CONSTITUTIONAL JUSTICE IN THE REPUBLIC OF SAN MARINO

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The article investigates the Sammarinese system of constitutional adjudication, framing it within the Sammarinese legal tradition, and outlines their interplay. In particular, the paper analyses the path leading to the establishing of a weak form of constitutional review in 1974 and of a sui generis constitutional court, the Collegio Garante della Costituzionalità delle Norme (Guarantors' Panel on the Constitutionality of Rules) in 2002.

This double analysis determines whether the Sammarinese model owes more to the Republic of San Marino being a small(micro) state or to its extraordinary and unique legal history.

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Il est souvent difficile de déterminer avec précision si le droit en vigueur dans la République de San Marin s'explique par sa taille réduite (il est généralement rangé dans la catégorie des micro-états) ou par sa tradition juridique.

Le régime constitutionnel de la république de San Marin n'échappe pas à cette difficulté, tel que le démontre l'auteur qui analyse les raisons sous-jacentes qui ont conduit à la mise en place en 1974 d'une forme atténuée de contrôle constitutionnel puis en 2002 à la création d'une Cour Constitutionnelle 'sui generis', le Collegio Garante della Costituzionalità delle Norme.

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Il presente contributo analizza il sistema sammarinese di giustizia costituzionale, avendo cura di evidenziare come essi si collochi nel sistema giuridico tradizionale. L'esperienza sammarinese si caratterizza infatti per una introduzione piuttosto tardiva del controllo di costituzionalità, iniziata nel 1974 e culminata nel 2002, anno della costituzione del Collegio Garante della Costituzionalità delle Norme.

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Il carattere sui generis del Collegio, da cui discende l'impossibilità di considerarlo una vera corte costituzionale, ben evidenzia le tensione tra sistema giuridico tradizionale e la necessità - avvertita, seppur in momenti diversi, da tutti i micro Stati - di recepire modelli già adottati dai marco Stati.

I PREMISE

Among the small and micro[1] states of the European continent the Republic of San Marino is one of the most interesting to analyse because of the peculiarities and the ancient origin of its legal system.

Even though there is no consensus on the definition either of small or of micro states, there is no doubt of the qualification of the Republic of San Marino as either a small or a micro state.[2] If one considers all the proposed classification criteria, either qualitative or quantitative - territorial size, population, GDP, strength in international relations,[3] self-perception - the Republic meets all of them.[4] Indeed, the Republic has a total area of 61,19 km^2, a population of 33.328[5] and a total GDP of US$2.09 billion.

The fact that the Republic lacked a sort of constitutional court for so long could be interpreted as perfectly on the lines of the main traditional approach, which considered constitutional courts as a key constitutional body within big states, usually characterised by a large territory and a pluralistic legal structure. In such a context, a body entrusted with functions connected to the resolution of disputes between the different territorial levels of government as well as between the

1 Micro state is the most popular name to identify the smallest sovereign polities. Other names are Liliputian state and ministate. Even though it does not provide for an analysis from a legal stand point, see Zbigniew Dumieński "Microstates as Modern Protected States: Towards a New Definition of Micro-Statehood" (2014) Centre Small States Studies, Institute of International Affairs at <http://ams.hi.is/wp-content/uploads/2014/04/Microstates_OccasionalPaper.pdf>.

2 This depends of the classification criteria. See, among others, Petar Kurečić, Goran Kozina & Filip Kokotović "Revisiting the Definition of Small State through the Use of Relational and Quantitative Criteria" (2017) at <www.researchgate.net/publication/313675926_revisiting_the_definition_of_small_state_through_the_use_of_relational_and_quantitative_criteria>; Matthias Maass "The elusive definition of small state" (2009) International Politics 65-83; and Tom Crowards "Defining the Category of 'Small' States" (2002) 14 J Int Dev 143-179.

3 Micro states as protected states, entertaining asymmetrical relations with normal states.

4 The classificatory problem is not just the lack of consensus on the definition, rather, vagueness and arbitrariness in the classification criteria. Some scholars even opted for not confronting the classification issue seeing it as impossible to solve. Niels Amstrup "The Perennial Problem of Small States: A Survey of Research Efforts" (1976) 11 Cooperation and Conflict 163–182. For further bibliography, see Dumieński, above n 1.

5 The International Monetary Fund, the World Bank and the Commonwealth Secretariat classify small states as those with a population of 1.5 million or less.

branches of government was perceived as essential. [6] On the contrary, a constitutional court in a small(micro) state would not have improved the state functioning. Therefore, the first step is to consider whether such a claim is still viable, mainly by briefly addressing the issue of constitutional adjudication in the broader context of small(micro) states.

The second step is to examine the Sammarinese legal system, with a particular focus on the form of government and legal sources. While performing this analysis, it is convenient to outline the connection between the Sammarinese system and being a small(micro) state.

This second part of the analysis is a requirement to investigate possible influences on the model of constitutional adjudication and on its late establishing by the traditional legal system.

The third part addresses the core of the constitutional justice model adopted by the Republic, examining the composition, the functioning and the most relevant case law of the Collegio Garante.

Finally, the article provides some concluding remarks, sustaining the result of the analysis, which claims that a major influence on the late establishing of a *sui generis* constitutional court has been the traditional Sammarinese legal system. Being a small(micro) state has thus had an indirect influence, exclusively through the traditional Sammarinese bodies.

II SMALL(MICRO) STATE AND CONSTITUTIONAL ADJUDICATION

The first point to be addressed is the claim that constitutional courts are not much needed in small(micro) states. Even though recently legal scholarship seems to be progressively dismissing the claim, it is convenient to deal with it here. The elements supporting the claim have been previously outlined and they seem not to be viable any more either theoretically or practically. These two sets of reasons will be analysed separately.

A The Theoretical Reasons

To say that a constitutional court would help the good functioning of a big state more than a small state may be true. Nonetheless, it fails to explain why the body should not perform well in a small(micro) state. When considering the constitutional architecture of a small(micro) state - even though distinctive features

6 Theo Öhlinger *Legge sulla Corte Costituzionale austriaca* (Centro editoriale europeo, Firenze, 1982) 66-67.

may be identified - there is nothing preventing the establishment of a constitutional jurisdiction.

Quite the reverse. A constitutional court could bring benefits to a small(micro) state.

The first to be mentioned is a more substantial exploitation of the *principaliter* (direct) proceeding, which should be favoured by the small population size. Greater access to the court would result in a more substantial protection of fundamental rights and freedoms. The claim is sustained *a contrario* by the fact that big European states - excluding Austria, Germany and Spain - tend to rule individuals out of the direct proceeding due to the difficulties flowing from their large size. However, one should not conclude that small(micro) states have strongly implemented the direct proceeding nor that individuals massively resort to it.

The second could be that the constitutional court would strengthen the implementation of impersonal rules given the trend to personalisation of politics.[7] Despite this being a general trend affecting states because of the crisis of traditional political parties and of the crumbling of 20th century ideologies, clearly it is favoured by the small size. Furthermore, it is not even a new problem for the Republic, even though the Republic has been an oligarchy. Indeed, how to avoid the risk of an excessive personalisation of politics is an issue that the Republic has already faced. Two solutions have been proposed. The first, dating back to 1243, is the provision of a six-month term of office for the Capitani Reggenti (Captains Regent), ie the head of state. The second, dating back to 1906, marked the preliminary step toward the abolition of co-optation in favour of election (limited suffrage) as a selection method for the members of the legislative body, the Consiglio Grande e Generale (Grand and General Council).[8] A third which has to be added is the selection of the members of the Collegio Garante also among foreign scholars and judges.

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7 Mario Patrono "La Corte costituzionale nei "piccoli" Stati" in Guido Guidi (ed) *Piccolo Stato, Costituzione e connessioni internazionali* (Giappichelli, Torino, 2003) 177-179 at 177.

8 The decision to transform the legislative body from a closed to an open assembly was of the Arengo that took place on 25 March 1906. The Arengo is the assembly of the heads of the Sammarinese households. Although it had been one of the most ancient bodies of the Sammarinese form of government, it stopped being summoned around 1560. Originally, the Arengo was entitled to appoint the members of the Consiglio Grande e Generale. The function was already declining in 1600, when the *Rubrica IV* of the *Libro I* of the *Leges Statutae* prescribed co-optation for membership of the legislative body. The Arengo was revived in 1906. On the Arengo, see Cristoforo Buscarini "Corpo elettorale, Arengo, Consiglio dei Sessanta" (2017) Identità sammarinese 15-24.

The final theoretical reason could be the role of the constitutional court as a junction between the small domestic dimension and the supranational circuit. Indeed, the court would be included in the multilevel constitutionalism, thus strengthening the protection of fundamental rights and freedoms. The Sammarinese legal system has proved to be committed to this supranational level by recognising, protecting and implementing the European Convention of Human Rights (later on ECHR), as stated under Article 1(4) of the Dichiarazione dei diritti dei cittadini e dei princìpi fondamentali dell'ordinamento Sammarinese (the DD).[9] The same position within the hierarchy of sources is occupied by the general principles of international law as well as by all the norms of international treaties on the protection of fundamental rights and freedoms which are well recognised as a part of its legal system (Article 1(4) DD).

B The Practical Reasons

The claim of the unsuitability of the constitutional court in small(micro) state is proved wrong by the fact that small and micro states have progressively established either a constitutional court or a supreme court/high court entrusted with constitutional adjudication.[10] Furthermore, the supremacy of the constitution is enshrined in all small(micro) states' constitutions.

III THE SAMMARINESE FORM OF GOVERNMENT AND SOURCES OF LAW

This part represents the outline of the main features of the Sammarinese legal system, addressing mainly the form of government and the system of legal sources.

The Republic of San Marino is characterised by a long tradition of independence and by ancient institutions that have survived throughout time. According to tradition, independence dates back to 3 September 301 CE.

Due to the small territorial size and its geographical position, the Republic of Titano[11] was able to preserve its independence and also to resist foreign influence.

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9 Declaration of Citizen Rights. Law no 59/1974. The text, in Italian, is available at <www.consigliograndeegenerale.sm>.

10 Two main exceptions are represented by Brunei, under art 84 of the Constitution, which establishes a weak Interpretation Tribunal (this is perfectly in line with Brunei's not being a democratic state). The Vatican City has also to be mentioned, although its qualification as a proper state is still debated: Luciani Musselli "Stato Città del Vaticano" in G Guidi (ed) *Piccolo Stato, Costituzione e connessioni internazionali* (Giappichelli, Torino, 2003) 13-24; and Winfried Schulz *Città del Vaticano (Stato della)*, in *Dig disc pubbl, III* (Utet,Torino, 1989) 1-12.

11 The Republic of San Marino is also known as the Republic of Titano. Here the name Titano refers to Mount Titano, which is a 739 m above the sea level mountain of the Apennines and the highest peak in San Marino.

This explains why San Marino could for centuries be a legal microcosm; this has made its legal system unique.

This longstanding tradition had resisted the evolution that characterised other states of continental Europe together with the progressive development of European constitutionalism. In particular, San Marino resisted for a long time two of the cornerstones of constitutionalism ie the codification process and the establishing of a system of constitutional justice. The Republic resisted as well any clash between the different social classes and attempts to establish a system of check and balances.[12] Accordingly, the most relevant reforms affected more the form of government rather than the form of state.

For centuries, the most important Sammarinese sources have been the Ancient Customs and the *Leges Statutae*, six books published in 1600, regulating the whole life of the Republic, the *Reformationes* (ie all the legislation following the *Leges Statutae*), and the *ius commune*.

The Republic was not involved in the codification process that characterised continental Europe in the 19th century. Accordingly, neither a formal constitution nor a civil code was adopted. This explains why in civil law interpretation and customs still play an important role, making San Marino closer to Common Law systems. Unlike civil law, the criminal law was codified, first with the 1865 code and then with its 1975 amendment.

Even though the 1865 codification was a solution alien to the Sammarinese traditions, the Republic has always proclaimed the principle of institutional continuity. It is based on that principle that San Marino, starting from the mid-20th century, gradually reformed the state architecture which dated back to the Renaissance.

The gradual reform of the legal system culminated in 1974 with the adoption of the DD (the Diachiarazione dei Diritti).[13] The DD, unlike constitutions that usually mark a break with the tradition and thus found a new system, lacks this founding character. On the contrary, the DD reflects a recognition of the historical development and of the very general principles regulating the Sammarinese legal system (together with state bodies and their functioning, and fundamental rights and freedoms). Therefore, the DD reaffirms the principle of institutional continuity.

12 More precisely, the separation of powers was realised within the Consiglio Grande e Generale, rather than between the Consiglio and the other prominent bodies. This element makes the separation of power still weaker in San Marino than in other democratic states.

13 Guido Guidi *Le fonti scritte nella Repubblica di San Marino* (Giappichelli, Torino, 2004).

However, it is convenient to note that a lively debate arose upon the adoption of a rigid constitutional document. The tradition proved to be resilient. In 1969, the Consiglio Grande e Generale, appointed a special committee to study the challenges of the Sammarinese legal system - Commissione per lo studio dei problemi istituzionali dell'ordinamento sammarinese. The committee, chaired by the prominent scholar Guido Astuti, was not in favour of reforming the core of the Sammarinese tradition or moving toward a system centred on a rigid constitution, which would have bounded too much the legislator.[14] The opinion was not followed and in 1974 the DD was passed by the Consiglio Grande e Generale. Furthermore, under art 16(1), the DD was assigned a super primary rank, thus becoming the first source of the Sammarinese system to be expressly qualified as rigid. The rigidity is clearly affirmed in arts 3bis and 17[15] which provide a specific procedure to amend the provisions of the DD as well as to pass *leggi costituzionali* (constitutional laws).[16] Nonetheless, it seems convenient to outline that the DD was passed following the ordinary legislative procedure by a simple majority. Together with the specific amendment procedure is established under Article 16,[17] a procedure to scrutinise the compliance with the DD of the Sammarinese sources. This transformation of the system of legal sources has clearly narrowed the application of customs.[18]

The process started in 1974 and when concluded in 2004 marked the final transformation of the Republic into a proper constitutional state. 2004 is considered as the concluding date of the process because of the entry into force of the Collegio Garante.

The Collegio Garante is a newly established body, completely alien to the Sammarinese institutional tradition. Indeed its origin cannot be traced back to the *Leges Statutae*, unlike for the other constitutional bodies.

Those bodies are listed here in order to better frame the Collegio Garante within the constitutional architecture.

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14 In Gilberto Felici "Il sindacato di costituzionalità in via diretta. Osservazioni sul controllo di legittimità costituzionale delle norme" (2009) Identità sammarinese 64-80 at 71.

15 Those articles were introduced by the 2002 amendment. Nonetheless, the original art 16 already provided for a 2/3 majority to amend the DD.

16 Lamberto Emiliani "Sul procedimento di revisione costituzionale"(2012) Identità sammarinese 111-124.

17 This article too was amended in 2002.

18 The position of customs within the new hierarchy of sources established by the DD will be discussed next.

The head of state is the Reggenza, composed of two Capitani Reggenti, appointed every six months by the Consiglio Grande e Generale. Their power is mainly symbolic as their main duty is to represent the country and to guarantee the constitutional order. They can dissolve the Consiglio Grande e Generale and have the power to promulgate and order the publication of the laws approved by it.

The Consiglio Grande e Generale is the legislative body of the Republic.[19] It is composed of 60 members (thus also called Collegio dei LX), elected by universal suffrage by all Sammarinese of 18 years of age every five years. It is presided over by the Capitani Reggenti. It is quite an anomaly, even from a comparative perspective, that the head of state presides over the legislative body. The Consiglio has also the power to ratify international treaties, to grant amnesty and pardon and to elect the Congresso di Stato (Congress of State). Traditionally, the Consiglio Grande e Generale was the pivotal body of the Sammarinese form of government. Indeed, under Rubrica III of the Libro I of the *Leges Statutae*, it is awarded the sovereign power.

The Congresso di Stato is entrusted with the executive power.[20] It is composed of 10 members elected by majority by the Consiglio Grande e Generale. It is in a relationship of confidence with the Consiglio Grande e Generale.

The Sammarinese gradual approach toward constitutionalism briefly outlined here marks a significant difference with respect to other two European small(micro) states such as the Principality of Monaco and the Principality of Andorra. Indeed, they both opted for the opposite approach, of the adoption of constitutions embracing all the principles of contemporary constitutionalism.[21]

IV ESTABLISHING CONSTITUTIONAL REVIEW: 1974 AND 2002

The analysis so far frames the resistance of the Sammarinese legal system to the establishing of a system of constitutional justice. Furthermore, it clarifies its anchoring to the uniqueness of the Sammarinese legal tradition. This point is important with respect to whether this resistance is to be ascribed to tradition or to the small size of the state. No one denies that the system has been influenced by the latter. Nonetheless, once the system was established and developed, it was the

19 Giovanna Crescentini "Il Consiglio Grande e Generale" (2015) Identità sammarinese 91-129; and Buscarini, above n 8.

20 The contemporary Congresso di Stato was established in 1945. However, its origins can be traced back to the 18th century, when it was a branch of the Consiglio Grande e Generale exercising administrative functions.

21 Cristoforo Buscarini "Sull'assetto istituzionale sammarinese. Alcune riflessioni" (2011) Identità Sammarinese 103-112 at 104.

former ie its uniqueness rather than the small size which was the major obstacle to the establishing of a constitutional court.

Accordingly, constitutional review was established in two steps, starting in 1974 with a weak form and some thirty years later with the creation of the Collegio Garante (2002-2004).

A Constitutional Review between 1974 and 2002

The first step was the establishment of a constitutional review under art 16 of the 1974 DD and the legge (law) no 4/1989, which implemented art 16 DD. The second step was the amendment of art 16 by art 7 of the legge di revisione costituzionale (law amending the constitution) no 36/2002, establishing the Collegio Garante.

The two versions of art 16 embodied two different models of constitutional review. The former, under para 2, established the discretion of the ordinary judge, in case of doubt or dispute on the compliance with a legal provision with the principles of the DD, to address the Consiglio Grande e Generale, asking for an opinion. Therefore, the Consiglio Grande e Generale, ie the legislative body, was entrusted with the power of review, upon the advice of experts. Thus, considering that the Consiglio Grande e Generale is both a party involved in the controversy and the judge of it, the request of the ordinary judge seems more a political petition rather than a *petitum*.[22] If the decision is one of unconstitutionality, the challenged provision is annulled with an *ex nunc* effect (art 8(1) legge no 4/1989). The decision to entrust the review to the legislative body marked a weak review, mainly in terms of rights protection, thus also weakening the rigidity of the DD. The involvement of a panel of experts was not sufficient to remove doubts on the actual efficacy of the review. Indeed, legge no 4/1989 introduced under art 6(4) a simple majority when voting on the acceptance or rejection of the experts' opinion. It is convenient to note this element because under art 16(1), a 2/3 majority is required to amend the DD. Therefore, for the law to provide the same majority would have been more rational and logical, and would have created symmetry between the amendment procedure of the DD and the decision on an alleged violation of the DD. This last point is also strengthened when considering that the body entrusted with the amendment and with the power to decide upon the alleged violation is the same. Beside the centralised control exercised by the Consiglio Grande e Generale, emerged the diffused control performed by ordinary judges. Indeed, it would not be

22 Michele Carducci "Il controllo di costituzionalità vigente" in Guido Guidi (ed) *Un collegio garante della costituzionalità delle norme in San Marino* (Maggioli, Rimini, 2000) at 66-67.

inappropriate to qualify the activity of the judge when interpreting and implementing the law as a sort of diffused control. The element leading to this conclusion is the verb 'may' - instead of 'must' - employed in art 16. Therefore, the doubt of the judge on the constitutionality of a provision does not entail the obligation to raise the question before the Consiglio Grande e Generale. In doing so, the article creates room for the discretion of the judge. Furthermore, the judge also freely decide not to apply a provision that is believed to be unconstitutional. However, with respect to this last point, it remains that among different possible interpretations and implementations of a certain provision, the judge has to choose the one more in compliance with the DD[23] and the decision shall have an *inter partes* effect. Nonetheless, the judge cannot declare the provision unconstitutional.

The review introduced under art 16 can be qualified as both centralised and decentralised. It is centralised because it is exclusively for the Consiglio Grande e Generale to carry out the review; it is decentralised because any ordinary judge has to enforce the DD not only when interpreting the law but also when enforcing it by non-applying a contrasting provision.

Another connected feature of this first model of review is that the review is not the main function exercised by the body entrusted with review function.

Indeed, the system performed poorly. Between 1989 and 2001 the Consiglio Grande e Generale reviewed just twelve complaints.[24]

In spite of the weak character of the review, this solution fits perfectly the peculiarity of the Sammarinese system. The soft introduction of the review reduced the possibility for the very same idea of review to be rejected.

B The Collegio Garante per la Costituzionalità delle Norme

The inappropriateness of the solution became evident, together with the development of a progressive awareness of the need for a stronger protection of fundamental rights and freedoms and for the separation between the legislative body and the body entrusted with the review of legislation. This resulted in the

23 The obligation to opt for the interpretation in compliance with the constitution is known in various legal systems (such as Italy and Germany). Among others, see Elisabetta Lamarque "The Italian Courts and Interpretation in Conformity with the Constitution, EE Law and the ECHR" (2012) 1 Rivista AIC 1-27; and Id. "Interpreting Statutes In Conformity With The Constitution: The Role Of The Constitutional Court And Ordinary Judges" (2010) 2 Italian Journal of Public Law 91-123; Gerrit Betlem "The Doctrine of Consistent Interpretation – Managing Legal Uncertainty" (2002) 22 Oxford Journal of Legal Studies 397-418.

24 Guido Guidi "Repubblica di San Marino" in Guido Guidi (ed) *Piccolo Stato, Costituzione e connessioni internazionali* (Giappichelli, Torino, 2003) 121-175 at 150.

establishing of a new body, completely alien to the Sammarinese constitutional tradition.

At the time the Capitani Reggenti stressed the extraordinary character of the new body by making reference to the Sammarinese tradition, which has always been to confer the most relevant powers to the only body directly elected by the voters, the Consiglio Grande e Generale, and to the Reggenza.[25] Besides, the establishing of the Collegio Garante would introduce a form of control on the original bodies of the Sammarinese form of government, the ones dating back to the Middle Ages. These two elements explain the concerns of a possible rejection of the new body that surrounded the establishing of the Collegio Garante.

The Collegio Garante has been entrusted with a wide range of functions. Besides the scrutiny of ordinary legislation, the scrutiny of political-constitutional bodies (the Reggenza), the resolution of disputes between constitutional bodies and the ruling on the admissibility (*ammissibilità*) of referendum. This latter function was introduced under the legge qualificata[26] no 1/2013 on the referendum.

The Collegio Garante realises a form of review, which is centralised, repressive and both abstract and concrete (*principaliter* and *incidenter*).

The Collegio Garante is further regulated by the legge costituzionale no 67/2003 and legge qualificata no 55/2003,[27] as provided under art 16(4) and (5) DD.

The former provides the responsibilities of the members. The latter provides for the selection of the members, the organisation, the functioning, the incompatibilities of the members, the proceedings and the effects of decisions.

Finally other sources on the Collegio Garante include the legge qualificata no 55/2003, the legge costituzionale no 144/2003, the legge qualificata no 145/2003 (as modified by the legge qualificata no 2/2011), and the Regolamento del Collegio Garante no 1/2004, which details the provisions under the legge qualificata no 55/2003.

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25 Giovanni Guzzetta "Relazione annuale sull'attività svolta dal Collegio Garante della Costituzionalità delle Norme. Anno 2016" (2017) at 3 at <www.collegiogarante.sm/on-line/home/parte-generale-informativa/relazioni-annuali.html> (in Italian).

26 The *legge qualificata* (art 3bis(2) DD) is the Act to regulate the constitutional bodies and the instruments of direct democracy. Furthermore, it has to be passed by an absolute majority.

27 Texts of both pieces of legislation - together with all the other relevant legislation on the Collegio Garante - are available at <www.collegiogarante.sm/on-line/home/riferimenti-normativi.html> (in Italian).

C Composition

The Collegio Garante is composed of three effective members and three deputies. The latter have to take over the former in case of either incompatibility, absence or impossibility to attend.

The members are elected by the Consiglio Grande e Generale, upon the advice of the Ufficio di Presidenza of the Consiglio, by a 2/3 majority (art 2(1) legge qualificata no 55/2003). The selection procedure by the Consiglio Grande e Generale is not detrimental to the independence of the Collegio Garante. On the contrary, the independence of its members is guaranteed by the regulations on the term of office and on incompatibilities and by the possibilities for foreign nationals to be selected as members.

The members serve for a first term of four years. Then the Collegio Garante is renewed by at least 1/3 every two years. At that time, two members, one effective and one deputy, are drawn by lot from among all the members who have completed the first term (art 2(4) legge qualificata no 55/2003). This procedure ensures that none of the members can serve for more than two terms. Nonetheless, they can be re-elected if four years have elapsed since of their last term (art 2(5) legge qualificata no 55/2003). Deputy members can be elected as effective ones and vice versa. The President is elected by the whole Collegio Garante among the effective members and serves for two years. In case of a tie, the oldest in office is elected; after that person the oldest in age (art 3(1) legge qualificata no 55/2003). The oldest in office is calculated from the moment a member is swore in (art 3 Regolamento del Collegio Garante no 1/2004). The President is entitled to organise the activity of the body (art 19 Regolamento del Collegio Garante no 1/2004).

The requirements for selection as a member are to be either a law school full professor or a judge or legal professional with at least twenty years of experience (art 16(1) DD). To be a Sammarinese citizen is not a requirement (art 2(3) legge qualificata no 55/2003). Indeed all the current members are Italian citizens. This is certainly very peculiar, although not rare from a comparative perspective. In the Principality of Monaco the members are usually French scholars and judges.[28] In Commonwealth countries in the Pacific - such as Solomon Islands, Tonga, Tuvalu, Vanuatu - judges of the Supreme or High Court are usually foreign nationals from Commonwealth jurisdictions (mainly from New Zealand). Accordingly, those Pacific courts work in English and never in their indigenous language (though English is one of the official languages). The Supreme Court of the Marshall Islands too usually relies on US judges or legal scholars. Surely the small size of

28 The current composition is of seven French members out of seven.

those states and the strong connection they may have either with big neighbours - this is the case of Monaco and San Marino but also of the Pacific islands - or their former colonial rulers - again Pacific islands - may favour the selection of foreign nationals. However, looking at San Marino (but the same goes for all the other examples mentioned) another explanation could be possible. Indeed, the rationale of the provision may be twofold. First, the benefit of the high level of expertise of Italian scholars and judges to the newly-born Sammarinese constitutional adjudication system. Second, the boosting of the independence of the body, considering the small size of the population. However, other guarantees are provided to strengthen the independence of the members such as the regime of selection and incompatibilities. Concerns could arise with respect to the suitability to allow foreign scholars/judges, who may not be very familiar with the Sammarinese legal tradition, to be the custodians of the new constitutional legal order.

Concerning incompatibilities, the office of member of the Collegio Garante is incompatible with any other office and commitment, either of a public or personal nature (art 4 legge qualificata no 55/2003).

Any member of the Collegio Garante can resign and the resignation has an immediate effect. Furthermore, a member loses office whenever an incompatibility appears or there is unjustified absence from three consecutive sessions (art 5 legge qualificata no 55/2003). The responsibilities of the members are regulated under the legge costitutionale no 67/2003. Besides the loss of the office (art 1), which directly refers to the aforementioned art 5, art 2 regulates the removal and the temporary suspension from office only by a special deliberation by the Collegio Grande e Generale (by a 2/3 majority) upon the proposal of the Collegio Garante (by absolute majority). A member can be either removed or suspended because of civil or physical incapacity, because of behaviour able to compromise the credit of the body, and because of any fault in the performing of his functions (art 3).

With respect to the functioning of the body, the legislation provides for the publicity of all the hearings (art 7 legge qualificata no 55/2003). For a session to be valid, the requirement is of three members present (art 8(1) legge qualificata no 55/2003). Decisions are taken by majority (art 8(2) legge qualificata no 55/2003). Decision can be either judgments or orders (art 8(3) legge qualificata no 55/2003), where the latter have to state the reason. All the decisions are published in the *Bollettino Ufficiale* (art 10 legge qualificata no 55/2003).

Legal professionals registered at the Sammarinese Bar are entitled to lodge complaints before the Collegio Garante; whereas foreign ones have to declare their

domicile at a Sammarinese professional address (art 9(1)(2) legge qualificata no 55/2003). The Republic is represented before the Collegio Garante by the Avvocatura dello Stato (Government Legal Service) (art 9(4) legge qualificata no 55/2003).

D Functions

The Collegio Garante exercises functions proper of a constitutional court.

According to art 16(3) DD, the Collegio Garante:

- scrutinises the compliance with laws, acts having the force of law with normative content, customs having the force of law with the founding principles of the Sammarinese system as provided or referenced by the DD;
- rules on the admissibility of the referendum;
- resolves disputes of competence between constitutional bodies;
- reviews the activity of the Capitani Reggenti.

The list is not closed. Indeed, under art 16(4) a legge costituzionale can add further functions. Furthermore, when considering constitutional review, because the DD does not expressly distinguish ordinary legislation from leggi costituzionali and leggi qualificate, the provision has to be interpreted as including within the competence of the Collegio Garante the review of both leggi costituzionali and leggi qualificate.

The effect of the decisions of constitutional review is dealt with under art 16(6) DD. In cassation decisions, annulment is to take place after six months in order to give the Consiglio Grande e Generale sufficient time to amend the unconstitutional provision or to take other legislative steps. In case the Consiglio Grande e Generale does not intervene within the six-month period, the Collegio Garante shall strike down the provision.

1 Constitutional Review

Constitutional review can be requested both *principaliter* and *incidenter*. Together with the establishing of the Collegio Garante, the *principaliter* proceeding is the major innovation of the new Article 16 DD.

The *principaliter* review can be requested by at least twenty members of the Consiglio Grande e Generale, the Congresso di Stato, at least five Giunte di Castello,[29] 1,5% of the voters.[30] Legge qualificata no 62/2005, art 1, has added

29 The Castello is the Sammarinese municipality, whose executive body is the Giunta (plural Giunte).

30 1,5% of the voters corresponds roughly to 500 voters according to the last census.

another body between those entitled to lodged the direct complaint, which is the Commissione per le pari opportunità (Equal Opportunity Committee). The fact that the complaint can be lodged by a variety of subjects entails a significant protection of the interests of political minorities, but also of very specific interests of the civil society. Furthermore, the inclusion of the Commissione per le pari opportunità proves the commitment of the Republic toward non-discrimination.

In the *incidenter* proceeding, it is either the judge presiding in the case or the parties or the Procuratore del Fisco (the prosecutor) that can ask for the review.

Review before 2002 has been qualified as both centralised and diffused. Indeed, very few constitutional complaints were lodged before the Consiglio Grande e Generale, whereas many more references to the DD were made by ordinary judges in regular court proceedings. [31] The 2002 reform weakens the decentralised character of the review. The reason is that under the new system - even though the obligation to opt for the interpretation in compliance with the DD still stands - the judge can no longer decide not to apply a provision believed to be unconstitutional. On the contrary, the judge has the obligation to refer the issue to the Collegio Garante. This is, again, on the lines of the European models of review. However, the fact that a judge can decide not to raise the complaint before the Collegio Garante but resolve any doubt through an interpretation in compliance with the constitutional can still be considered as a sort of very basic diffused system of review. Therefore, the *incidenter* review maintains a small diffused character at the ordinary judge level, whereas it is undoubtedly centralised at the level of the Collegio Garante.

Besides the above-mentioned functions, the Collegio Garante was temporarily entrusted with jurisdictional functions under the transitional provision of the DD introduced by the legge di revisione costituzionale no 36/2002, at art 9. The functions were related to: resolution of jurisdictional conflicts; abstention and objection of judges and of the Procuratore del Fisco; ruling in case of disparities between decisions of first and second instances in civil and administrative cases; ruling on applications for a revision of criminal decisions and on complaints for *restitutio in integrum*[32] and *querela nullitatis*.[33] Those functions were previously exercised by the Consiglio dei XII[34] and the Consiglio Grande e Generale and

31 In Felici, above n 14 at 73.

32 Reinstatement of the previous situation.

33 Action to ascertain the invalidity of a decision.

34 The Council of Twelve, elected by the Consiglio Grande e Generale, was, until 2003, the supreme tribunal of the Republic.

better specified under the legge qualificata no 55/2003, the legge costituzionale no 144/2003 and the legge qualificata no 145/2003 (the latter both regulating the judiciary).

However, the entry into force of the latter two 2003 laws, no 144 (art 10) and 145 (as modified by the legge qualificata no 2/2011), marked the transferral of almost all those temporary functions to the judiciary, with the exception of the complaints for *restitutio in integrum* and *querela nullitatis*.

The legge costituzionale no 144/2003 entrusted additional functions to the Collegio Garante. Under art 5, it decides on abstention and objection of the giudici per i rimedi straordinari[35] and of the judges in charge of the civil responsibility of judges. Under arts 7 and 8, it is competent for the control of the activity of judges.

Further regulations on the proceedings before the Collegio Garante are to be found in the Regolamento del Collegio Garante no 1/2004.

The proceedings of constitutional review are regulated into detail under Title III (arts 11-14) of legge qualificata no 55/2003: *principaliter* under art 12 and *incidenter* under art 13.

In the *principaliter* proceeding, the constitutional complaint has to be lodged before the Collegio Garante within 45 days from the publication *ad valvas*[36] of the law or act having the force of law (art 12(2)). This timeframe does not apply when the challenged provision is a customary one. The complaint has to clearly identify the provision(s) upon which the doubt has arisen as well as the provision(s) of the DD that are alleged to be violated (art 12(2)). Otherwise, the Collegio Garante cannot receive the complaint. Nonetheless, the body tends to receive a complaint even if there are some irregularities in the identification of the challenged legislation or of the parameters. What matters for the Collegio Garante is that the will of the parties is clear.

When the complaint is lodged by the voters, they have to identify their representative to interact with the Collegio Garante. Furthermore, they also have to attach to the complaint the signatures of 1.5% of the voters. Those signatures have to be previously authenticated by the Ufficiale di Stato Civile[37] and the Cancelliere

35 Judges for extraordinary remedies. They mainly decide on abstention and objection of the judges and on the review of final judgments.

36 On the gates of the Palazzo Publico, ie the palace of the government.

37 Office of civil status records.

del Tribunale Commissariale.[38] It will then be for the Collegio Garante to verify that all the subscribers of the complaint are actually registered as voters (art 12(3)).

On the contrary, when the procedure is started by five Giunte di Castello, the deliberation of each Giunta is necessary and the minutes of the sessions have to be attached to the complaint. Moreover, two delegates for each Giunta have to sign the complaint (art 12(4)).

The *incidenter* proceeding is regulated under art 13 legge qualificata no 55/2003. The proceeding can be started by the parties involved in a regular trial before any jurisdictional body, by the Procuratore del Fisco[39] - both with a written claim (istanza) - or by the judge (the so-called judge *a quo*) - with an order stating the reason (ordinanza motivata) (art 13(1)). It is convenient to note that the Collegio Garante as well, when performing its jurisdictional functions, may lodge a constitutional complaint before itself. Therefore, the Collegio Garante can be a judge *a quo*.

Regardless of who raised the constitutionality issue, the judge *a quo* is the only one entitled to interact with the Collegio Garante. Before referring the question to the Collegio Garante, when the initiative is of either of the parties or of the Procuratore del Fisco, the judge has to perform a preliminary check and declare the question admissible. The judge must dismiss those complaints that are clearly unfounded or not relevant to the trial. Furthermore, the complaint has also to meet the requirements under art 2(2) - the identification of both the challenged provision and of the infringed parameter. This control is not just aimed at filtering the complaints, but also at preventing the *incidenter* proceeding turning into a *principaliter* proceeding.

The judge, whether accepting or dismissing the complaint, has to issue an order stating the reason. If the judge does not accept the complaint declaring it inadmissible, this does not prevent the same compliant from being lodged in other instances of the lawsuit or in another lawsuit.

Moreover, it may happen that both the judge and the parties (or the Procuratore del Fisco) raise a constitutional complaint - though it may be different with respect to the parameter and reasoning - during the same regular trial. In that case, the judge has to refer the issue to the Collegio Garante in two distinct orders,

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38 Chancellor of the Commissioner Tribunal. This is the only tribunal in the Republic and is divided into different branches.

39 The Procuratore del Fisco intervenes by law in all criminal lawsuits and in some civil lawsuits as a representative of the state.

otherwise, the Collegio Garante will not be able to distinguish the complaints and will declare both of them inadmissible.

For the Collegio Garante to be able to receive the complaint, the same requirements for the *principaliter* proceeding under art 12(2) are applied (art 13(2)).

Article 13(3) sets a limit with respect to the complaints that can be lodged: namely a complaint already lodged and decided upon by *principaliter* cannot be lodged a second time by *incidenter* proceeding. An analogous limit does not apply when the complaint is not received by the judge *a quo*. In that case, the issue can be raised again in another instance of the same trial or in another trial (art 13(5)).

Once the complaint is filed, and declared admissible by the judge *a quo*, it is notified to the parties and to the Procuratore del Fisco (art 13(4)). It is then transmitted to the Collegio Garante, which sends it to the Reggenza to be published in the *Gazette* and *ad valvas*. Interested parties have 20 days to study the complaint and send observations or conclusions (art 13(7)). Within 10 days the Collegio Garante hears the case (art 13 (8)).

The proceeding before the Collegio Garante follows the rules of the due process (art 14(1)). Furthermore, the Collegio Garante has a two-month time period to deliver the final decision (art 14(2)). If a direct complaint is clearly unfounded, the Collegio decides by order (art 14(3)). In the *incidenter* proceeding, the Collegio Garante rules on the admissibility by judgment. The complaint is declared inadmissible if it is clearly unfounded. From the case law it emerges that for the Collegio Garante the challenged provision may not be immediately relevant to the court case. Moreover, the Collegio Garante has to check that there was no infringement of the procedure by the judge *a quo*; it also has to verify that the challenged provision relates to the justiciable acts.

It is convenient to outline an important difference between the two proceedings. In the direct proceedings, so long as the Collegio Garante has not delivered the decision, the petitioners can request to withdraw the complaint. If so, the Collegio Garante declares the complaint closed by order. In *incidenter* proceedings, the withdrawal of the complaint, once filed, is never possible.

Decisions of acceptance or dismissal are delivered by judgment (art 14(4)). Once delivered, decisions are immediately notified to the plaintiffs, the parties, and the Reggenza, who informs the Consiglio Grande e Generale (art 14(5)). In case of *incidenter* proceedings, the court case *a quo* is resumed within five days (art (14(6)).

Some conclusions can be drawn from the established model of review. The first is that the centralised model entails the so-called privilege of the legislator. The ordinary judge cannot alone rule on the challenged provision although the judge is the one entitled to perform a first check on the admissibility of the constitutional complaint as well as to interact with the Collegio Garante. Furthermore, the prominent position of the Consiglio Grante e Generale is strengthened by both the 45-day time limit to lodge the direct complaint and by the fact that the review is repressive.

2 Admissibility of the Referendum

Another important function exercised by the Collegio Garante is ruling on the admissibility of referendum. Formerly, this kind of control on the referendum, introduced by the legge no 101/1994, was entrusted to the Collegio Giudicante.[40] Later on, the legge qualificata no 1/2013 (as further amended by the leggi qualificate no 1 and 2/2016) repealed the legge no 1/1994.

The Collegio Garante has to rule on the admissibility of the petition. The Sammarinese legislation provides for three different referenda that can be promoted: abrogative, advisory/propositive (di indirizzo/propositivo) and confirmative (confermativo) (art 1(1) legge qualificata no 1/2013). The referendum is the most common instrument of direct democracy through which the people exercise their sovereign power alongside the institutions of representative democracy (art 2 DD).

With respect to the abrogative referendum, it can be requested by at least 60 voters or at least five Giunte di Castello. Requirements for the petition are the authenticated signatures, the personal information of the 60 voters and a detailed presentation of the petition (in the case of popular initiative) (art 5 legge qualificata no 1/2013). When the initiative is of the Giunte di Castello, the minutes of the deliberations - signed by two delegates each - together with a detailed presentation of the petition (art 6 legge qualificata no 1/2013) are required. In both cases, the petition has to be addressed to the Reggenza (art 5(1) legge qualificata no 1/2013). Once the Reggenza receives the petition, it sends it to the Collegio Garante which has a 20-day period to rule on the admissibility of the petition (art 9 legge qualificata no 1/2013); the decision is by majority and cannot be appealed, with the exception of the validity of the signatures (art 10(4) legge qualificata no 1/2013). The petition is admissible whenever all the formalities under arts 5 and 6 are

40 The Collegio Giudicante was regulated under art 11 *legge* no 101/1994 and composed of judges and legal experts.

complied with and when the requirements under art 3 a) and b) are met (art 10(1) and (2) and art 18 (1) legge qualificata no 1/2013). Article 3 a) excludes the possibility that a referendum may aim at abolishing bodies or powers, which are, under the DD, fundamental to the functioning of the state; at repealing rights and freedoms and fundamental principles under the Sammarinese legal system; at repealing any law or act having the force of law regulating taxes, budget, amnesty or pardons, or a law ratifying an international treaty.[41] It is to be noted that the reference to both the DD and the Sammarinese legal system allows a reference to the two Sammarinese constitutions: the formal one represented by the DD, and the substantial one which entails also the stratification of *ius commune*, customs and previous legislation. Article 3 b) deals with the phrasing of the petition, which has to be clear, accurate and understandable in order to allow a full and conscious exercise of sovereignty. If the initiative is popular, once the Collegio Garante has declared admissibility, the promoters have 90 days to collect the signatures of at least 3% of the voters as a support to the petition, otherwise the referendum cannot be held (art 12(1) legge qualificata no 1/2013, as modified by art 3(1) legge qualificata no 2/2016). It is the Collegio Garante which is entrusted with the check on the validity of the collected signatures (art 13 legge qualificata no 1/2013). It is convenient to outline that no assessment on what will be the consequence on the legislation of a successful referendum has to be performed by the Collegio Garante to rule on the admissibility (art 10(3) legge qualificata no 1/2013).

With respect to the advisory/propositive (di indirizzo/propositivo) referendum, the requirements under art 3 and the formalities under art 5 are to be applied (art 21(1) legge qualificata no 1/2013). However, further requirements are set under art 21: the petition should not entail any limitation of the right to vote nor of the right to work, to settle, to move, nor to any other right enshrined in the DD (art 21(2)); the petition should not propose principles, which may lead to the introduction of norms contrasting with the general principles of the Sammarinese system under the DD (art 21(3)); the principles have to be expressed into a single petition each (art 21(4)). If the Collegio Garante rules the petition admissible, are to be applied the same provisions as for the abrogative referendum on the collection of signature, referendum campaign and voting (art 21 legge qualificata no 1/2013).

The confirmative referendum is of popular initiative (art 25(1)) or by at least 31 members of the Consiglio Grande e Generale (art 26 legge qualificata no 1/2013). It is admissible only for legislation on bodies and power fundamental to the Sammarinese legal system under the DD (art 25(1)). The formalities to be met are

41 The exact same matters are beyond the scope of the Italian abrogative referendum under art 75(2) Constitution.

always the ones under art 5. If the Collegio Garante rules the petition admissible, the same provisions are to be applied as for the abrogative referendum (art 25(6) legge qualificata no 1/2013). It is convenient to outline that when the initiative is of the counsellors, the procedure is slightly different: the petition is admissible unless if focuses on tax laws, budgetary laws, amnesty or pardon laws, or laws ratifying an international treaty (art 26(1)). Then, once the Collegio Garante has ruled on the admissibility, signatures are collected and the Collegio has to finally rule on the validity of the whole procedure, under art 12 (art 26(2)).

3 Resolution of Disputes

A further function exercised by the Collegio Garante is the resolution of conflicts between the constitutional bodies on the interpretation and application of constitutional provisions. The Collegio Garante then rules on the competent body (art 16 (1) legge qualificata no 55/2003). The complaint is lodged either by the president of the collegial body or by the judge who is interested by the conflict (art 16(2)). The Collegio Garante has a 5-day period to rule by order on the admissibility of the complaint (art 16(3)). The decision on the conflict has absolute priority with respect to all the other functions and it is taken within two weeks (art 16(4)). If the complaint is accepted by judgment, the Collegio Garante declares who is the competent body and, as necessary, annuls all the acts enacted (art 16(5)).

4 The Review of the Reggenza

Finally, the Collegio Garante also has the power to review the Capitani Reggenti – the so-called Regency syndicate – under art 17 legge qualificata no 55/2003. At the end of their mandate, they are accountable before the Collegio Garante, under Rubrica XIX of Libro I of the *Leges Statutae* (art 17(1)). The reference to the *Leges Statutae* outlines that the review of the mandate of the head of state is not a recent acquisition of the Sammarinese legal system. More precisely, it goes back to 1499. Indeed, before the establishing of the Collegio Garante, the review was exercised by the Sindacatori della Reggenza.

The focus of the review is exclusively the assessment and the investigation of alleged institutional responsibilities; criminal or civil responsibilities fall under the competence of the judiciary (art 17(2)). Claims against the Reggenza can dealt with either by the role of the Capitani as presidents of the Consiglio Grande e Generale or as head of state.

The procedure can be started by any citizen who, within 15 days from the end of the term of the Capitani Reggenti, can lodge a complaint before the Collegio Garante on what they have done or not done during their mandate. The complaint

has to be detailed with respect to the activity of the Capitani Reggenti, has to state a reason and also has to indicate the decision sought from to the Collegio Garante (art 17(3). Within 5 days the Collegio Garante rules on admissibility and delivers the judgment within ten days (art 17 (4), (5) and (7)).

When considering the functions exercised by the Capitani Reggenti as head of state, it is convenient to examine art 4 legge costituzionale no 185/2005,[42] which entrusts with them the promulgation of legislation. When they receive the legislation to promulgate, if they have concerns on the compliance with the DD, from either a formal or substantial stand point, they can send it back to the Collegio Grande e Generale, requesting a new deliberation, thus performing a sort of preliminary check of constitutionality.[43] The promulgation of legislation, typically performed by heads of state, in the Sammarinese system falls to be scrutinised by the Collegio Garante.

V RELEVANT CASE LAW

As previously outlined, the Republic does not have a proper codified constitution. The legal document closest to a constitution and to which it is assigned the super primary rank is the DD. Besides the DD, the Ancient Customs mentioned under the *Leges Statutae* still stand.[44] The fact that customs are both a parameter for the Collegio Garante and justiciable acts - as stated under art 16 DD - may generate some identification problems. Whether a custom has a super primary or primary rank may not be so clear.[45] The problem was approached by judgment no 5/2010, although in that case the issue was not properly a custom, rather a non-stable jurisprudential custom (non consolidata prassi giurisprudenziale). The resort to customs, on the contrary, played a key role in the identification of those decisions that can be the object of *querela nullitatis*, which the judgment no 5/2007 extended to all types of decision. Judgment no 1/2008 focused of the *interpretazione principis* (authentic interpretation), which is considered legitimate when two conditions are met: first, that the interpreted provision is doubtful, and second, that the adopted interpretation can be reasonable with respect to the provision. If that is not the case, the interpretation law cannot have the retrospective effect, which is usually connected with authentic

42 This is the legge costituzionale regulating the functions of the Reggenza.

43 However, if the legislature passes once again the legislation, the Capitani Reggenti have to promulgate it.

44 See, inter alia, decisions no 12 and 13/2004 and 13/2005.

45 Augusto Barbera "Il diritto costituzionale della Repubblica di San Marino nella giurisprudenza del Collegio Garante" (2011) Identità sammarinese 47-56 at 48.

interpretation laws. Furthermore, as stated in the *obiter dictum* of decision no 1/2008, if the authentic interpretation law may influence the solution of a case, the judge may lodge a claim for violation of the separation of powers. The reason is that the influence would amount to an infringement of the autonomy of the judge from the legislator.

Besides Ancient Customs, another parameter, though recent, is the European Convention of Human Rights (ECHR).[46] Following the DD 2002 amendment, under art 1(4), the DD especially mentions the Convention, stating that the Sammarinese legal system "recognises, protects and implements" the fundamental rights and freedoms enshrined in the Convention. From this particular phrasing, the Collegio Garante interprets the ECHR as integrated in to the DD, thus occupying a special position within the legal sources. Besides, under paragraph 1 of the same article, the Republic now recognises as a part of its legal system the general principles of international law as well as all the norms of international treaties on the protection of fundamental rights and freedoms.

The DD does not provide an exhaustive list of rights and freedoms protected by the system. On the contrary, art 5 - declaring as inviolable all the rights of the human being - is a clause open to all the founding principles of contemporary constitutionalism. Therefore, is up to the Collegio Garante to identify more precisely, on a case-by-case basis, those principles. Some of those principles in criminal matters have been identified by the judgment no 5/2006.[47] The interplay between the documents led also to the recognition of the right to a fair trial, in particular with respect to the reasonable duration of the trial.

The Collegio Garante seldom employed the reasonableness principle, unlike other European courts such as the Italian one. This is also the reason of the rare resort to other judgments.

The Collegio Garante intervened also on the hierarchy of sources. Article 3bis DD has now introduced a closed system of sources, outlining the hierarchy. It is convenient here to mention judgment no 4/2007 on law decrees and judgment no 20/2005 on the relationship between legislation and propositive referendum.

The former offered the Collegio Garante the chance to better clarify some key differences between delegated decree (under art 3bis(5) DD and art 2(2) a) legge costituzionale no 183/2005) and law decree (under art 2(2) b) legge costituzionale

46 The Republic ratified the Convention by *decreto reggenziale* (regency decree) no 22/1989.

47 For more detail on that judgment see Barbera, above n 45 at 50-52.

no 183/2005). Although the complaint originated from a misunderstanding of the plaintiffs about the two acts, the Collegio Garante ruled on the issue, specifying that the urging of the Consiglio Grande e Generale toward the enactment of a law decree does not alone justify adoption. Indeed, the requirement for a law decree is a situation of necessity and urgency (as under art 12 legge qualificata no 184/2005 and art 9(1) legge qualificata no 186/2005). Therefore, no preventative intervention is needed on the part of the Consiglio Grande e Generale; delegation of the legislator is a requirement for the delegated decree. Furthermore, in the *obiter dictum*, the Collegio clarified that law decrees cannot modify current legislation, but can temporarily exclude its application.

In the latter judgment, the Collegio Garante examined whether the relationship between the propositive referendum and the subsequent legislation creates a sort of hierarchy between the two. Indeed, the Collegio Garante stated that if the latter is not in compliance with the former, it can be declared unconstitutional.

The case law on the referendum is quite abundant, with 69 orders, judgments and opinions. Here, it is convenient to recall judgment no 4/2004 on abrogative referendum. This decision is important, because the Collegio Garante stated that the limits set by the legislation have to be narrowly interpreted. One of those limits is the legislation ratifying international treaties (under art 3(1) a) legge qualificata no 1/2013). Although the referendum question was not upon such legislation, the success of the referendum and the following abrogation of the related provision would have endangered international obligations of the Republic. This would have undermined the general principle of international law *pacta sunt servanda*, which, together with all general principles of international law, are part of the Sammarinese legal system (art 2(1) DD). However, the Collegio Garante clarified that to analyse the consequences of the referendum is outside of its scope. This judgment further clarified the narrow interpretation of the legislative limits, marking a different approach from the one endorsed by the Collegio Giudicante. Here the Collegio Garante specifies that only legislation with a specific content with respect to ratification of international treaties is excluded from repeal through abrogative referendum. Therefore, the legislation cannot be interpreted as to exclude an abrogative referendum on foreign policy, as the Collegio Giudicante did. Furthermore, to better sustain its reasoning, the Collegio Garante stressed the need for a narrow interpretation, because the limitation of popular sovereignty has to be minimal.

Another important judgment on abrogative referendum is no 1/2005, intervening after the 2002 constitutional amendment. The focus was on the possibility of including among the sources that can be under referendum also leggi costitutizionali and leggi qualificate. The Collegio Garante excluded both these

sources from the referendum, based on the different procedure that the Consiglio Grande e Generale has to follow in order to pass leggi costituzionali (2/3 majority), leggi qualificate (absolute majority) and ordinary legislation (simple majority). To admit the possibility of a referendum for all the three aforementioned sources would abolish any distinction between sources, thus undermining the hierarchy that the DD had introduced. The Collegio Garante reached this conclusion even though the legislation provides for excluded subject matter and not type of acts. The same judgment deals with the advisory/propositive referendum, reaching a different conclusion on the same issue. Under art 23(1) legge qualificata no 1/2013, in case of propositive referendum, the Congresso di Stato has six months to draft a Bill to regulate the subject matter the referendum was about. However, no such obligation exists toward the legislative body. Therefore, the Collegio Garante reasoned that leggi qualificate can be the object of an advisory/propositive referendum. It is always up to the Collegio Garante to decide whether to approve by a qualified majority the Bill drafted by the Congresso di Stato based on the referendum result.

The issue of the compulsory effect of this referendum was addressed also by judgment 4/2010, which clarifies again the nature of the advisory/propositive referendum, stating that there is no obligation on the legislature to pass a law following the referendum. Here the Collegio Garante specified that the obligation exists only if the Bill was the very purpose of the referendum. In doing so, the Collegio Garante seems to make a clear distinction between the advisory referendum, aimed just at orienting the political activity of the government, and the propositive referendum, aimed at the approval of a specific legislation.

With respect to the disputes between constitutional bodies, there is no relevant jurisprudence. The Collegio Garante delivered just four orders (the first one in 2009) and no judgments. All four disputes were declared inadmissible. [48] Nonetheless, it is convenient to mention order no 1/2017. Some groups within the Consiglio Grante e Generale claimed an infringement of the prerogatives of the legislative body by the Congresso di Stato. The Collegio Garante, when examining *locus standi*, declared that it is exclusively the Collegio Grande e Generale as a whole which is entitled to lodge the complaint.

Review of the activity of the Capitani Reggenti is a very delicate function, because it assumes a political connotation.[49] The Collegio Garante, when defining

48 Order no 1/2009; no 1/2012; no 1 and 3/2017.

49 There are six decisions of the Collegio Garante on the matter. Three orders: no 2/2004 and 2 and no 3/2011. Three judgments: no 5/2004, no 8/2011 and no 28/2018.

the parameters for review of the Reggenza (under art 17 legge costituzionale 55/2003) states that it is not just the DD and the legge costituzionale no 185/2005 on the Capitani Reggenti (here with respect to arts 2 and 4), but also Rubrica XIX of Libro I of the *Leges Statutae*. Therefore, the review can be performed on both an action of the Reggenza as well as on inaction. It is convenient to outline that in both cases there has to be an institutional responsibility (ie related to their constitutional functions) connected to the (in)activity of the Capitani Reggenti. This latter point is important because closes to any sort of political censorship toward their activity.

As previously outlined, claims against the Reggenza can be dealt with either by the Capitani as presidents of the Consiglio Grande e Generale or as head of state.

With respect to the former, judgment 8/2011 is important because it discusses the issue of sanctions in cases of institutional responsibility. The issue was an alleged wrong interpretation and enforcement of the standing order of the Consiglio Grande e Generale. The Collegio Garante ruled in favour of the plaintiffs, declaring that the Reggenza should have acted more cautiously and looked for a bipartisan solution, in order to avoid doubts arising on its neutrality. However, the Collegio Garante considered that there were some mitigating circumstances. Since there had been a violation from the part of the Reggenza, the focus moved to the punishment. The Collegio Garante imposed a sanzione morale (moral reprimand) on the two Capitani. This punishment was based on two main elements. First, the existence of mitigating circumstances. Second, and foremost, the *Leges Statutae* do not provide any form of punishment and furthermore, when examining the case law, different punishments had been imposed. Here the Collegio Garante complied with a recent precedent, the Sindacato della Reggenza of 17/12/1996, where the punishment imposed was a moral reprimand.

Whereas, with respect to the latter, a recent judgment dealt with the promulgation of legislation and the sending back to the Consiglio Grande e Generale requesting a new deliberation. The judgment, no 2/2018, is particularly interesting because it focused on the decision of the Reggenza to promulgate the budget law, thus not asking for a new deliberation. The plaintiffs claimed that the law did not provide all the necessary coverage for the expenditures and that it had to be sent back to the Consiglio Grande e Generale. That would have resulted in the violation of the rights and duties of the Reggenza. However, the Collegio Garante stressed that there is no obligation upon the Reggenza to send legislation back to the Consiglio Grande e Generale. On the contrary, the Reggenza enjoys a discretion, as proved by the employment of the verb "may". The employment of this discretionary power cannot be scrutinised.

VI CONCLUSION

The long and controversial path that led to the establishing of the Collegio Garante and of the constitutional review of legislation fits perfectly with the traditional structure of the Sammarinese form of government.

The central role played for centuries by the Consiglio Grande e Generale, the sovereign, and the interplay between the legislative and the other powers kept the Republic free of the deep transformations that affected European countries from the 17th century. The principle of the separation of powers could not fully prevail over the Consiglio Grande e Generale.

The pre-eminence of the legislative body and the lack of a formal and rigid constitution excluded the very idea of constitutional review.

Even with the adoption of the DD in 1974, the Sammarinese system approached the issue of review very carefully. The Consiglio Grande e Generale was not keen to have courts interfering with the legislative power. Therefore, the Consiglio kept the central role, becoming the competent body also with respect to the constitutional review. Furthermore, the programmatic character of the DD, with a blurry bill of rights made the choice coherent with the whole system.

The 2002 amendment to the DD was aimed at realising a more effective separation of powers and protection of the rigidity of the DD. The establishing of a new constitutional body represented a turning-point in Sammarinese institutional history. Nonetheless, the Collegio Garante was framed as within the institutional continuity that characterised all the previous reforms.

The Republic, following the lines of the Kelsenian model of review and opening the system to supranational sources (the ECHR notably) is integrated into a more comprehensive system of protection of rights and freedoms and of the rule of law.

The activity of the Collegio Garante, in particular with respect to the review (almost exclusively through *incidenter* proceedings) of legislation and the admissibility of the referendum, proves that the body is now part of the Sammarinese constitutional architecture and that it has not been rejected by the traditional legal system.