obligation imposed on economic activities run either by public authorities or by private persons to observe the principles of free competition.

Through different processes—ranging from the obligation to transpose the European directives to the binding nature of the European treaties—important parts of the legal rules applying in the different countries will be common to all. And there will be the obligation to observe the same superior European rules: the procedure followed before the French administrative courts or before the British courts may remain different, but they will have in common the observance of the provisions of Article 6 of the European Convention of Human Rights.

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SEPARATING LAW FROM FACTS: THE DIFFICULTIES FACED BY THE ITALIAN *CORTE DI CASSAZIONE* IN AN APPEAL FOR ILLOGICALITY OF REASONING

The recent judgment of the *Corte di cassazione*, Italy's highest appeal court in civil and criminal matters, in the so-called "jeans rape case" has caused much controversy and attracted much media attention both in Italy and abroad. The *Corte di cassazione* has been showered with criticism for purportedly establishing a "jeans alibi", according to which a woman cannot be raped if she is wearing jeans as she must have consented to their removal. However, this judgment is of significance not merely for this statement but because it is particularly demonstrative of the difficulties faced by the *Corte di cassazione* in separating law from fact in an appeal on the grounds of illogicality of the reasoning given by the lower court. The *Corte* has been subject to academic criticism recently for exceeding its competence to review on a question of law and entering into the realm of the merits, criticism which this judgment has undoubtedly fuelled. The aim of this article is to explore the nature of the *Corte di cassazione* and, in providing a critical analysis of the "jeans rape" judgment, to examine the difficulties inherent within this particular ground of appeal.

A. Background to the "Jeans Rape" Ruling[1]

In 1992, A, then 18 years old, informed the police that on the previous day at around 12.30 pm, she had been raped by B, her driving instructor. A's version of events was as follows: B had picked her up as usual from her house for her driving lesson and, using the excuse of picking up another girl, had taken her out of the town. Stopping the car on a small country road, he threw her to the ground and after removing her jeans from one leg proceeded to rape her. Afterwards he took her home, threatening her in order to keep her quiet about what had happened. Her parents noticed that she was upset and asked why. She did not tell them what

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1. The facts are taken from judgment of the *Corte di cassazione* of 6 Nov. 1998–10 Feb. 1999, No.1636, reported in *Guida al diritto*, 27 Feb. 1999, No.8, pp.85–86. Hereafter the judgment will be cited as *Sentenza* 1636/99.

had occurred until later that day after returning to the driving school for a theory lesson. B was immediately detained by the police and gave a different version of events. He admitted to having had sexual relations with A at the time and place stated by her but stressed that she had consented.

B was charged with *violenza carnale*,[2] *violenza privata*,[3] *ratto a fine di libidine*,[4] *lesioni personali*[5] and *atti osceni in luogo pubblico*.[6] At first instance, the *tribunale*[7] of Potenza found B guilty only of *atti osceni in luogo pubblico* and he was acquitted on the other charges.[8] Both the prosecutor and defendant appealed to the *Corte di Appello*[9] of Potenza, which subsequently found B guilty of all charges and sentenced him to two years and ten months imprisonment.[10] B then appealed to the *Corte di cassazione* against the ruling of the *Corte di Appello* on the basis that the reasoning by which guilt was ascertained was illogical.

B. Corte di cassazione

The *Corte di cassazione*[11] is at the apex of the Italian court structure in civil and criminal matters as the highest appeal court in Italy and the "supreme organ of justice".[12] As such, its task is "to ensure the exact observance and uniform

2. A.519 criminal code—*codice penale* (c.p.). The crime of *violenza carnale* was constituted by the use of violence or threat, in order to force *congiunzione carnale*. *Congiunzione carnale* translated literally means a "joining of the flesh" and therefore required some form of penetration. Sexual acts without penetration were covered by A.521 c.p. and defined as acts of lust or sexual harassment—*atti di libidine*. It is important to note that L. 15 *febbraio* 1996 n.66 (Law No.66 of 15 Feb. 1996) abolished the distinction between *violenza carnale* and *atti di libidine* and that now there is only one crime, that of *violenza sessuale* which is contained in A.609 *bis* c.p. committed by a person who adopts the use of violence, threat or abuse of authority in order to force another to perform or submit to sexual acts. In this case the defendant had been charged before this law came into force although the judgments were given afterwards. For a detailed commentary of L. 15 *febbraio* 1996 n.66, see Cadoppi, A. (a cura di), *Commentari delle Norme Contro la Violenza Sessuale e della Legge Contro la Pedofilia* (Cedam, Padova, 1999, 2nd ed.).

3. A.610 c.p. This is coercion between private individuals, committed when a person uses violence or threat in order to coerce another into doing or not doing something or into enduring something.

4. A.523 c.p. This was the abduction or holding of a minor or a woman for sexual purposes by means of violence, threat or deception. This crime was abolished by L. 15 *febbraio* 1996 n.66.

5. A.582 c.p. This is the crime of causing a personal injury which leads to physical or mental illness.

6. A.527 c.p. This is the crime of committing obscene acts in an open or public place. Obscene acts are defined by A.529 c.p. as those which offend common decency.

7. This is a collegiate court of first instance composed of three professional judges and which has specialist competence—such as for organised crime.

8. *Sentenza* 29 *febbraio* 1996.

9. This is the court of appeal from the *tribunale*, composed of three professional judges.

10. *Sentenza* 19 *marzo* 1998.

11. This court sits with a panel of five professional judges as a *sezione* or a *sezioni unite* with a panel of nine professional judges when the case is of special importance or when there is a need to settle contrasts between differentiating decisions of the single sections (A.610(2) c.p.p.).

12. "... organo supremo della giustizia", A.65, r.d. 30 *gennaio* 1941 n.12. *Ordinamento giudiziario*. Although at this point in time it should be noted that the Constitutional Court was not yet in existence.

interpretation of the law and the unity of national law".[13] Unlike appeal (*appello*) at lower levels, which can be proposed on the facts and thus upon the justice of the first instance decision, *ricorso per cassazione* can only be proposed upon a question of law, which may be a procedural error—*error in procedendo*, or an error in the application of the substantive criminal law—*error in judicando*.[14] The ruling of the *Corte di cassazione* is thus considered one on legitimacy and the presence of one of these *errores* will lead to the total or partial annulment of the decision appealed against. Indeed, the word *cassazione* means exactly this, annulment.

Either the prosecutor or defendant can propose *ricorso per cassazione* for reasons which are defined explicitly by A.606(1) of the code of criminal procedure (c.p.p.), namely:

(a) the judge[15] has exceeded the powers invested in him by law;
(b) non-observance or erroneous application of the criminal law;
(c) non-observance of procedural norms;
(d) failure to admit decisive counter-evidence requested by the party as of right;
(e) omissions in the reasoning (*motivazione*) or its manifest illogicality, such being evident from the text [of the reasoning] itself.

It is this final ground for *ricorso per cassazione* which is of interest in this particular case as the defendant challenged the judgment on the basis that the reasoning or *motivazione* given by the *Corte di Appello* was inconsistent with the evidential outcome of the trial—and thus was manifestly illogical. This ground for *ricorso* thus focuses upon the reasoning of the court which decided the case on the merits. The *motivazione* is defined as a precise exposition of the reasons in fact and in law upon which the decision is founded[16] and is an essential procedural requirement as, without it, the judgment will be null and void.[17] It should be noted that the *motivazione* is the judgment of the court as a whole and that any dissenting opinions are not recorded. The *motivazione* thus documents the correlation between the evidence adduced by the parties at trial and the conclusion reached by the court. It therefore resolves the accusatorial "contest" between the parties at trial and embodies the right of the party not only to have evidence admitted at trial—*diritto alla prova*—but also to have such evidence *evaluated*.[18] This reason for *ricorso per cassazione* is also significant in that it has given rise to much debate

13. "... assicura l'esatta osservanza e l'uniforme interpretazione della legge, l'unità del diritto oggettivo nazionale", *ibid.*

14. Siracusano, D. *et al.*, *Diritto Processuale Penale* (Giuffrè Editore, Milano, 1994) Vol.2, p.510.

15. The use of the singular "judge"—*giudice* in this context indicates the court.

16. A.544 c.p.p.

17. A.546(3) c.p.p., A.125(3) c.p.p. Indeed it is a constitutional requirement that all judgments be reasoned—"Tutti i provvedimenti giurisdizionali devono essere motivati", A.111 *Costituzione*.

18. Illuminati, G., "Giudizio" in Conso, G. and Grevi, V. (Eds), *Profili del Nuovo Codice di Procedura Penale* (Cedam, Padova, 1996), pp.550–610, at p.607.

within Italian *dottrina*[19,20] as to the role of the *Corte di cassazione*, debate which was particularly evident in the reports surrounding the drafting of Italy's new code of criminal procedure of 1989 and which has re-surfaced again recently in the context of general concern over the functioning of the *Corte di cassazione* and proposed changes to A.111 of the *Costituzione*.[21] Indeed, although the role of the *Corte di cassazione* is intended to be that of ensuring the correct interpretation of the *law*, it has nonetheless been "accused" of being indirectly concerned with the *facts* of individual cases when exercising control over the *motivazione*—and thus of exceeding its competence.[22] If this is in fact true, it could be argued that the *Corte di cassazione* becomes merely a court of third instance rather than fulfilling its declared nomothetic[23] function. The aim of the 1989 code has been to circumscribe the control exercised over the *motivazione*[24] by providing, first, that in relation to omissions in the *motivazione*, a mere insufficiency[25] of reasoning does not constitute an omission: rather, the court must have actually omitted to consider or evaluate a piece of evidence—the consideration of such being necessary in order to arrive at the decision—and secondly, in the case of illogicality, the *motivazione* must not merely be illogical, but *manifestly* illogical. How exactly the court is to distinguish between what constitutes merely illogical and *manifestly* illogical is unclear.

Particularly interesting is the extent to which manifest illogicality and omissions can be evaluated on the basis of the text of the *motivazione* itself and without reference to the acts of the trial, which is the formal requirement of A.606(1)(e) of the code of criminal procedure in accordance with the review function of the court. Indeed, the knowledge of the previous proceedings—and therefore of the evidence presented therein—which *cassazione* has, is limited by the code to those reasons presented by counsel for its *ricorso*.[26] Yet it would defy the very nature of the task set before the court if it did not have some knowledge of the proceedings—it could not make a decision as to an omission, for example, if it did not have knowledge of the evidence allegedly omitted. Whether manifest illogicality could be decided purely on the basis of the *motivazione* without any further knowledge of the merits is altogether a more difficult and complex question. Nonetheless, it is accepted that whilst the role of the *Corte di cassazione* is that of review, in order to carry out review for the reasons of illogicality and omissions in the *motivazione*, the *Corte* will necessarily have some knowledge of the merits, as presented to it by counsel. What is strictly prohibited by the code is

19. *Dottrina* refers to academic opinion and writings.

20. Spangher, G., "Impugnazioni" in *ibid.* pp.665–741, at pp.703–704. See also Siracusano *et al. op. cit. supra* n.14, at pp.516–521.

21. See *infra* n.45.

22. As stated by the President of the court "... la giurisprudenza della cassazione presenta frequenti e gravi oscillazioni, anche non giustificate dall'interpretazione evolutiva, e spesso essa si occupa indirettamente anche del fatto, attraverso un non corretto esercizio dei poteri di controllo dei vizi di motivazione della sentenza impugnata". *Relazione al progetto preliminare del codice di procedura penale*, in *Gazzetta Ufficiale* 24 *ottobre* 1988 n.250, *Supplemento ordinario* n.2, pp.3–158 at p.132.

23. I can find no translation for *nomofilachia* and have decided to use nomothetic.

24. *Op. cit. supra* n.22.

25. *Ibid.*, at p.133.

26. A.609(1) c.p.p.

that the *Corte* has "open" viewing of all the acts of the trial—it may only know that which is relevant to these particular circumstances of review. The restrictions placed upon the *Corte di cassazione* in relation to the merits of the case are further exemplified by proceedings before it. If it does not proceed in chambers, *camera di consiglio*, it proceeds by public hearing in the same way as for the decision at first and second instance, that is, the discussion is carried out in *contraddittorio*[27] between the counsel, if these are present. Nevertheless there are substantial differences between first and second instance and *cassazione* in that, at the latter, the parties may not be present and are represented purely by counsel, and, significantly, there can be no formation of evidence or presentation of new evidence. The adjudication is therefore made purely upon the basis of the reasons put forward by counsel.

It is obvious that the 1989 code has sought to restrict the operation of this ground of *ricorso* in order to restrict any examination of the merits on the part of the *Corte di cassazione*. Yet, the very need of the court to have some knowledge of the merits in order to be able to carry out this particular review function properly highlights the particularly tenuous nature of this provision of the code. At this point it is easy to comprehend how the merits and therefore justice of the case at hand come, albeit indirectly, to the knowledge of the *Corte*. The problems that this can subsequently cause are exemplified in the case under examination.

In summary, the correlation between the facts and decision, that is, the judgment on the merits, was the task of the *tribunale* and subsequently the *Corte di Appello*, whilst the task of the *Corte di cassazione* was to examine the correctness of the *motivazione* given by the *Corte di Appello* by checking whether it contained omissions or was manifestly illogical in terms of its conclusion between facts and decision. What the *Corte di cassazione* must not do is exercise a control over the *motivazione* which is really aimed at re-evaluating the evidence previously adduced at trial.[28]

C. *The Reasoning of the* Corte di cassazione

In annulling the judgment of the *Corte di Appello* on the basis that the *motivazione* contained omissions and lacked congruent reasoning, the *Corte di cassazione* began its judgment with a statement that the *Corte di Appello* ought to have proceeded to carry out a rigorous analysis of the reliability of the statements made by the victim.[29] It continued by stating that the *Corte di Appello* had instead determined the guilt of the defendant upon the basis of facts which more readily

27. This phrase, for which I can find no suitable translation, explains the situation whereby the parties act equally, in *par condicio*, in opposition to each other. The parties therefore have equal powers and rights to contest and contradict that put forward by the other side. It is one of the "key" phrases used by Italian *dottrina* in regard to the functioning of the new code of criminal procedure 1989.

28. Giaravolo, N., "La Corte di cassazione non può ricercare alternative alle risultanze processuali" in *Guida al Diritto*, 27 *febbraio* 1999 n.8 pp.87–88, at p.87. For an analysis of the distinction between law and fact in English law see Beatson, J., "The Scope of Judicial Review for Error of Law", (1984) 4 O.J.L.S. 22.

29. "... la Corte di merito avrebbe dovuto procedere a una rigorosa analisi in ordine alla attendibilità delle dichiarazioni accusatorie rese dalla (A) ..." *Sentenza* 1636/99, *op. cit. supra* n.1, at p.86.

favoured the defence, minimalising or omitting an evaluation of facts which were hardly reconcilable with the rape charge.[30] This very first paragraph sets the tone of the judgment and does not seem harmonious with the nomothetic function of the *Corte di cassazione* as it is already becoming concerned with an evaluation on the merits. This is because it is not saying that the arguments are merely unconvincing, but rather that the evaluation of the merits and conclusion thus reached by the *Corte di Appello* is erroneous. By talking of facts which more readily favour B's version of events, for example, the *Corte di cassazione* appears to be entering into the realm of value judgment, it is saying that fact X leads to conclusion Y. Yet, it is for the judge on the merits to evaluate fact X because it is before him and not the *Corte di cassazione* that the evidence is adduced orally and in *contraddittorio* between the parties.[31] The code of criminal procedure provides few evidential rules, the basis of factual decision-making being the principle of *libero convincimento del giudice*, that is, that the judge is freely convinced—the only restraint being of course, logicality, as imposed by the obligation of *motivazione*.[32]

The *Corte di Appello* had, however, given its reasons for finding A's statements reliable, namely, lack of motive—A had no reason to bring slanderous charges against B. Yet the *Corte di cassazione* argued that this argument could not be sustained, reasoning that "A could have falsely accused B of rape in order to justify having sexual intercourse with a much older and furthermore, married, man, to her parents, A not wishing to conceal the intercourse for fear of its possible consequences".[33] What is intended by "possible consequences" is not revealed. It appears that what the *Corte di cassazione* is doing is making its own value judgment as to the reliability of A, by providing its own alternative explanation for her lack of credibility as a substitute for that of the *Corte di Appello*. Yet this is a purely theoretical submission, indeed there is no evidence to substantiate such an alternative hypothesis[34]—and thus the *Corte di cassazione* is providing a judgment upon the merits by offering its own argument to replace that of the court on the merits.

In order to attempt to substantiate its hypothetical version of reliability, the *Corte di cassazione* reasons that A, following the alleged rape, did not inform her parents of the rape immediately, despite the fact that they asked her what was wrong, but later that evening, following an evening theory lesson at the driving school. This delay was justified by the *Corte di Appello* on the basis that A probably felt shame or guilt over the events. Yet the *Corte di cassazione* states that

30. *Ibid.*

31. This argument could also be applicable to the judgment of the *Corte di Appello*, but it must be considered that this court has more access to the facts of the trial (A.602(3) c.p.p.) and also that the trial stage can be renewed, for the re-taking of evidence already taken at trial and also for the taking of new evidence (A.603 c.p.p.).

32. A.192 c.p.p.

33. "Una tale considerazione non può condividersi sol che si consideri che la ragazza potrebbe avere accusato falsamente il (B) di averla violentata, per giustificare con i genitori l'amplesso carnale avuto con una persona molto più grande di lei per età e per di più sposata, amplesso che non si sentiva di tener celato perchè preoccupata delle possibili conseguenze del rapporto carnale". *Sentenza* 1636/99, *op. cit. supra* n.1, at p.86.

34. See Giaravolo, *op. cit. supra* n.28, at p.87.

this is not a convincing argument in that "it is difficult to see what shame or guilt A could have felt if effectively she had been a victim of rape",[35] given the seriousness of this offence and given that it was committed by her driving instructor whilst she was in his car for a driving lesson.[36] This argument put forward by the *Corte di cassazione* can be criticised on two grounds. First, it is in itself an argument of dubious coherence. It is based on a logic which cannot be attributed to a victim of rape—that she should have felt no fault because she was legitimately in the car for a driving lesson—so implicitly she had done nothing to provoke the attack. In the light of the circumstances, the *Corte di cassazione* states that shame or guilt should not have been a reaction to rape. Yet the feelings and reaction of a rape victim surely cannot be abstractly or generically categorised and to do so would be to ignore psychological evidence which demonstrates that such feelings are a common reaction in rape victims and that the psychological effects of the trauma are complex.[37] The second criticism is that again the *Corte di cassazione* is making its own evaluation on the merits replacing that of the *Corte di Appello*.

D. The Jeans

The *Corte di cassazione* also finds the *motivazione* of the *Corte di Appello* illogical in determining that A had been raped because her jeans were only partly removed whereas they would have been totally removed had the intercourse been consensual.[38] Although such reasoning appears illogical on the basis that nakedness is not a necessary prerequisite of consensual sexual intercourse, the *Corte di cassazione* chose not to point this out but again to offer an *alternative* hypothesis on the basis of the facts. Indeed the *Corte di cassazione*'s interpretation of events was that the *Corte di Appello*'s reasoning could not be shared because as the intercourse took place at midday in a place which although isolated was not necessarily devoid of passers-by, it would have been extremely unusual if A were to have removed all her clothing.[39] From the wording of the judgment it does not appear that the *Corte di cassazione* is saying that the *Corte di Appello*'s reasoning is illogical because it *failed to consider* this alternative hypothesis; rather, this statement again appears to be a hypothetical explanation of events intended to repudiate A's version of events and the evaluation of the facts given by the *Corte di Appello* and thus amounts to a consideration of the merits on the part of *cassazione*. It is at this point in the judgment that the *Corte di cassazione* made its statement, "that it is a fact of common experience that it is almost impossible to remove jeans from a person, even in part, without their cooperation, given that this is a difficult operation for the wearer themselves".[40] Not only is this an absurd statement without any feasible basis, it is also gratuitous—an *obiter dictum*, irrelevant to the facts or the reasoning of the *Corte di Appello*. The *Corte*

35. "Non si vede infatti quale vergogna o senso di colpa la (A) potesse avvertire, se effettivamente vittima di una violenza carnale". *Sentenza* 1636/99, *op. cit. supra* n.1, at p.86.
36. *Ibid.*
37. See Giaravarolo, *op. cit. supra* n.28, at p.88.
38. *Sentenza* 1636/99, *op. cit. supra* n.1, at p.86.
39. *Ibid.*
40. "Deve poi rivelarsi che è un dato di comune esperienza che è quasi impossibile sfilare anche in parte i jeans ad una persona senza la sua fattiva collaborazione, poiché trattasi di una operazione che è già assai difficoltosa per chi li indossa." *Ibid.*

di cassazione is using this statement to reinforce its theory that B did not commit rape because A would have been unlikely to take her jeans off totally because of the danger of passers-by and the fact that her jeans were even partially removed meant that she must have removed them consensually. Yet importantly, what *cassazione* has *not* stated, in contrast to the newspaper coverage of the case,[41] is that A cannot have been raped because she consensually removed her jeans in part. It is implicitly arguable that the *Corte di cassazione* intends exactly this, that a woman who wears jeans whose jeans are removed cannot be the victim of rape because she must have co-operated in the removal of the jeans. This is certainly the angle which has been taken by the media, hence the notion of the "jeans alibi", but surely there is a difference between consenting to the removal of jeans and consenting to sexual intercourse? This would have the absurd result that consent to removal of jeans is equivalent to consent to subsequent full sexual intercourse and therefore that co-operation in the removal of jeans means the right to say no is foregone. This cannot surely have been the intention of the *Corte di cassazione*, although the absurdity of the statement in the first place means that such cannot be an automatic conclusion. Although no such statement was explicitly made and therefore the intention of the *Corte di cassazione* remains unclear, it may well be implicit, given that the statement forms part of the reasoning which rebuts the reasoning of the *Corte di Appello* that rape occurred because A's jeans were only in part removed. What is certainly arguable is that the *Corte di cassazione* would not have strayed into such controversial territory and therefore would not have provoked such a media attack if it had not been offering alternative explanations of the merits, thus exceeding its competence, in the first place.

E. Further Remarks

The *Corte di cassazione* also notes further points where the *motivazione* of the *Corte di Appello* is, in its opinion, lacking in coherence. For example, it notes that there were no signs of a struggle discovered upon the bodies of A or B or resistance of B by A. Upon this point, the *Corte di Appello* had noted that physical violence does not necessarily accompany rape and that in this case the girl had submitted in fear of her further safety. The opinion of the *Corte di cassazione* is, however, that it is instinctive for a young girl to use all her might to stop her attacker and therefore that it is illogical to state that a girl would submit to a rape, rape being a serious attack on the person, for fear of being subject to a further attack which could be no more serious than the rape itself.[42] Again the *Corte di cassazione* is offering a decisive alternative explanation of the merits in a situation of A's word against B's—the illogicality is in the reasoning of the *Corte di Appello*, not in its failure to consider the alternative explanation. It is for the court on the merits to decide who to believe and it is not for the *Corte di cassazione* to set out abstract behaviour patterns for rape victims, by saying that a victim will not submit to rape. No one can say what should or should not be the reaction of a victim of rape—it is a totally subjective situation and the woman who is too scared or shocked to fight her attacker should not forfeit the right to be believed.

41. See *The Times*, 18 Feb. and 19 Mar. 1999.
42. *Sentenza* 1636/99, *op. cit. supra* n.1, at p.86.

F. Omissions

Finally the *Corte di cassazione* considers that the *Corte di Appello* had failed to reconcile other factors satisfactorily, namely, why A did not attempt to escape when B stopped the car and his intentions became apparent, and why, following the rape, the girl drove the car home. This is a fair point, but the *Corte di cassazione* goes further, demonstrating its opinion by its use of language. Indeed, in the opinion of the *Corte di cassazione*, the *Corte di Appello* should have considered the extreme singularity of a girl, immediately following a rape, being in the state of mind to be able to drive a car, above all under the instruction of the man who moments before had committed the rape.[43] The *Corte di cassazione* does not err in demonstrating the *Corte di Appello*'s failure to consider, or rather to explain and reconcile these facts with its guilty decision, yet one cannot help but notice how the wording used by *cassazione* strongly intimates that the fact that A drove the car home is indicative of B's innocence. Yet it must be pointed out that no-one except the victim can know—and maybe not even the victim—why she behaved in a certain manner and it therefore ought to be a question of credibility for consideration only by the court on the merits.

G. Importance of the Ruling

The *Corte di cassazione* thus quashed the decision of the *Corte di Appello di Potenza* and remitted the case back to the level of *Corte di Appello* but at Naples to be re-decided.[44] The *Corte di Appello di Napoli* recently gave judgment, acquitting the defendant.[45] In Italy, remission of the case to the lower court means that the *giudice di rinvio* has effectively the same powers as the court which gave the judgment, but is tied by the resolution of the question of law fixed by *cassazione*, that is, the case is to be re-tried (or re-examined if on *appello*) in conformity with the decision as to the law announced by the *Corte di cassazione*.[46] This tie only operates with regard to the principle of law and thus the court evaluates the facts autonomously, unless the decision upon the law has necessitated the verification of a particular fact, in which case, the *giudice di rinvio* must act in conformity with this.[47] The principle of law in this case is that in order to convict of rape when the statements made by the victim contrast with declarations of innocence made by the defendant (in that the "victim" consented), then the statements given by the victim must be subject to thorough analysis. If this is correct then the *Corte di Appello di Napoli* could have decided the case without adhering to the evaluation of the merits put forward by the *Corte di cassazione* in its re-examination of the reliability of A's statements. It needed merely to consider the alternative reasoning put forward by *cassazione* but could

43. *Ibid.*

44. This is not the only outcome of the appeal to the *Corte di cassazione*. It may also proceed to rectify errors of law in the *motivazione* or errors in the law applied, if such errors have not affected the outcome, thus, for example, it may substitute passages of the *motivazione*—A.619 c.p.p. The judgment may also be annulled without the case being remitted for a decision—A.A.620, 621 c.p.p.

45. *La Repubblica*, 13 Oct. 1999. The judgment has not yet been published.

46. A.627 c.p.p.

47. Siracusano *et al. op. cit. supra* n.14, at p.538.

have rejected its conclusion. Its only obligation, which can be appealed against for inobservance of the principle of law decided by the *Corte di cassazione*,[48] was therefore to conduct this strict analysis. In this case, however, the *giudice di rinvio* has adhered to *cassazione*'s consideration of the merits and it may well be that in reality the *giudice di rinvio* will not easily depart from the judgment given by *cassazione* when this judgment specifically considers the merits.

H. Conclusions

It can be concluded that throughout the judgment, the *Corte di cassazione* has consistently put forward an alternative evaluation of the merits of the case and that this is the basis of the finding that the *motivazione* of the *Corte di Appello* was manifestly illogical and contained omissions. The *Corte di cassazione* has not criticised the *motivazione* on the basis that X plus Y cannot equal Z, but rather has declared that X plus Y must equal W. Such a judgment calls the very nature of the role of the *Corte di cassazione* into question, as clearly in this case it has acted as a court of third instance rather than in fulfilment of its nomothetic function. It is also interesting that the debate as to the role and function of the *Corte di cassazione* has recently been re-opened with some fervour and that entering into the merits of a case is a criticism which has featured in recent Italian academic articles amongst many other criticisms.[49] Its error of competence in this case had led the *Corte di cassazione* into making statements devoid of all logic and which have attracted intense media criticism. Such value judgments as put forward by the *Corte di cassazione* as to the victim's reaction to rape and the issue of the jeans have clearly left the court wide open to substantiated criticism as to its anachronistic and anti-women's rights orientation. Indeed, it is easy to see how the reasoning of the *Corte di cassazione* is based on a feeling that the "victim" has lied out of panic and has cried rape in order to cover up her own actions. Yet this is most definitely not the role of this court. How the *Corte di cassazione* fell into this trap is also easy to see; the very ground of *ricorso* for omission and manifest illogicality of the *motivazione* is particularly complex and tenuous in itself. It might be questioned whether the *motivazione* ought to be open to appeal in this way. That it should be is substantiated by the rationale that the *motivazione* must be subject to control in order to prevent its abuse. Yet on the other hand it can be argued that it is only for the trial judge to decide on the merits as the evidence is adduced as an accusatorial contest between the parties and it therefore should not be open to an appeal court to challenge the decision on the merits. This argument remains to be resolved by Italian *dottrina*. The problem is particularly evident in a case like this, where the outcome is a result of A's word against B's—and

48. It can also be opposed for reasons which have not been the subject-matter of the decision by the *Corte di cassazione*—A.628(2) c.p.p.

49. See Ferdinando Zucconi Galli Fonseca, "Un Nuovo Articolo 111 della Costituzione per Salvare la Suprema Corte dal Collasso", in *Guida al Diritto* 8 *maggio* 1999 n.18, at pp.110–113.

therefore whom the trial judge finds credible.[50] It is exactly these two arguments which combined have led to this ground of appeal to the *Corte di cassazione*—there must be control for reasons of democracy and transparency, but the control is as to legitimacy and not the merits. Yet one wonders whether the two are so readily distinguishable and whether it is possible to challenge logicality of the fact-plus-fact-equals-conclusion sequence without offering a different evaluation or why it cannot equal the conclusions given. Hence the difficulty of the nature of the appeal in itself. From a comparative point of view this problem will never arise in a British court given that the jury does not give reasons for its decisions on the merits. The jury's free evaluation of credibility in a rape case remains private with no burden to give reasons and therefore can never be challenged on the basis of logicality. The Italian *Corte di cassazione* may have overstepped the mark this time, but in light of the difficulties inherent in the procedural rules themselves, extensive criticism may be misplaced.

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50. The credibility of the rape victim when consent is in issue is of topical importance in England with reference to previous sexual history—see the sexual history provisions of the Youth Justice and Criminal Evidence Act 1999. For a detailed analysis of these provisions see Kibble, N., "The Sexual History Provisions: Charting a course between inflexible legislative rules and wholly untrammelled judicial discretion?" [2000] Crim.L.R. 274.

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