

PUBLIC SELECTION BASED ON QUALIFICATIONS AND INTERVIEW FOR THE AWARDING OF NO. 1 GRANT LASTING 12 MONTHS FOR CONDUCTING RESEARCH IN ACCORDANCE WITH ART. 22 OF LAW OF 30.12.2010 NO. 240 AT THE DEPARTMENT OF LAW OF THE UNIVERSITY OF BERGAMO (ACADEMIC RECRUITMENT FIELD 12/G2 – CRIMINAL PROCEDURE – ACADEMIC DISCIPLINE IUS/16 – CRIMINAL PROCEDURE (CUP: F12I14000230008) AS PART OF THE PLAN FOR EXTRAORDINARY RESEARCH CALLED ITALY® (TALENTED YOUNG ITALIAN RESEARCHERS) - YOUTH IN RESEARCH INITIATIVE FOR THE YEAR 2016 - TRANCHE II – TYPE D – CUP: F12I14000230008

announced with decree of the Rector Rep. no. 533/2016 of 19.10.2016 and posted on the official registry of the University on 19.10.2016

RESEARCH PROJECT

“The ideological value of nullities strict interpretations in criminal procedure”

The research focuses on nullity in Criminal Procedure, that is on articles of the Code dealing with sanctioning the non compliance of law.

As it involves one of the most important principles of the Rule of Law - the separation of powers - and another difficult issue for any jurist - the relation between judge and law- this subject has always been a field of study for legal theorists, who have divided into formalists and realists. Formalists, when facing a difformity between act and legal model, ask the judge to ascertain exclusively whether this difformity can lead to nullity in the act, without investigating on the offensiveness of vice; this investigation is on the contrary considered essential and dutiful by realists.

In 1999, at the time of the constitutional reform on Fair Trial, both the two approaches found in the reform material supporting their own positions: the formalists the principle of rule of law, the realists the “trial within a reasonable time”. The breaking point came when the Constitutional Court, about ten years ago, established that the Cedu rules as interpreted by the Strasbourg Court integrate the art 117 of the Constitution when it imposes State legislation to conform to international rules. So the new European laws were added to the ever present tendencies to disregard the dato Italian law, in turn ready to rewrite the discipline of nullity in Criminal Procedure according to single cases. The supporters of antiformalism derived from the approach of the European Court- receptive of effective prejudice - new reasons for their interpretation, which was eased by the consideration that, after 30 years, the discipline of nullity cannot be said to have worked efficiently in promoting functionality and granting guarantees.

Legislation, apparently clear, is actually not without ambiguity in certain parts; for example, when it states that nullities - different from absolute ones - cannot be objected by those who 'have no interest in the observance of the law violation', it allows two opposite interpretations, consequent to the meaning given to the word 'interest', whether it designates something abstract or concrete. Also, legislation can be vague - for example the rules about 'general nullity', use concepts whose definition is not always clear.

It is therefore clear that, even not considering the frequent peculiarities of jurisprudence, there is large ground for interpreters, despite the intention of the legislator to limit as much as possible their discretion (emblematic in this respect the art. 177 c. p.p. which regulates the strict interpretation in nullities).

The research project will have to deal with these issues; its aim will be establishing the feasibility of an interpretation apt to guarantee the interests inherent the procedural rules, and at the same time to avoid both exceedingly formalistic interpretations, which disregard functionality, and theories founded on effective prejudice, which, given the vagueness of the very concept they are built upon, risk undermining the legality of trial.

The research project will entail attendance to conventions and seminars. In the first part of the project the grantee will thoroughly study the legal theories with relevance to the assigned issue; in the second part scientific publications will have to be submitted.

Every six months a report will have to be submitted to account for the grantee's research activity.

In addition to a survey of the current debate with references to the European law, whose concept of 'equity' is quite far far from our cultural tradition, the research project should provide an original solution to be ranked halfway between exceedingly formalistic interpretations, unable to take into account the complexity of interests in Penal Law, and interpretations that hastily conclude their analysis by investing the 'ethic of responsibility' of the single judge with a decisive role, (as if the ideals of certainty and predictability, already obsolete in their original Enlightenment version, had finally set forever)