union. Potentially, although practically this may not happen for political reason, the Italian judge has

[54] In the Italian literature, see Leonardo Giani & Tommaso Ariani, *La tutela degli azionisti nelle crisi bancarie*, in *Rivista del diritto societario*, 2013, p. 713,731. A more recent reference to *"Grainger and Others v UK"* can also be found in Michele Perrino, *Gli Organi, in La Risoluzione bancaria (Atti del Convegno)*, in *Diritto della banca e del mercato finanziario*, 2018, pp. 685 ff., in particular p. 708.

the power to examine the criticality of the constitutional law (Art. 47, in the case in question) and to raise the question of "Constitutional legitimacy" vis-à-vis the Italian Constitutional Court.

Apart from the misleading case of the Italian State Council (*"Grainger"*) and the confusion between sets of laws which the Court itself seems to have fallen prey to, it must be noted that the complaint of the appellant CRF bondholders was extremely serious: the cancellation of the capital value of bonds, and also of bonds, where provided for, of a failing bank subject to resolution, could be an expropriation of property rights, an illegitimate one because it was carried out without indemnity. Thus, a contrast with Art. 47 of the Constitution may arise, according to which the Republic protects savings in all their forms. The reasoning of the Italian State Council seems rather puzzling; in particular, it may be stated that the judges of Palazzo Spada did not want to go into the substance of the syndicate provided for in Art. 47 of the Constitutional Charter. If the existence in the European legal system of a regulation protecting property is sufficient to make the issue of contradiction with a theoretically main principle[55] such as Art. 47 unnecessary *ex ante*, then the reference itself made by the State Council to the ruling of the Constitutional Court No. 170/1984 seems vague, which is a contradiction in itself.

It is also puzzling that the Italian State Council recognised the stability of the financial system as a new main principle of the BRRD as well as European Law. In this regard, the highest Italian administrative judges believed that the Italian constitutional tradition, as provided for in Art. 47 of the Constitution, had to give way to the emerging principle. From this viewpoint, it is important to underline that the BRRD objectives are so obviously explained in the BRRD regulations themselves.[56] The former, not necessarily consistent with one another within the Directive, are anything but clear. The BRRD, although it implements the objective

[55] At least because there are two opposing points of view on this matter among eminent scholars.
[56] Such objectives, in the BRRD, are five: from a hierarchical perspective, all of them should be placed on the same level. See, among scholars, in Italian, Pierre de Gioia Carabellese, *Bail-in, diritti dei creditori e Costituzione italiana in connessione con un recente provvedimento del Consiglio di Stato*, in *Giurisprudenza Commerciale*, 2020, forthcoming publication.

of financial stability, does so not so much in compliance with a European Union principle, as in observance with a more global need, which is reflected in the sets of economic laws promoted by the G20, in the aftermath of the Anglo-American apocalyptic banking crises of 2007/2008.[57] These international financial needs abruptly became principles of the European Union, in the view of the Italian State Council. Not without a touch of irony, it is important to remark that: a) the source of the new principles (stability of the financial system) does not seem to be European, since the beginning, although more recently it has been included in ancillary legal provisions enshrined in the Treaties;[58] b) the principles themselves, if they do really exist, were not originally present in the Treaties; and c) the possible contrast between constitutional law and the BRRD does not necessarily concern the objective of the BRRD (which is financial stability), but rather the way the latter was implemented.[59]

**5. Further potential constitutional profiles of the bail-in tool. 5.1. The *par condicio creditorum*: a legal pillar**. At a national level, the BRRD undoubtedly places a strain, to put it euphemistically, on the *par condicio creditorum* principle or, more broadly speaking, the principle of general capital

[57] Reference should be made to the Pittsburgh Summit in September 2009. On this occasion, politicians of the most prominent countries of the world came to the conclusion that the "too big to fail" notion, especially regarding the most important banks for the system, requires a new set of regulations on the matter of management of a crisis affecting groups that operate on an international level. See Antonella Brozzetti, *Ending of too big to fail" fra soft law e ordinamento bancario europeo. Dieci anni di riforme*, Cacucci Editore, Cari, 1028, 31-32. The authors comment on the existing connection between the type of bank – *major and complex bank* – and its end. Although the leitmotiv of the interpretation of the financial crisis is clear, more recent works highlight the fact that the cause was the lack of a proper system of banking management liability. It must be acknowledged that major and international players (banks) are monitored by minor and national institutions. However, big responsibilities connected with bank management (responsibilities intended to cover liability and mismanagement) were not followed by many penalties for the administrators of these banks. It seems much more common in cases when financial crises broke out, in Anglo-American countries, and, in Europe, Great Britain.

[58] Art. 127(5), of the Treaty for the Functioning of the European Union is the only one, although it was introduced more recently; hence, technically speaking, it cannot be regarded as a "Pillar". It is worth recalling the wording of this legal provision: "The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system."

[59] These aspects are analysed by Pierre de Gioia Carabellese, *Bail-in e art. 17, Costituzione. Un recente decisum del Consiglio di Stato su Cariferrara*, in *Giurisprudenza Commerciale*, 2020, forthcoming publication.

guarantee. In Spain, where the legal system is a Civil Law one as in Italy, this principle is provided for in Art. 1911,[60] *Código Civil*. In the context of *Título XVII*, headed *"De la Concurrencia y Prelación de Créditos"*, the *Capítulo Primero*, on the subject matter of *Disposiciones Generales*, prescribes as follows:

*"Del cumplimiento de las obligaciones responde el deudor con todos sus bienes, presentes y futuros."*

("Obligations shall be fulfilled by the debtor with all his present and future assets", translation by the authors)

On the same subject, the *Artículo 1912*, prescribes as follows:

*"El deudor puede solicitar judicialmente de sus acreedores quita y espera de sus deudas, o cual quiera de las doscosas; pero no producirá efectos jurídicos el ejercicio de este derecho sino en los casos y en la forma previstos en la Ley de Enjuiciamiento Civil."*

("The debtor can resort to legal help to obtain from his creditors cancellation or postponements of his debts; however, the exercise of the above right shall not produce legal effects, except for cases and forms provided for in the Law of Civil Prosecution", translation by the authors)

Lastly, the *Artículo* 1913, *Código Civil*, prescribes:

*"El deudor cuyo pasivo fuese mayor que el activo y hubiese dejado de pagar sus obligaciones corrientes, deberá presentarse en concurso ante el Tribunal competente luego que a quella situación le fuere conocida*

("The debtor whose liabilities are higher than the assets and who has interrupted the payment of his current obligations, shall appear in the competent Court as soon as he realises it", translation by the authors)

According to Spanish scholars,[61] the principle of *Garantias de la obligación*, is a main pillar, which prescribes that *"el deudor responde del cumplimiento de sus obligaciones con todos sus bienes presentes y futuros, es posible que sus nienes puedan llegar a ser pocos y los acreedores muchos, en modo tal que no puedan cobrar efectivamente todos ellos."*

[60] *Artículo 1911*.
[61] Carlos Rogel Vide, *Derecho de obligaciones y contractos*, II ed., Madrid, 2013, 39.

("the debtor shall fulfil his obligations with all his present and future belongings; it is possible that his assets may be few and the creditors' many, in a way that they cannot effectively receive all of them", translation by the authors)

Other scholars,[62] also referring to *Artículo* 1911, underline how the connection between capital and person (natural or legal) is not merely of an economic or accounting nature, but is probably of a legal nature. In this regard, the authors of the present paper add that, in contrast to civil law, which is well represented by Spain, the *pari passu* in common law is a bland conception, merely of an accounting nature, of common law,[63] as discussed below. The main principles of civil law on the matter of capital guarantee,[64] which are completely absent in common law jurisdictions such as England and Wales, are reported below:

*"El conjunto de los bienes atribuidos a una persona (física o jurídica) se conoce con el nombre de patrimonio. Ahora bien, conviene tener en cuenta que era atribución es de carácter estrictamente jurídico y no coincide (o, al meno, no coincide exactamente) con los conceptos económicos y contables de patrimonio."*

("All belongings ascribed to a person (natural or legal) go under the name of assets. However, it is better to take into account the fact that such ascription is of strictly legal nature and does not correspond (or rather, not entirely) to the economic and accounting concepts of assets", translation by the authors)

Lastly, it is stated as follows:

*"En suma, el patrimonio es el ámbito de bienes proprio de una persona (física o jurídica) a lo largo de toda su existencia, y de bienes definidos porque dicha persona ostenta un titulo jurídicos obre los mismos, con independencia de su real disponibilidad económica o de la posibilidad de su inclusión contable."*

[62] Francisco Capilla Roncero, *Introdución al Derecho Patrimonial Privado,* 7° edición attualizada, Tirant Lo Blanch, Valencia, 2015, 128-129.
[63] See below.
[64] Ibid., 128.

("Ultimately, the asset is the entirety of belongings of a person (natural or legal) during his whole life, and of belongings defined because the person in question claims a legal title upon the former, independently from his available income or from the possibility of accounting inclusion", translation by the authors)

It is well known that the Italian legal provision to be referred to is the one stipulated in Art. 2741, Civil Code, on the basis of which creditors have an equal right of benefitting from the expropriation of debtor assets.[65] The *par condicio creditorum* principle is not legally binding in itself; however, exceptions to the system are limited to privileges provided for in Art. 2745 ff., Civil Code, particularly on the cause of obligation, and to preferential debts originating from real warranties. The division of creditors into classes according to the agreement represents a more advanced example of an exception to the rule.[66] This system of capital guarantee is flanked by a solid body of law which protects creditors, even during the enforcement phase,[67] and of credit collection.

**5.2. The *pari passu* in common law.** Another important characteristic can be represented by common law legal systems, where a strong and tangible set of laws, such as those in Italy and Spain as in the examples provided above, does not exist. The English common law features the *pari passu* principle which, in contrast to the principle of *par condicio creditorum*, is prescribed as follows:

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[65] Aldo Checchini & Giuseppe Amadio, *Istituzioni di diritto privato*, Giappichelli, Turin, 2014, p. 430.

[66] Giovanni Maria Uda, *Il bail-in e i principi della par condicio creditorum e del no creditor worse off (ncwo)*, in *Il diritto dell'economia*, 2018, pp. 733 ff., in particular p. 743.

[67] Scholars (Cesare Massimo Bianca, in collaboration with Mirzia Bianca, *Istituzioni di diritto privato*, Giuffrè Editore, Milan, 2014, p. 665; Cesare Massimo Bianca, *Diritto civile*. *La responsabilità*, Vol V, Milan, Giuffrè, 2000, pp. 111-112) clarify the cut-off line between capital guarantee and capital responsibility, the former indicating the active part (namely, "*creditor right on the asset belonging to the debtor*"), and the latter indicating the passive part ( "namely, *the subjugation of the asset belonging to the debtor, on which the guarantee is based*"). It is well known that in Italy this point of view is opposed by other eminent scholars (Luigi Mengoni, voce *Responsabilità contrattuale (dir. vig.)*, in *Enciclopedia del diritto*, Vol. XXXIX, Giuffrè, Milan, 1988, p. 1072), according to whom, since the service is not possible due to a cause attributed to the debtor, the originating right of credit still exists with a different object. By contrast, a binding relationship still exists as a fundamental relationship. Other Italian scholars in in-depth and more recent works (Giovanna Marchetti, *La responsabilità patrimoniale negoziata*, Wolters Kluwer Italia, Milan, 2019), observe that the general principle of personal liability (o *responsabilità patrimoniale*, in Italian) is a fortress under siege, increasingly affected by exceptions of a legislative nature.

*"[A]ll the creditors in a particular category will share the money available – they are "on an equal footing", they rank and abate equally. If there is not enough to pay every creditor in that category in full, each creditor will receive the same percentage of his original debt."*[68]

Undoubtedly, what is lacking in the English *pari passu* is, as in Civil Law legal systems, the subjugation of the whole capital to the creditor, which across the Channel in continental Europe is considered a discretionary right[69] because it allows action against debtor assets. Moreover, the definition of *pari passu* is watered down by the argument that it is also, and more frequently, a mere provision which is inserted in international contracts. Thus, the borrower declares, vis-à-vis the lender, that his payment obligations in compliance with the facility agreement are at least equal to the present and future obligations, not guaranteed, towards the remaining creditor class. This provision, previously discussed in its true extent, is currently even more under siege, after a number of common law rulings which questioned its usefulness.[70] Furthermore, within the context of insolvency laws, *pari passu* in English common law appears even weaker, since its role in the winding-up process is considered very unsatisfactory,[71] with regard to avoidance actions or anti-deprivation rules.[72]

The lack of the principle in question allows for the fact that common law accepts situations such as the floating charge, a guarantee based on assets that,

[68] Pierre de Gioia Carabellese, Chair of Law, Company Law Lectures, University of Huddersfield, Academic Year 2017/2018.
[69] Technically a *diritto potestativo*, a concept hardly existing in English common law.
[70] As is well known, Argentina and its problematic public bonds served as a battleground, from a judicial point of view, with regard to the above subject matter. Disputes in front of the judge in New York were about the restructuring of an international debt of a bond issued in 2001, and then restructured, connected to a provision which prescribed payment by instalments. The impact of this payment by instalment on the pre-existing *pari passu* provision was the object of the ruling. See *White Hawthorne, LLC, et al. V Republic of Argentina*, No. 16-cv.1042 (SDNY 22 December 2016).
Lee C. Buchheit and Andres de la Cruz, 'The Pari Passu Fallacy - Requiescat in Pace' (2018)30 International Financial Law Review 32-33. The *pari passu* provision, in its contractual version, leads many scholars to think that it is only a symbolic one.
[71] Rizwaan Jameel Mokal, 'Priority as Pathology: the *Pari Passu* Myth" (2001)60 Cambridge Law Journal 581-621; Rizwaan Jameel Mokal, *Corporate Insolvency Law. Theory and Practice* (Oxford University Press, Oxford 2008).
[72] Reinhard Bork & Martin Voelker, 'The Anti-Deprivation Rule as an Anti-Avoidance Rule' (2016)29 Insolvency Intelligence 65-75.

at the right time, will come back to a company asset.[73] In the court ruling *"Re Yorkshire Woolcombers' Association",*[74] the three necessary conditions for the floating charge were, firstly, there must be legal security of the equity (and not of the common law) on all or some asset classes of the company;[75] secondly, assets constantly subject to guarantee change constantly; and thirdly, the company is not bound to assets subject to floating charges, as it is assumed and lawful that in the ordinary course of business, and until the charge crystallisation takes place, the company can use these assets. A situation such as the floating charge would be hardly conceivable in Civil Law or in Italy. Indeed, due to the ever-changing nature of the subject, it would also make it inconsistent with the principle of legal security and capital guarantee.

It is worth noting that, since in the common law a real *par condicio* principle is not present, the laws concerning the (mere) *pari passu* principle are only accounting references, or slightly more, which the liquidator, i.e. the court officer, must take into account in two cases: in the first case, when assets belonging to the failing institution are liquidated (and thus converted into money), and in the second, when credit is payable and the creditor[76] acts against the debtor.

**6. From the *pari passu* principle in common law to the *par condicio creditorum*.** The present theoretical premise plays a key role, bearing in mind the existence of a real *par condicio* principle in the BRRD. When carefully analysing such important systems, it is clear that the BRRD – as regards Italy, the legislative text which sanctioned its implementation as provided for in Legislative Decree 180/2015 – questions civil principles as well as legal traditions. The main principle of *par condicio creditorum* and its "legal derivatives", which in the Civil Law is not accounting rules but rather the main pillars of a social system and of a body of laws, is dismantled due to the new EU

[73] Alan Digman & John Lowry, *Company Law* (10th ed. Oxford University Press, Oxford 2018) 80-94.
[74] [1903] 2 Ch 284.
[75] In other words, stock, book debts or even the whole of the company's undertaking.
[76] Moreover, speaking of ownership (in Italian "titolarità") in Common Law may turn out to be risky.

body of laws.[77] It is important to note that there are regulatory actions that lead to a partial but balanced exemption of *par condicio creditorum*. The objective of protecting the company, as a constitutional value, was already an occasion to implement a number of limitations, at a national as well as a European level.

In Italy, in the preventive arrangement with creditors, there are various options of a normative nature which are in contrast with the principle of *par condicio creditorum*; in particular, creditors can be paid separately from every pool, in violation of the *par condicio*, if that results in greater satisfaction; there is a possibility of taking on debts intended for the conversion of the company, for which the preferential status is recognised in the following failure and also in a potential following agreement,[78] as well as in the procedure itself in which they were granted;[79] and there is a possibility of providing real guarantees in favour of pre-deductible credits, as provided for in Art. 182-5, par. 2.[80] Moreover, at a European level, restructuring operations were the object of recent intervention by the legislator, thanks to a regulation which, albeit reducing credits, protects private autonomy by means of "democratic" mechanisms, based on the consensus of a majority.[81] Reference must be made to Directive 2019/1023[82] and

[77] Claudia Sandei, *Il bail-in fra diritto dell'insolvenza e diritto dell'impresa*, in *Rivista di diritto civile*, No. 4, 2017, p. 896; Francesco Capriglione, *La nuova gestione delle crisi bancarie tra complessità normativa e logiche di mercato*, in *Rivista trimestrale di diritto dell'economia*, 2017, No. 2, p. 143.
[78] If granted in the event of an agreement in accordance with Art. 182-2.
[79] Art. 182-5.
[80] Diego Rossano, *Nuova disciplina per la gestione delle crisi bancarie: il bail-in e la sua concreta applicazione*, in *Rivista trimestrale di diritto dell'economia*, 3-supplement, 2015, p. 307.
[81] Reference is made to the Directive on the matter of restructuring.
[82] "*Directive (Eu) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)"* [OJ L 172]. At the time the present work is being written, there are probably no objections in Italy against the legal instrument from Brussels. In the cross-Channel literature, see Irit Mevorach, & Adrian Walters, 'The Characterization of Pre-Insolvency Proceedings in Private International Law' (2019) European Business Organization Law Review, forthcoming publication; Dominik Skauradszu & Walter Nijnens, 'The Toolbox for Cross-Border Restructurings Post-Brexit – Why, What & Where?' (2019) Nottingham Business and Insolvency Law e-Journal, forthcoming publication. In Spanish, Ignacio Tirado, *European Directive on Preventive Restructuring and Second Chance*, organised by Juana Pulgar Ezquerra, Universidad Complutense, 30 May 2019, Madrid. On restructuring in general, focusing on the Spanish law, see the most representative and eminent source in Spanish, Juana Pulgar Ezquerra, *Preconsursalidad y reestructuración empresarial*, II ed, Wolters Kluwer, Madrid, 2016.

to bankruptcy discharge of creditors, which link a partial write-off to a precise majority, with democratic involvement of the parties concerned: a rather different scenario from the "quasi-dictatorial" BRRD[83] that is, apart from the linguistic provocation, a strongly discretional and untechnical model of resolution tools.

**6.1. The *pari passu* principle in the BRRD.** Bearing in mind the evolutionary process, the principle of *par condicio creditorum* was weakened with the intervention of private autonomy[84] or as a result of an authorisation made by the legal authority.[85] On the other hand, in the BRRD the resolution authority itself makes its own choices concerning credits, given its power of excluding certain liabilities,[86] in a totally independent way from the intervention of the legal authority, in other words not taking into account private autonomy. In Directive 2014/59 the *par condicio creditorum* is not only waived, but is a completely overlooked principle. Art. 22, par. 1B of Legislative Decree 180/2015 prescribes that shareholders and creditors with the same position in the priority order applied in insolvency proceedings are treated equally and undergo losses in the same order. According to the authors of this article, this regulation allowed some scholars to state erroneously that priority order, according to the BRRD, is the one provided for by the single legal systems of each Member State. In fact, in the event of resolution, the order of first refusal right becomes only theoretical. It becomes reality only if and insofar as an actual bank winding-up takes place. The context of resolution is regulated by a legal and administrative microsystem which is governed with discretion by the resolution authority.

[83] Moreover, reference is made to Raffaele Lener, *Profili problematici delle nuove regole europee sulla gestione delle crisi bancarie*, in *Banca impresa società*, 2018, p. 15.
[84] Similarly, the case of the Directive addressing credit restructuring.
[85] As in the hypothesis provided for with regard to insolvency proceedings.
[86] Diego Rossano, *Nuova disciplina per la gestione delle crisi bancarie: il bail-in e la sua concreta applicazione*, in *Rivista trimestrale di diritto dell'economia*, 3-supplement, 2015, p. 307.

It must also be noted, with disapproval, that in the entire BRRD the sacrosanct expression[87] *par condicio creditorum*[88] is never used, which indicates that the legislator challenges the civil law principles of most of the Member States. The real problem of the BRRD set of laws on this matter is the expression *"unless the present Decree prescribes differently".* Thus, Art. 22 of Legislative Decree 180/2015 allows, by means of this expression, for the possibility of countless exceptions. This thereby leads to the creation in the BRRD, with high administrative discretion, of a microsystem of orders that prevails over all the others as soon as there is a failure. More precisely, Art. 49 par. 1 and par. 2, Legislative Decree 180/2015, regulates liabilities excluded by means of law, providing the authority with the power of discretional exclusion. In this way, the expression "unless the present Decree prescribes differently" comes full circle in Art. 49.

Subtly, Italian scholars have underlined the fact that Art. 49 may justify the power of absolute discretion given to the administrative authority, on the basis of technical and political reasons. The possible, or rather probable, unequal treatment following different bail-in experiences is not justified by any

[87] Perhaps it should have been, or could still yet be, the disapproving statement of an Italian civil law expert or of a legal expert of Civil Law in general.

[88] However, the *pari passu* principle is present, but only in the English version of the BRRD, which confirms that this expression is downgraded to a mere linguistic expression. Furthermore, the comparison between Recital 77 in its English and Italian versions speaks for itself:
*"Except where otherwise specified in this Directive, resolution authorities should apply the bail-in tool in a way that respects the pari passu treatment of creditors and the statutory ranking of claims under the applicable insolvency law. Losses should first be absorbed by regulatory capital instruments and should be allocated to shareholders either through the cancellation or transfer of shares or through severe dilution. Where those instruments are not sufficient, subordinated debt should be converted or written down. Senior liabilities should be converted or written down if the subordinate classes have been converted or written down entirely".*
In the Italian version:
*"Salvo se altrimenti specificato dalla presente direttiva, le autorità di risoluzione dovrebbero applicare lo strumento del bail-in in modo tale da rispettare il trattamento paritario dei creditori e il rango dei crediti ai sensi del diritto fallimentare vigente. Le perdite dovrebbero essere assorbite innanzitutto da strumenti del capitale regolamentare e dovrebbero essere ripartite tra gli azionisti mediante la cancellazione, il trasferimento o una forte diluizione delle azioni. Se ciò non bastasse, il debito subordinato dovrebbe essere convertito o svalutato. Le passività di primo rango dovrebbero essere convertite o svalutate se le categorie subordinate sono già state convertite o azzerate".*
The key words have been underlined by the authors of the present work in order to show that the "*pari passu*" principle in the English version corresponds, in the Italian version, to the expression "equal treatment of creditors".

regulation.[89] Art. 49, probably written in haste and with a legislator perhaps still traumatised by the financial crisis of 2007/2008, cancels, by briefly typing on his laptop, a thousand-year-old European tradition in the field of Civil Law and insolvency law.[90] From a more sociological and extra-legal point of view, Art. 49 is also the presumption of a legal-technological Big Brother,[91] which with its algorithmic nature decides the fate of creditors, "killing them", "setting them free" or "bringing them back to life", according to the situation.[92] Thus, no principle of law, at least of traditional law, seems to be truly valid. Art. 49 is not a waiver to the law, but it is simply an area outside the law, as it is understood. It could also be stated that, if in the future at a European level, legislation is drafted in this way, the European Union law may become a danger for the very countries it is supposed to protect, because it will destroy their legal foundations.

However, it cannot be stated that the exclusions, very peculiar though they are, created by the agreement stipulated in Art. 49 and Art. 22 of Legislative Decree 181/2015, have changed, with the necessary changes having been made, a system or privilege that is a traditional system. Furthermore, a possible assimilation must be excluded *ex ante*, after acknowledging that the system of exclusions provided for in the BRRD is not connected with the specific cause of credit.[93] Ultimately, the *pari passu* and *par condicio creditorum* principles are violated, because some creditors (those subject to internal banking recapitalisation) must provide resources necessary to satisfy others (those not being subject to bail-in). Thanks to a radical change in the financial assets,[94] creditors who undergo bail-in are transformed from being protected into

[89] Giovanni Maria Uda, *Il bail-in e i principi della par condicio creditorum e del no creditor worse off (ncwo)*, in *Il diritto dell'economia*, 2018, pp. 733 ff., in particular p. 745.
[90] We use the expression with deliberately disclosed sense of irony.
[91] Big Brother is here intended as a reference to the Orwell's fictional character. Therefore, the reference shall not be intended as the most enthusiastic commentary.
[92] The statement, clearly provocative, is used in Italian by Pierre de Gioia Carabellese, Ricapitalizzazione bancaria interna. Epistemologia, patologia e fenomenologia di un concetto giuridico, (Rome, Studium 2020) passim.
[93] Claudia Sandei, *Il bail-in fra diritto dell'insolvenza e diritto dell'impresa*, in *Rivista di diritto civile*, 2017, No. 4, p. 898. The choice made by the Resolution Authority is entirely independent of the cause of the credit.
[94] Potentially subject to algorithmic preparations of the Resolution Authority.

protecting subjects.[95] Furthermore, excluded creditors do not take part in burden sharing, and, as a consequence, the burden on protecting creditors increases. More precisely, the present authors, in the heat of the moment, has just used the expression “protecting creditors”, which may subconsciously bring to mind the figure of a patron saint. In a way, the analogy clarifies the point that, just as the saint reaches beatitude through voluntary martyrdom, the creditor subject to bail-in becomes a saint, though in his case martyrdom is not a choice, but rather a decision by means of a law enacted by Big Brother, in other words the resolution authority.

**6.2 *Par condicio creditorum*, bail-in and Art. 3, Italian Constitution.** The system described above, from a strictly legal point of view, leads to a series of considerations and analyses. Firstly, the unequal treatment provided for in Art. 49, BRRD, is not perfectly compatible with the Italian constitutional principles. Art. 3, Constitution, prescribes a principle of equality, which seems violated due to the unequal and disproportionate treatment of credit owners, namely the social and personal conditions provided for in par. 1 of the article in question of the Constitution.[96] This unequal treatment is not based on objective criteria, as it

[95] This expression is used by Gaetano Presti, *Il bail-in*, in *Banca impresa società*, 2015, No. 3, pp. 339 ff., in particular p. 357.

[96] The scenario is not among the most absurd ones. In Austria, there was a ruling by the Constitutional Court of 3/28 July 2015 concerning the Hypo Alpe Adria Bank dispute. The judges declared the constitutional illegitimacy of HaasSenG. In this case, the law implementing the BRRD in Austria, in compliance with Legislative Decree 180/2015, prescribes that subordinated shareholders and bondholders must be subject to the legal consequences of the rescue, with the purpose of repairing the bank. In this particular case, the Austrian Constitutional Court approved the censorship related to the unequal treatment between creditors belonging to the only class of subordinate bondholders, for reasons of bond maturity, which is an extrinsic element in itself, but without a real legal justification. More specifically, bondholders with bonds reaching maturity on 30 June 2019 were called to contribute to the funding, and thus were “eligible” for purposes of internal bank recapitalisation. Bonds expiring after 30 June 2019 were not subject to bail-in and therefore the “infamous” fate was spared to them. See Giuseppe Guizzi, *Il bail-in nel nuovo sistema di risoluzione delle crisi bancarie. Quale lezione da Vienna*, in *Corriere Giuridico*, No. 12, 2015, p. 1489.

would violate a logical criterion of proportionality or, to put it better, of reasonableness[97]

( ) that is the cause, as for privileges, but rather on the discretion of the authority. The latter, with its decision to "favour" one specific credit over another in the implementation of a resolution tool, may be completely independent from the cause of credit, or from its type, thus favouring a specific creditor. Therefore, the main purpose of the resolution authority, assuming that there is no factionalism or favouritism, is to ensure that "the figures" check out, and that the bank is recapitalised. In a nutshell, the accounting end justifies the means, potentially illegal, which is in contrast with the principles of law. A differentiation of creditors is possible, and this does occur in the Italian legal system within the context of laws concerning privilege. However, what seems to be completely lacking in the entire BRRD framework is an objective differentiation criterion which corresponds to a valid *ratio*, for instance, as regards a mere banking relationship such as a bank account. If it exceeds the threshold of 100,000 Euros, the account holder becomes protector (as a symbolic gesture and to ease the pain, after this he will be referred to as a "patron saint"); otherwise, he will become a protected subject. The differentiation criterion could become completely discretional, for it is not provided for by the legislator, but it is the object of a decision made by the Resolution Authority.[98]

In this regard, it should also be added that some scholars at an international level[99] have identified the shortcomings in the BRRD, from the above point of view.[100] It is underlined that in the BRRD, insolvency regulations and creditor

[97] For a general analysis of the structure of the proportionality judgement in all its different components, see Aharon Barak, *Proportionality Constitutional rights and their limitations* (Cambridge, 2012).

[98] It seems that the case of the Banco Espírito Santo, where the decision to include some credits and transfer them to the bridge bank (thus saving them), while leaving others of the same kind, was absolutely discretional. For further analysis on the matter, see Pierre de Gioia Carabellese, *Bridge bank e decisum della UK Supreme Court su Banco Espírito Santo: dal bonus argentarius al coactus argentarius*, in *Banca impresa società*, 2019, pp. 377-425.

[99] David Ramos Muñoz, *Resolución bancaria y preferencias de crédito*, in *Revista de derecho concorsual y paraconcorsual*, 2018(29), p. 22.

[100] There are also scholars who express a more cautious form of perplexity, such as Jens-Hinrich Binder, *The Position of Creditors under the BRRD*, Commemorative Volume in Memory of Professor Dr. Leonidas Georgakopoulos, Bank of Greece, Centre for Culture, Research and

protection tend to align, the latter being based on the principle of *par condicio creditorum*. However, upon closer inspection, this alignment is only theoretical. Formally, regulations on internal bank recapitalisation seem to adapt to regulations on credit preferences. In reality, the system seems to be the exact opposite. With regard to insolvency laws and in *par condicio creditorum* the principle is, with reference to credit, "high or low",[101] a consequence of the hierarchical rule: credit of higher rank, credit of lower rank. By contrast, in the principles and operativity of the BRRD, in a very unique way, the logic seems to be "in or out",[102] with regard to credit. Therefore, there is apparently a waiver, which could even become a permanent historic shift, from the strict verticality of the *par condicio creditorum,* to the flexible and "fickle" horizontality of "take there, put here", if that colloquialism may be allowed.

The external or internal fate by means of the agreement issued by the BRRD regulations is obviously entrusted to the Resolution Authority, with the uncertain presence of a real judge, even in the mere *ex-post* stage. Thus, from an epistemological point of view, it is difficult to fully understand whether, when deciding the fate of the credit, the Authority truly pays attention to insolvency principles and to *par condicio creditorum* or, on the other hand, whether it follows exclusively BRRD regulations,[103] in which the public need for financial stability protection seems to overwhelmingly prevail over the rights of private persons.[104]

Documentation, 2016. An overall positive opinion of the system is expressed in Karl-Philipp Wojcik, 'Bail-in in the Banking Union' (2016)53(1) Common Markets Law Review 91-138.

[101] *"Arriba o abajo"*, in the Spanish expression used by eminent scholars. See David Ramos Muñoz, ibid.

[102] *"Dentro o fuera"* ("in or out"), the incisive Spanish expression provided by the eminent Spanish scholar mentioned in the previous note.

[103] It must be underlined that the above principles are not included in EU regulations of constitutional rank, but are the result of the temporary situation of the Anglo-American financial crises in 2007/2008.

[104] Due to the excessive haste to provide this protection, the BRRD made legal "bloopers", which expose a considerable lack of adherence to the *pari passu* principle. For instance, among exempt liabilities, depositors of up to 100,000 Euros are exempt. Depositors are creditors merely proved to be such by a written document. On the one hand, exclusion modifies the *par condicio* (for a higher value but for the same cause other depositors can be written off). On the other hand, this exclusion is not justified, since the depositor protection fund covers these creditors, too (below 100,000 Euros). The second effect is that the originating pillar of the European banking union should be so strong that depositors, for the purpose of saving the bank, should be potentially subject to writing-off, as the fund ought to protect them equally. On the other hand, the BRRD

Within the framework of the BRRD, the value of equal treatment of creditors is most likely not only recessive if compared to the value of financial stability,[105] but even ignored. Although some believe that financial stability is a main value that must be considered as prevailing over the *par condicio creditorum*,[106] in the present paper perplexities about the literature are expressed, but also hesitations of a conceptual nature: within the BRRD it is not even clear which value is protected, in that, as already hinted, a definitive solution is difficult to provide. There are considerable misgivings of a systematic nature within the BRRD, because the exception system was introduced in a way that, in contrast to privileges, is independent of the cause of credit.

**7. Conclusion**. The points for reflection emerging from the analysis carried out in this contribution are many. Italy's acquiescence towards the disruptive mechanisms of the BRRD cannot be exempt from criticism, even after five years. The wording of Art. 47, para 1 and para. 2, Italian Constitution, which had to be adapted to momentous changes,[107] would be worth receiving the judgment of constitutional judges, given that the scholarly interpretation, with regard to the limits, and above all the strengths, of the constitutional provision,[108] is ambiguous.

seems to offer a double and useless protection, which from the point of view of civil law seems to have a negative effect on the priority order.

[105] This is an admission that financial stability is the real purpose of the BRRD. It is highlighted by scholars that the objectives of the BRRD are not completely clear, and indeed partly contradict one another. See, in Italian, Pierre de Gioia Carabellese, *Bail-in, diritti dei creditori e Costituzione italiana in connessione con un recente provvedimento del Consiglio di Stato*, in *Giurisprudenza Commerciale*, 2020.

[106] Among eminent scholars, Lorenzo Stanghellini, *La disciplina delle crisi bancarie: la prospettiva europea*, in Banca d'Italia (Quaderni di ricerca giuridica della consulenza legale), *Dal Testo unico bancario all'Unione bancaria: tecniche normative e allocazione di poteri. Atti del convegno tenutosi a Roma il 16 settembre 2013*, March 2014, No. 75, pp. 147 ff., particularly p. 176.

[107] Reference is made to the introduction of the Euro currency, to the evolution of the bank from a public institution (the one existing at the time the Constitution was drafted) to a private institution, and to the concept of currency itself and what is represented by a safe value, which can be protected at the highest legal level. On the matter of safe assets, see in the Anglo-American literature Anna Gelpen and Erik F Gerding, *Rethinking the Law in "Safe Assets"*, in Ross P Buckley, Emilios Avgouleas and Douglas W Arner (eds), *Reconceptualising Global Finance and its Regulation* (Cambridge University Press, Cambridge 2016) 159-190.

[108] Again, the delimitation (the savings of the bank versus the savings of the entire financial industry) and the depth (Art. 47, par. 1, as a founding value of the Constitution versus Art. 47, par. 1, as a constitutional provision which must adapt to the value, which in the past has become disruptive, of the stability of the financial system).

A ruling of the Court would be extremely helpful to Italian politicians. It seems correct to state that these politicians, during the drafting of the BRRD, were rather submissive towards the European legislator. By contrast, a more authentic and recent interpretation of Art. 47, both para. 1 and para. 2, Italian Constitution, also with regard to the BRRD objectives, in reality rather vague and not yet entirely clarified, could be very opportune. This opportunity was missed perhaps too quickly, in the ruling issued by the Italian State Council in early 2019. Moreover, thanks to the reference to the constitutional experience of other Civil Law countries, a ruling of the Constitutional Court on Art. 47, par. 1, Italian Constitution, could lead to a less strict interpretation of the controversial concept of depositor.[109] . On the other hand, it is acknowledged with slight disappointment that a Common Law country like Great Britain, devoid of a Constitution or a Constitutional Court, is not of great help in relation to this matter, and that is not merely because it is leaving the European Union. Indeed, the complicated Brexit process, in which British politicians and constitutionalists have been trapped, by their own admission, seems to confirm this assumption.

If the laws in force persist in compliance with the BRRD, it is likely that the legal expert must acknowledge the fact that there is a new way of legislating, perhaps fascinating for some, but certainly risky and fearsome for others. Where the rule of law is present in this perspective, is yet to be fully understood. If the scenario mentioned above comes true, it may be necessary to prepare for a new 'war', even if it lasts a hundred years, far longer than the iconic Thirty Years War. However, before the outbreak of a fierce conflict, the guardians of the law will hopefully intervene: therefore, there is a desperate need for judges,[110] or rather for constitutional judges on the matter of the BRRD, both Italian[111] and

[109] As provided for in Art. 51, Spanish Constitution.
[110] Reference is made, in Italian, to Pierre de Gioia Carabellese, *Bail-in, diritti dei creditori e Costituzione italiana in connessione con un recente provvedimento del Consiglio di Stato*, in *Giurisprudenza Commerciale*, 2020, forthcoming publication.
[111] Constitutional Court with regard to Art. 47 and Art. 3. With regard to Art. 47, par. 1, an updated "original" interpretation of what constitutionally protected savings really means in the 21st Century seems necessary. It is a consequence of the fact that, as previously mentioned, the scholarly opinions are only two, but are in opposition. Art. 3, Italian Constitution, until now a rarely discussed matter, could became a prevailing topic for discussion with Brexit, since the leading actor, namely

European,[112] or even a real European administrative judge who can supervise the actions of the Resolution Authority.

The bail-in, a banking law concept, has proven itself to be an interdisciplinary concept of legal analysis. With a court decision of the Consiglio di Stato, the issue of a possible contrast of the bail-in with a number of important pillars of the Italian Constitution is rejected. Nevertheless, this paper shows that this decision is far from being convincing. Certain fundamental legal provisions of the Italian Constitution, such as depositors' protection, under Art. 47, deserve a final clear-cut ruling by the Italian Constitutional court, especially in the light of the two different schools of thought that have sprouted in the last decades. Surprisingly, this paper, in dissecting the pillar of Art. 47, shows that the bail-in may drive a coach and horses through other constitutional pillars, such as the principle of equality, in connection with the possible violation of the *par condicio creditorum.*

* Although the contribution is the outcome of a common reflection of the two authors, Chapters 2, 3, 4 shall be bestowed upon Carola Pagliarin, whereas Chapters 1, 5, 6 and 7 to Pierre de Gioia Carabellese

Great Britain, has three different Common Law systems. The likely prevailing role of Civil Law legal systems may once again bring the issue to the fore.

[112] The five theoretical objectives of the BRRD should be examined by the judges of Luxembourg, also bearing in mind that the economic and social framework in which the BRRD was issued has changed drastically. The real essence of the BRRD (avoiding the use of public money while still ensuring financial stability) is not only a theoretical elaboration, but also an exercise which helps us to understand when a credit institution must be subject to resolution or winding up.