# English Pragmatism and Italian Virtue: A Comparative Analysis of the Regime of Illegally Obtained Evidence in Civil Law Proceedings between Italy and England.

Vito Breda[[1]](#footnote-1)\* / Matteo Vricella[[2]](#footnote-2)\*

Key Words: Illegally Obtained Evidence, England & Wales, Italy

## Abstract

This article provides a comparative analysis of the Italian and the English regimes of improperly or illegally obtained evidence (hereafter IOE) in civil law cases. We will use the term ‘regime’ to indicate the system of rules and juridical practices that regulate IOE. In the past decade, the Italian and the English regimes of IOE have been adapting to new institutional and economic demands. Till recently, the Italian civil justice system mechanically assumed that IOE was inadmissible. In contrast with the Italian regime, IOE was normally allowed in English courts. However, a series of court decisions has changed the assumption of inadmissibility of IOE. In England and Wales (the two nations share the same civil procedure system), the introduction of Civil Procedure Rules 1998 (hereafter CPR) and Human Rights Act 1998 (hereafter HRA) has instead imposed a duty to exclude an IOE that has been obtained as a result of outrageous violation of the European Convention on Human Rights. This article will contend that the regimes of IOE are moving into an untested terrain, albeit from different starting points, and that a comparative analysis might help clarify the relation between admissibility of an IOE that engages protected rights such as article 8 of the ECHR and the functioning of the civil justice system. The article is divided in three sections preceded by an introduction and followed by a conclusion. The first two sections discuss the English & Welsh and the Italian regimes of IOE. The third section focuses on how the two legal systems sought to strike a balance between the violation of rights and the compelling demands of efficient civil trial.

## Introduction

Italy, According to the Organisation for Economic Co-operation and Development Italy and by a way of comparison of other countries, experiences an high number of civil court preceding delays and, as a corollary, high number of pending cases.[[3]](#footnote-3) However, having a precise and objective representation of the relevant facts, within the limit of reasonableness,[[4]](#footnote-4) is essential to ensure the quality of judicial decisions in both the Italian and English civil cases.

In relation to the regime of IOE, the Italian and English judges adopted different procedural stances. In Italy, submitting an IOE in court is generally perceived as antithetical with the deontological functions of a judicial system.[[5]](#footnote-5) For instance, the Court of Appeal of Milan in deciding the admissibility of a stolen document explicitly refused to consider the legal effects of illicitly obtained evidence.[[6]](#footnote-6) The 1934 Court of Appeal decision to limit illicit activities of the parties by refusing to consider the effect of such activities could be justified by an attempt to uphold the rule of law during a dark period of Italian history. Yet the rigid applications of IOE, which might be intended as one of the manifestations of an attempt to protect civil values, has an impact on the present efficiency and, perhaps, the esteem of the Italian civil courts.

For instance, the insistence on excluding without evaluation IOE has led researchers to label some civil procedures experts as verofobes.[[7]](#footnote-7) The term, which Michele Taruffo takes from Goldman’s Knowledge in the Social World,[[8]](#footnote-8) suggests that a large section of Italian doctrine (and of the judiciary) mechanically upholds principles, such the one that force the court to accept only legally obtained evidence, hinder the functioning of a civil justice system (that aspires to be accurate and efficient). The reason for such insistence is a matter of speculation, yet it is certain that it cannot be explained, as the Court of Appeal of Milan could have in 1934, by a noble attempt to protect individual rights against a fascist regime.

In direct contrast with the Italian regime of IOE, English courts normally consider any relevant IOE admissible.[[9]](#footnote-9) Again, it is difficult to point out the contextual reasons that support such a jurisdictional practice, but the general explanation might be that English judges are expected to allow a party to submit evidence that might help in retrieving an objective and truthful representation of the facts of the case. This stance is, also, manifested in the regulatory framework that deals with the ethical implications for practitioners who *de facto* are asked to manage IOE. For instance, Bar Council’s Guidance on the conduct of Barristers points out that a council submitting a document obtained without consent is in breach of sec 50(1) of the Data Protection Act.[[10]](#footnote-10) The violation of sec 50 (1) might trigger criminal proceedings against the person that has retrieved information without authorization, yet subsection 2 of the same act specifically allows for an exception to criminal persecution to counsel that discloses evidence that was in breach of Sec 50 (1). It appears, in other words, that whilst some illegal conducts aimed at resourcing information might have criminal implications for those who retrieved it, the knowledge of such behaviors is not enough to prevent their admissibility in court.

So the English legal system appears to have a ‘Don't ask how relevant information might have been retrieved, but do inform to the court’ approach, whereas the Italian civil judges appear happy to behave like someone who has lost his house keys in a corner of a dark alley but has decided to search for them under a street light ‘because it is where they ought to be’. However, both systems are going through a series of gradual transformations that have made their respective stance fluctuating. For instance, the adoption of the HRA has increased awareness in the UK of the importance of the rights of individuals, such as due process[[11]](#footnote-11) and right to privacy.[[12]](#footnote-12) In Italy, instead, the case law is developing a line of authority, perhaps motivated by economic necessity of a more efficient civil law system, that admits IOE in court. In short, there are strong indications that the two legal systems are in the process of closing the cleavage between their upheld antithetical stances on the respective regime of IOE. In particular, I will argue that comparative analysis of dynamic changes in both legal systems might help a richer understanding of how to balance rights and efficiency. However, before unraveling the supporting reasons to our contention, a series of issues have to be dealt with as preliminary issues.

Firstly, the reasons for different regimes of IOE in Italy and in England are not related to their belonging to a different legal family.[[13]](#footnote-13) It might be argued, for instance, that the doctrine of stare decisis and the practice of distinguishing cases logically increase the pressure on common law judges to find the truth. However, the doctrine of stare decisis differentiates civil and common law systems only to a degree.[[14]](#footnote-14) Italian judges are also obliged to provide consistent decisions (the so-called horizontal effect of the doctrine of the binding precedent) and to comply with the case law of the final appellate jurisdictions (the so-called vertical effect) of the Corte di Cassasione, the Consiglio di Stato and the Corte Costituzionale.[[15]](#footnote-15)

Secondly, there is a well-established literature on the specific methodologies for comparing two legal systems.[[16]](#footnote-16) However, this essay will focus almost exclusively on a functional perspective that aims at comparing judicial arguments that support decisions (for excluding or allowing an IOE in court).[[17]](#footnote-17) The reason for adopting this perspective is related to the pragmatic effects that IOE regimes have in deciding cases and on the binary nature of the decision over their admissibility. In other words, whilst the arguments that support the admissibility of an IOE might vary (in Italy there is a deontological evaluation of their improperness, whereas in England and Wales there is assessment of their consequences in the main issue of the case), the judicial decisions that follow are either allowed or disallowed.

Given the prominent role of case law, an analysis that focuses on principles might not inform either academics or practitioners. For instance Jane Stapleton in his *Benefits of Comparative Tort Reasoning: Lost in Translation*[[18]](#footnote-18) argues that in a comparative analysis that focuses on differences between judicial practices, such as the one engaged by this essay, a richer understanding of the compared systems is achieved by focusing on judicial arguments.[[19]](#footnote-19) The methodology, if applied correctly, would allow the reducing of the linguistic and terminological mistakes.[[20]](#footnote-20) It also reduces the dual concern of comparative subjectivism: ‘the desire to see a common legal pattern in legal systems’ and ‘the tendency to impose one’s own (naïve) legal conceptions and expectations on the systems being compared’.[[21]](#footnote-21)

The article, by focusing on case law that qualifies the regime of IOE, will mitigate the effect of comparative subjectivism. Judges that are asked to admit/exclude an IOE are asked to provide a solution to legal dilemmas. The level of candor of how a judge represent each party's argument in the decision might vary and it is possible to deliver a misdirected comparative assessment by, for instance, stretching the significance of authoritative argument. However, the possibility of making these types of mistakes (which might be perceived as: “massaging the narrative”) is reduced in comparative analyses that focus on the series of winning and losing judicial decisions (such as the ones that accepted or excluded IOE). This is the methodology that this essay will follow.

Thirdly, this article will compare Italian and English regimes of IOE in civil and family law cases. It is important to note Italian civil procedure rules do not distinguish the regime of IOE in family and other civil cases. However, the English civil procedure contains a specific set of rules, commonly known as ‘the Hildebrand Rules’ for an IOE submitted in family law cases.[[22]](#footnote-22) The ‘Hildebrand Rules’ *de facto* encourage one of the spouses during a divorce proceeding to retrieve private information (that shows the effective extent of the other spouse’s assets). The rules have no equivalent in Italian law and therefore they are ill suited for a comparative analysis.

Fourthly, it is not part of the aim of the essay to discuss the ethical implications for legal practitioners of having a regime that allows IOE in court. As mentioned earlier, the Bar Council has published guidance for its members who come into contact with IOE.[[23]](#footnote-23) Given the present changes in the Italian system, it is logical to assume that the Ordine Nazionale Forense (the Italian Bar Association) will, in the near future, set an internal regulation for its members who might need to present an IOE in court. It could be also speculated that the Ordine Nazionale Forense will seek inspiration from Bar Council’s regulations. However, this ethical aspect of the regime of IOE can be distinguished from the deontological and pragmatic implication of admitting and excluding IOE and will not be discussed in this essay.

The last point of this, rather long, list of preliminary issues engages the so-called ‘language barrier’. There is, we can speculate, an unbalance between the number of Italian judges who speak English and the number of English judges who might read Italian.[[24]](#footnote-24) This is an axiomatic aspect of a comparative analysis; however, we have to remember common law systems are, by comparison to civil law systems, designed to accept persuasive narratives from other common law jurisdictions. Furthermore, the lack of linguistic knowledge does not reduce the strength of our contention. That is, the judicial qualifications of the regimes of IOE (in Italy and England ) are changing and, in this transitional phase, they might be inspired from each other experiences.

## Squaring an Outrageous Circle: Illegally Obtained Evidence in England

The admissibility of IOE in England and Wales is regulated by statutes and common law. Rule 32.1 (1) of the CPR has entrusted the judges with the power of evaluating the admissibility of evidence and to exclude it (ex Rule 32.1 (2)).

The HRA had, instead, an indirect effect on the regime of IOE.[[25]](#footnote-25) The HRA introduced in the UK legal system a selection of articles of the European Convention on Human Rights (ECHR)[[26]](#footnote-26) and the related jurisprudence of the European Court of Human Rights (ECtHR) that had the consequence of changing indirectly judicial practice. For instance, evidence obtained as a result of outrageous violation of the right to privacy (ex article 8 ECHR) might be excluded from a civil case.[[27]](#footnote-27)

The combined interpretation of the CRP and of the HRA altered the main line of authority set in *Helliwell and Others* v *Piggott-Sims*.[[28]](#footnote-28) The case spelt out in compelling narrative that judges are prevented from excluding an IOE in a civil case. ‘I know that in criminal cases the judge may have discretion […] But so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning.’[[29]](#footnote-29) The parties in a civil case should be allowed to support their claims with the best evidence they might retrieve.

However, the *laissez faire* policy set in *Helliwell* v *Piggott-Sims* has been qualified by the CPR and HRA in two ways.[[30]](#footnote-30) Firstly, CPR entrusts judges with a series of ‘case management’ prerogatives. For instance, a judge might decide preliminary issues[[31]](#footnote-31) and has the prerogative to accept and exclude evidence obtained by phone. [[32]](#footnote-32)

The HRA has, instead, introduced a selection of articles of ECHR into the British legal systems. Given the nature of the issues surrounding IOE (e.g. retrieval of confidential documents that belong to someone else) article 8 is likely to be engaged more often by an illegal conduct and to be a proxy for an ancillary issue. Secondly, the HRA and the CRP have a combined interpretative effect. Section 3 of HRA provides that Act of Parliaments should be: ‘read and given effect in a way which is compatible with the Convention rights’. [[33]](#footnote-33)

The first indication of the effect of the CPR and the HRA on the regime of IOE was in *Jones* v *University of Warwick*.[[34]](#footnote-34) The ancillary issue in *Jones* v *University of Warwick* hinged on a video filmed by a private investigator employed by the University of Warwick. The video could help proving that Miss Jones exaggerated the extent of her injuries in a tort case against her employer. In the first instance, the judge refused to consider the video (ex Rule 32.1 (2) CPR) because the activities that produced the video were in violation of article 8 of the ECHR (as introduced in the UK by section 6 of HRA). At the appellate stage, however, the IOE were allowed back into the main trial, and the decision went in favor of the University of Warwick. Jones appealed against the ancillary decision to allow an IOE in court, yet her arguments were rejected.

*Jones* v *University of Warwick* bears a particular significance in our analysis because Lord Woolf, the author of the Access to Justice Report 1996 that inspired many of the changes introduced by the CPR, took on the task of clarifying what was expected by a judicial evaluation of an IOE. In particular, he explicitly referred to a judicial discretion on accommodating two diverging public interests such as the necessity of objective (within the limit of reasonableness) representation of the facts of the case, and the protection of the rights of the parties involved in the present and future disputes.[[35]](#footnote-35) ‘Fortunately courts can now adopt a less rigid approach to that adopted hitherto which gives recognition to the fact that there are conflicting public interests which have to be reconciled as far as this is possible.’[[36]](#footnote-36) In other words, judges in civil cases have an active role in balancing a violation of right and procedural requirements of a case.

The assessment is not to be confused with an activity that seeks the deontological accommodation of a conflict between fundamental human rights.[[37]](#footnote-37) For instance, it would be erroneous to assume that *Jones* v *University of Warwick* is creating a line of authority that imposes the duty on courts to accept video evidence obtained in violation of article 8 of the ECHR in all tort cases. Rather, Rule 32.1 (1) charges the court of a duty to carry out a pragmatic evaluation of the implications of excluding (or allowing) evidence from forthcoming cases (ex Rule 32.1 (2)). ‘A judge's responsibility today in the course of properly managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in CPR Pt 1, to consider the effect of his decision upon litigation generally.’[[38]](#footnote-38) The importance of balancing the effects of deciding against accepting an IOE and acknowledging a violation of a human right is reinforced in several passages. ‘The weight to be attached to each of the two public interests will vary according to the circumstances. […] Here, the court cannot ignore the reality of the situation. This is not a case where the conduct of the defendant's insurers is so outrageous that the defence should be struck out.’[[39]](#footnote-39) The extract shows an indication and also an attempt to set a floodgate to Rule 32.1 (1) by limiting the prerogative allocated to the judge to evaluate the admissibility of evidence connected to outrageous violations of rights.

A civil law practitioner might perceive the adjective ‘outrageous’ as worryingly ambiguous. It could be argued that allowing evidence that is not linked to an outrageous violation might be interpreted in a way that allows any IOE short of that involving, for instance, violence and torture. This interpretation is unfounded. Even before the HRA, judges could evaluate the impact of excluding evidence against the illegitimacy of the conducts that retrieved it. For instance, in *Marcel* v *Commissioner of Police for the Metropolis*, Sir Christopher Slade explained that judges do have the power to exclude evidence from civil cases obtained without consideration of justice and public interest.[[40]](#footnote-40)

A more appropriate reading of the ‘outrageous violation criterion’ interprets it as: the judicial task of balancing the need of an objective reconstruction of the facts and the protection of justice. For instance, the judge, in unloading the tasks set in Rule 32.1 (1), should consider, firstly, whether the activities that yield the contested evidence had engaged some specific articles of the ECHR (and the jurisprudence of the ECtHR). Secondly, if the result of the first activity resulted in a negative response, the court should balance the violation of a protected right(s), with the effects of excluding the evidence (which were connected with the improper conduct).

The case *Lifely* v *Lifely* confirmed the requirement of the two stages procedure set in *Jones* v *University of Warwick*.[[41]](#footnote-41) The ancillary issue in *Lifely* v *Lifely* hinged on the admissibility of a series of entries in a personal diary that would have changed the criteria of allocation of a family inheritance. In reporting to the court, Lord Ward conceived that the diary was retrieved in a way that might have engaged article 8 of the ECHR.[[42]](#footnote-42) However, the decision balanced the potential effects of excluding the IOE. ‘The result of undertaking this balancing exercise is plain. Here there was no trespass or burglary […] It would be wholly disproportionate to exclude this evidence and I have no hesitation whatsoever in rejecting this submission.’[[43]](#footnote-43) The decision is in favor of admitting the diary, but Lord Ward, in the same passage, is quick to reduce the general implications of his decision. ‘What forensic use, if any, should be permitted of an opponent's private information when it has been obtained criminally, or unlawfully, or opportunistically, or even adventitiously gives rise to current problems […] My judgement will not be and should not be the last word on this expanding jurisprudence as it is deliberately fact centred and fact sensitive.’[[44]](#footnote-44) In other words, *Lively* v *Lively* cannot be, Lord Ward argues, the starting point of a line of authority that allows in court any evidence obtained short of an outrageous violation of article 8.

One of the key aspects of a combined reading of *Lively* v *Lively* and *Jones* v *University of Warwick* is the development line of authority that entrenches a limit on admissibility of IOE (set in *Helliwell* v *Piggott-Sims*). However, it remains unclear how the new line of authority will develop. Recall that drivers of the change that motivated the reforms (ie the demand of efficiency and the expansion of rights) are likely to increase the pressure on judges to consider the deontological and pragmatic implications of rights violations. From this perceptive, the ‘not outrageous violation criterion’ might appear a weak apotropaic response for a legal system committed to equanimity and justice. It is in this task of balancing right that the English jurisprudence might be enriched by Italian judicial practices.

## *Fiat* Indeed: the Italian Regime of IOE

In the previous section, the essay reported on the effects of the HRA and the CPR. This section will discuss, instead, the Italian regime of IOE. The Italian civil procedures is organized in a code.[[45]](#footnote-45) Recently the code has been reformed to increase the efficiency and accuracy of the civil justice system. For instance, Legislative Decree n.83 has recently introduced changes to the appeal system that should expedite the final decision of civil cases.[[46]](#footnote-46) However, the regime of IOE is largely based on case law.[[47]](#footnote-47)

The most probable starting point of the present line of authority is an 1884 decision by the Corte di Cassazione - the highest court in civil cases for final cassation appeals. The ancillary issue concerned a stolen letter that, if accepted by the court, might have proved the existence of a contested payment. The Cassazione refused to allow the letter as evidence, setting a practice that bounded all the courts of the Italian Kingdom. The important aspect of the decision is, at least for our debate, the *ratio* given to support it. In the explanation, the Cassazione engaged the deontological implications of allowing a violation of right (in this case of ownership of a letter) with the prerogative to present an item of evidence (of another right) and decided that rights could not be trumped by a procedural prerogative.[[48]](#footnote-48) An analogous evaluation (based on balancing rights against procedural prerogative) is a 1934 Court of Appeal decision.[[49]](#footnote-49)

In 1935, the Corte di Cassazione was asked to go back again to the issue of the stolen letter as evidence of a debt and confirmed its previous decision. The 1935 case is significant for our debate because the Cassazione had the opportunity to introduce an element of flexibility to the regime of IOE. The ancillary legal issue was whether the stolen letter could be considered as an indication of further evidence. If the Cassazione were to answer positively, lower courts might, for instance, rely on an IOE to subpoena further documents or, perhaps, to subsume the existence of additional evidence. However, the response of the Cassazione was again on the negative, and that had the effect of freezing the line of authority in the areas of IOE.[[50]](#footnote-50) The position of the Cassazione on stolen documents was so precisely defined that it might have had the effect of being interpreted as aprioristic exclusion of *any*  IOE from civil cases.

It is difficult to pinpoint the origin of the aprioristic exclusion of *any* IOE, but there are hints, mainly from doctrinal writings, that it has been constructed by analogy with the regime adopted for IOE in criminal law. For instance, Comoglio, one of the leading experts in the Italian Law of Evidence, discusses the regimes for IOE in criminal and civil law without distinguishing the two areas of law.[[51]](#footnote-51)

Even from a cursory glance at the case law of the Constitutional Court, it is reasonably evident that the Italian courts are concerned with the potential implication of police practices on the rights of the accused.[[52]](#footnote-52) However, the early apprehensions raised by the Constitutional Court were partly due to the role of the prosecution in an inquisitorial system which, till 1989, gave the task to a powerful prosecution office to obtain evidence for and against the accused. In 1989, the inquisitorial system in Criminal Law was reformed, and police practices which lingered on after the reforms have been curtailed by the Constitutional Court.[[53]](#footnote-53) For instance, the Constitutional Court squarely engaged the judicial effects of illicit activities: ‘[A]ctivities carried out in defiance of fundamental rights cannot be used as a foundation and/or as a justification of procedural activities against the victim of such a practice.[[54]](#footnote-54) The wording of the decision sets an uncompromised regime for IOE in criminal law, yet there are indications that, in criminal cases, Parliament intended to add an element of flexibility in the assessment of IOE. For instance, the Italian Personal Data Protection Code 2003 allows defense councils to submit evidence based on personal information that has been retrieved without the consent of the legitimate owner. [[55]](#footnote-55)

In 2007, and independently from the jurisprudence in criminal law, the Tribunal of Bari approached the issue of admissibility of an IOE from a different perspective.[[56]](#footnote-56) The tribunal, for the first time, explicitly considered the consequences of excluding evidence from litigation without engaging deontological implications of the conduct that retrieved them. The ancillary issue was linked to an acrimonious divorce in which the wife’s counsel submitted confidential medical exams of her husband's sexual health (that included stolen clinical records). The counsel for the husband objected over the admissibility of the IOE, but his claim was rejected.[[57]](#footnote-57) The Tribunal of Bari explained that a distinction has to be made between the potential criminal and civil consequences of the wife’s conduct and the admissibility of evidence which might have a significant impact on the decision of the case. ‘Even if it were obtained by illegal or improper means, the documents would remain unchanged. Obviously the decision of the ancillary issue might not prevent criminal responsibilities and/or civil liability but that is to be ascertained in a separate proceeding/s.’[[58]](#footnote-58) The motivation unfortunately does not articulate the reasons for considering the consequences of excluding IOE from the main hearing. This is unfortunate, since it leaves one of the most significant elements of the decision truncated. In the penultimate section of the paper, we will return to this point, but we could anticipate that Italian jurisprudence has not, by comparison to the English jurisprudence, a long tradition in considering the benefits of consequentialism as a plausible form of legal reasoning.[[59]](#footnote-59)

However, there are strong indications that the Order made on 16 February 2007 by the Tribunal of Bari might be the harbinger of a new line of authority. The decision was promptly confirmed in September of the same year by the Tribunal of Turin in *Ciocchetti* v *Fiat Auto Financial Services*.[[60]](#footnote-60) The Order was made to decide an ancillary issue in an unfair dismissal case involving Mr Ciocchetti and his former employer, Fiat Auto Financial Services. The ancillary issue in this case involved the admissibility of two types of evidence: records of private phone calls made using a company mobile phone, and personal computer data retrieved, again, in a company laptop. [[61]](#footnote-61) Italian law has recently introduced a statutory qualification of article 8 ECHR, the so-called Italian Personal Data Protection Code that provides a specific regulation on how to manage these types of personal information. The evidence submitted on behalf of Fiat Auto Financial Services intended to prove that Mr Ciocchetti was in breach of his contractual obligations and that a disciplinary dismissal for gross misconduct was proportional to the breach. Counsel for the former employee objected to the admissibility of the evidence on several grounds. However, the court noted that restriction on the publicity of personal data, such as phone call records, could not be applied in a situation in which one of the parties sought to defend a right to privacy (ex Legislative Decree n.196 30 June 2003 24 (f)).

It is significant for our analysis that Fiat was the legitimate owner of the phone call records provided by a third party (ie mobile phone provider) and intended to use such data to protect its right to terminate employment relations with its employee. To reject the use of the records, the argument purported on behalf of Mr Ciocchetti’s lawyer was particularly quixotic. According to Mr Ciocchetti’s solicitor, the records of Mr Ciocchetti’s phone calls were to be excluded because some of the numbers were private. The court rejected Mr Ciocchetti’s argument since its supporting reason (ie the phone was used for personal use) was exactly one of the motivations that justified Fiat’s decision to sack Mr Ciocchetti. The bathos was, however, succeeded by a remarkable analysis of the private use of the company laptop.

The issue of the improper use of the company laptop was different from the admissibility of Mr Ciocchetti’s phone records in two distinctive areas. Firstly, personal use of Mr Ciocchetti’s mobile phone could be documented by Fiat Auto Financial Services by showing, for instance, that Mr Ciocchetti’s phone calls were directed to individuals who did not have a working relation with Fiat. In this case, the evidence could show an improper use of Mr Ciocchetti’s phone (by deductive reasoning) without making public the phone numbers called.

Secondly, the files stored in Mr Ciocchetti’s laptop (including some pornographic pictures) were destroyed via an ancillary procedure triggered by Mr Ciocchetti’s request.[[62]](#footnote-62) However, to support the claim that Mr Ciocchetti had misused his company laptop for personal use, Fiat sought to submit evidence that proved the existence of those pornographic pictures. In short, Fiat asked to submit evidence that flouted the ancillary procedures set to protect Mr Ciocchetti’s privacy and had to be considered both illegitimate (in relation to the procedures that destroyed them) and in violation of an individual privacy (*ex* article 140).[[63]](#footnote-63)

However, the Tribunal of Torino decided to accept the evidence retrieved from the laptop. The personal folder in the laptop in question, it is important to point out, was deleted and Fiat demanded to submit traces of personal use (ie indication of pornographic material being stored in the personal folder). In an unusually long motivation (that included comparative analysis of the Italian and US legal systems), the court explained, showing a distinctive acuity, that Italian civil procedures do not demand an aprioristic exclusion of IOE.[[64]](#footnote-64) The assessment of the admissibility of IOE, the Tribunal of Turin explains, requires an evaluation of the rights engaged in the ancillary and main case. For instance, in the early part of the court decision, the tribunal delivered a well-articulated analysis of Mr Ciocchetti’s right to privacy.[[65]](#footnote-65) However, later in the body of the decision, the court dwelled on the implications of the right of privacy in the submission made by Fiat Auto Financial Services (that is, the allegation of dishonest conduct by one of its employees).[[66]](#footnote-66) The Tribunal of Turin concluded that the decision of the preliminary issues requires the balancing of the violation of the right to privacy and the right to defend a claim in court.

In *Ciocchetti* v *Fiat Auto Financial Services,* the court favored the latter. In the next section, we will refer again to this aspect of the decision, but at this stage of the essay, it is important to say that: a difference between the balancing activity of the Italian and the English judges on the ancillary issue of IOE is likely to produce the same results in main cases. In other words, IOE that have a substantial bearing on the party’s ability to defend a claim are likely to be accepted in both legal systems. However, an evidence that helps to clarify the facts of the case (but that might not help a party claim) might not be allowed by Italian courts, and that might, in turn, increase the level of protection of those who have their rights violated.

The Tribunal of Turin justified its decision by proposing a fresh interpretation of the Civil Procedures Code. The court noted, for instance, that the Italian Parliament has not included a specific statutory limitation on the admissibility of illegitimately obtained electronic data.[[67]](#footnote-67) By making an argument from analogy, the Tribunal of Turin explained that Italian Criminal Law Procedures distinguish between an evidence that have been retrieved in violation of specific procedural rules (that might be unacceptable) from an IOE that have been found as a result of a generally illegitimate conduct which might be presented in court.[[68]](#footnote-68) For instance, a bag full of cocaine found in an illegally confiscated car might be used to support a conviction for trafficking of illegal substances. Furthermore, the Italian civil procedure includes specific limitations on the admissibility of IOE (for instance, injurious statements could not be allowed in a trial)[[69]](#footnote-69) that are analogous to the ones set in the Criminal Procedure Code, but do not have a specific regime for an evidence retrieved from electronic devices. It was, therefore, within the remit of the Tribunal of Turin to evaluate the admissibility of IOE submitted by Fiat.

The important element of the case is the indication of a new trajectory, so to speak, in the regime of the Italian IOE. Italian tribunals, if they were not explicitly prevented by Parliament, would have the prerogative to evaluate the admissibility of IOE, firstly on the basis of extension of the violation of rights that have been engaged by an illicit conduct, and secondly, by assessing the potential effects of excluding an evidence from the main trial. It is this new line of authority that tilts the Italian civil procedures in the same direction, albeit coming from a different stance, of the English jurisprudence.

## Some Reflections: Rights and Judicial Search for the Truth

The Italian and the English civil procedures are expected to provide a legal structure for well-organized and accurate accommodation of conflicts. Part of such a legal framework is the management of what evidence could be allowed in court. This essay has focused on the regimes of IOE and showed that Italian and English jurisprudences are in a transitional phase. The combination of the expansion of statutory rights and demand for economic efficiency are, and will continue to be, the most likely reasons for the two legal systems to change.

For instance, the prerogative set in Rule 32.1 (1), as clarified in *Johns* v *University of* *Warwick*, allows English judges to evaluate the severity of a right violation that occurred during the retrieval of an IOE. The assessment of the type of violation of rights in civil cases is still in its infancy, but it is likely to be progressively clarified in subsequent case law. It is, for instance, reasonable to expect that judges will be required to further qualify the so-called ‘outrageous violation criterion’ in a way that increases the consideration for the victim of right violation.

It is from the study of their differences that the two systems might learn from their respective experiences. For instance, English jurisprudence might be enriched from the Italian familiarity with the practice of balancing statutory rights. Recall that in *Ciocchetti* v *Fiat Auto Financial Services,* the Italian Tribunal of Turin balanced the violation of Mr Ciocchetti’s right to privacy with the potential negative impact on Fiat’s right to defend its claim in court. The advantage of this practice, by way of comparison to the reliance on the criterion of ‘outrageous violation’ adopted in *Jones* v *University of Warwick*, is an increased consideration of Mr Ciocchetti’s privacy. The Tribunal of Torino accepted, for instance, only the limitation of Mr Ciocchetti’s right to privacy that allowed Fiat Auto to prepare a reasonable defense of its claim in court. In practice, the Tribunal of Torino allowed the evidence that proved a private use of the company laptop (ie traces of pornographic material in the private folder of the company laptop) that supported the decision to dismiss a dishonest employee, not a substantive analysis of the type of evidence.

The differences between the English and the Italian assessment process is a matter of degree and, as mentioned earlier, the main decision in *Ciocchetti* v *Fiat Auto* might have been the same in English or Welsh court. However, there are strong indications, from a comparison of the two regimes of IOE, that a balancing of Ciocchetti’s privacy has received a higher level of protection without interfering with the fair adjudication of the main issue of the case.

The practice of balancing the requirement of justice, without making rights semantic structure with hollow substance, might be quite attractive to the English jurisprudence. For instance, in a speculative analysis of what might have been the effect of balancing Miss Jones’ right to privacy with the right of the University of Warwick to defend its claims in court, the improperly obtained video evidence might be reviewed only by medical experts (appointed by the parties and/or by the court). Obviously, having experts viewing the evidence would not compensate for a violation of article 8, but it might reduce, albeit only to a degree, the level of publicity of the submitted IOE. Such care for the right of Miss Jones might not have an effect on how the case was decided. Miss Jones has claimed to have permanent disability that was contested by the University of Warwick. The extent of her injuries, which she might have dishonestly inflated, could be clarified by expert witnesses watching the IOE. The advantage of the practice of balancing between substantial and judicial rights is that a right granted by the ECHR has perceptible influence in the court decisional process without hindering the functioning of judicial system.

The Italian jurisprudence might, instead, ‘absorb’ from the English judicial experience of forecasting the potential implications of excluding an IOE from the trial. Indications of how to conduct such an assessment could be found in *Helliwell* v *Piggott-Sims* as well as from a well-articulated literature on how to consider the pragmatic consequences of judicial decisions.[[70]](#footnote-70) These types of evaluations require a ‘forward looking’ approach’ that balances the pragmatic consequences of an ancillary decision with its effects in the main case. However, till the Tribunal of Bari’s decision *Ciocchetti* v *Fiat Auto Financial Services*, Italian jurisprudence had been reluctant to mix deontological evaluations with their pragmatic consequences on a case. The staunched defense of the priority of the principle of justice over the pragmatic implications of a judicial decision is the basis of Taruffo’s critique of the verophobes.[[71]](#footnote-71) The English jurisprudence, by comparison to the Italian, expects that judges have the ability to forecast, within the limits of reasonableness, the effect of excluding an IOE from the trial. It is this ability to consider pragmatism as a plausible type of legal reasoning in a debate over right violation that might inspire Italian jurisprudence. This point might be misunderstood and so we must be precise. The argument is not a Panglossian suggestion that Italian and English judges should adopt, or even worse, mimic, the respective practices of the other legal system. Rather, we argue that both IOE systems are changing and judges, by considering the experience of others might, after the opportune adjustments, set a new balance between the exigency of protecting rights and justice.

## Conclusion

The reasons for the prevalence of orthopraxy or orthodoxy in a legal system are probably historical. In England, an IOE is constructed an unfortunate event that, nevertheless, brings a beam of light in the court room. In Italy a IOE is considered inadmissible for deontological reasons. Italians law students are taught that: *nemo turpitudinem suam allegans auditor.* The court will not hear about the result of illicit activities.

Recently, civil procedures rules in both systems have been heavily reformed by their respective parliaments to meet the criteria of efficiency, accuracy expected by a modern economy and increase culture of rights. However and quite strangely, regimes of IOE in both systems remained largely untouched by their respective reforms.

Nevertheless, the courts have taken the task of ‘tuning’ the regime of IOE to the new legal framework. I explained that the regimes of IOE in both systems are, albeit starting from different stances, going through a transitional phase. Lord Wools in *Jones* v *University of Warwick* explained that IOE not linked to outrageous violation of rights criterion could be admitted in court. The requirement of qualification tilted the regime of English regime of IOE toward a greater level of protection for the victims of illicit activities. However, the idea to limit such a protection to an evaluation of to its effects might be not sufficient. In particular, it might, in the long term, be a proxy for claims of a human rights violations.

In Italy, the Tribunal of Bari and the Tribunal of Turin explained, instead, that judges could balance the violation of a right, by the conduct that retrieved the IOE, and the right to defend a claim in court. Such a stance is, however, still based on an unqualified explanation of how judicial consequences in the main case ought to be engaged in the ancillary issue.

In this essay, it was argued that during this period of transition, judges in both systems might benefit by considering the present and past experiences of the other. For instance, Italian jurisprudence might be inspired by the English line of authority that balances the admissibility of evidence in relation to its pragmatic consequences in the main trial. Instead, the English jurisprudence might consider the Italian experience of balancing the rights to a fair process with a defense of claim in court as a more effective process to protect rights.

1. \*Lecturer in Law at University of Southern Queensland, MacCormick Fellow at the University of Edinburgh, and Visiting Professor in Comparative Law at the Universidad de Deusto. [↑](#footnote-ref-1)
2. \* Research Assistant at the University of Southern Queensland, Praticante Avvocato, Ordine Degli Avvocati di Brescia. [↑](#footnote-ref-2)
3. ‘ In 2010 the average length of civil proceedings in first instance in the OECD area was around 240 days, but only 107 days in Japan, the best performer. About 420 days were required in Slovenia and Portugal, and 564 days in Italy. The average length of a civil dispute going through all three instances was 788 days, ranging from 368 days in Switzerland to *almost 8 years in Italy’*. [My emphasis] OECD, What makes civil justice effective?, OECD Economics Department Policy Notes, No. 18 June (2013), at 2 . [↑](#footnote-ref-3)
4. *See* Neil MacCormick, Reasonableness and Objectivity, 74 *Notre Dame Law Review* 1575 (1998). [↑](#footnote-ref-4)
5. Michele Taruffo, La Verita` nel Processo, *Rivista Trimestrale di Diritto e Procedura Civile* 1117–1135 (2012). [↑](#footnote-ref-5)
6. Court of Appeal, Tribunal of Milan Decision 5/3/1934, *II Rivista di Diritto Processuale Civile* 63 (1934). [↑](#footnote-ref-6)
7. Taruffo, *supra* note 3, at 1117. [↑](#footnote-ref-7)
8. lvin I. *Goldman, Knowledge in a Social World* (1999). [↑](#footnote-ref-8)
9. The line of authority is established in: John Anthony Helliwell & ors. v Terry D. Piggott-Sims, F.S.R. 356 (1980). [↑](#footnote-ref-9)
10. Data Protection Act 1998 Ch 29, (1998). [↑](#footnote-ref-10)
11. Convention for the Protection of Human Rights and Fundamental Freedoms, 4 IX 1950, 213 U.N.T.S. 222 article 6. [↑](#footnote-ref-11)
12. *Id.,* at article 8. [↑](#footnote-ref-12)
13. *See*, for a critical review of the concept of legal family, Mariana Pargendler, The Rise and Decline of Legal Families, 60 *American Journal of Comparative Law* 1043–1074 (2012). [↑](#footnote-ref-13)
14. *See* Jan Komárek, *Reasoning with Previous Decisions: Beyond the Doctrine of Precedent*, 61 *American Journal of Comparative Law* 149–171, 149, 160–167, 170 (2013). [↑](#footnote-ref-14)
15. *See* Vincy Fon & Francesco Parisi, Judicial precedents in civil law systems: A dynamic analysis, *International review of law and economics*. - New York, NY [u.a.] : Elsevier, ISSN 0144-8188, ZDB-ID 704902x. - Vol. 26.2006, 4, p. 519-535 (2006); Marco Croce, *Precedente giudiziale e giurisprudenza costituzionale*, 4 1114–1161 (2006); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 *The American Journal of Comparative Law* 343–401, 356 (1991). [↑](#footnote-ref-15)
16. *See*, for an Italian perspective, Rodolfo Sacco, *Introduzione al Diritto Comparato* 44 (1990). [↑](#footnote-ref-16)
17. Jan Smits, A Dialogue on Comparative Functionalism Maastricht Journal of European and Comparative Law, Vol. 18, pp. 554-558, (557) 2011. [↑](#footnote-ref-17)
18. Stapleton Jane, *Benefits of Comparative Tort Reasoning: Lost in translation*, *in* Tom Bingham and the Transformation of the Law 773–814 (Andenas Mads & Fairgrieveduncan eds., 2009).) [↑](#footnote-ref-18)
19. *Id.* [↑](#footnote-ref-19)
20. *Id*., at 778. [↑](#footnote-ref-20)
21. Peter De Cruz, Comparative law in a changing world 219 (2007). [↑](#footnote-ref-21)
22. *Hildebrand* v *Hildebrand* [1992] 1 FLR 244, [1992] Fam. Law 235. [↑](#footnote-ref-22)
23. Illegally Obtained Evidence in Civil and Family Proceedings, 3, http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/guidance-on-the-professional-conduct-of-barristers/illegally-obtained-evidence-in-civil-and-family-proceedings/ (last visited Mar 1, 2013). [↑](#footnote-ref-23)
24. *See*  Luca Passanate, *Modelli di tutela dei diritti. L’esperienza inglese e italiana* (2007). [↑](#footnote-ref-24)
25. Human Rights Act 1998 c.42, (1998). [↑](#footnote-ref-25)
26. ECHR, *supra* note 9. [↑](#footnote-ref-26)
27. Adrian Keane, The Modern Law of Evidence 56 (2008). [↑](#footnote-ref-27)
28. John Anthony Helliwell & ors. v Terry D. Piggott-Sims, *supra* note 3. [↑](#footnote-ref-28)
29. *Id.,* at 4. [↑](#footnote-ref-29)
30. It is noteworthy that a first attempt to regulate IOE regimes was in rule 81 Supreme Court of Judicature Act 1873 Ch. 53. [↑](#footnote-ref-30)
31. The Civil Procedure Rules 1998 n. 3132 (L.17), Rule 31.1 ss. k,l (1998). [↑](#footnote-ref-31)
32. *Id.*, at s d [↑](#footnote-ref-32)
33. HRA 1998 *supra* note 22 at 3 (1) [↑](#footnote-ref-33)
34. Jean F Jones v University of Warwick [2003] EWCA Civ 151, 1 WLR 954 (2003). [↑](#footnote-ref-34)
35. *Id.*, at 956. [↑](#footnote-ref-35)
36. *Id*., at 961. [↑](#footnote-ref-36)
37. *See* Lorenzo Zucca, Constitutional dilemmas : conflicts of fundamental legal rights in Europe and the USA 1 (2007). [↑](#footnote-ref-37)
38. ‘So the fact that in this case the defendant's insurers, as was accepted by Mr. Owen, have been responsible for the trespass involved in entering the claimant's house and infringing her privacy contrary to article 8(1) is a relevant circumstance for the court to weigh in the balance when coming to a decision as to how it should properly exercise its discretion in making orders as to the management of the proceedings.’ Jones v University of Warwick, *supra* note 29 at 962- 961. [↑](#footnote-ref-38)
39. *Id.,* at 962 [↑](#footnote-ref-39)
40. Marcel v Commissioner of Police for the Metropolis [1992] 4 Admin. LR 309. [↑](#footnote-ref-40)
41. *Andrew* *Lifely* v *Nicholas Lifely* [2008] EWCA Civ 904. [↑](#footnote-ref-41)
42. *Id.,* at para 32. [↑](#footnote-ref-42)
43. *Id.,* at para 37. [↑](#footnote-ref-43)
44. *Id.* [↑](#footnote-ref-44)
45. Codice di Procedura Civile, Royal Decree n. 1443 28 September 1940. Please note that the code has been reformed several times. [↑](#footnote-ref-45)
46. Legislative Decree n.83 22 June 2012, articles 54–56. [↑](#footnote-ref-46)
47. *See* Luigi Paolo Comoglio, Il Problema delle Prove Illecite nell’Esperienza Angloamericana e Germanica (1966). [↑](#footnote-ref-47)
48. Corte di Cassazione, 8 May 1884. [↑](#footnote-ref-48)
49. Court of Appeal, *supra* note 4. [↑](#footnote-ref-49)
50. Cassazione del Regno, 8 Febraury 1935, in *Foro Italiano*, 1935, I, c.c. 1083. [↑](#footnote-ref-50)
51. See Comoglio Luigi Paolo, *Le Prove Civili* (Milan: Wolters Kluwer Italia 2010) [↑](#footnote-ref-51)
52. William T. Pizzi & Luca Marafioti, New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 The Yale Journal of International Law* 1 (1992). [↑](#footnote-ref-52)
53. *See* Elisabetta Grande, Italian Criminal Justice: Borrowing and Resistance, 48 *The American Journal of Comparative Law* 227–259 (2000). [↑](#footnote-ref-53)
54. *Id*. [↑](#footnote-ref-54)
55. Legislative Decree n.196, 30 June 2003. Article 24 (f)–26 (4 c). [↑](#footnote-ref-55)
56. Tribunal of Bari, Order 16 February 2007. [↑](#footnote-ref-56)
57. Legislative Decree n.196 30 June 2003, Article 26. [↑](#footnote-ref-57)
58. Origianal text in Italian:‘[S]i osserva infatti che il documento acquisito al processo resta pur sempre il medesimo sia che venga introdotto lecitamente sia illecitamente, e ciò proprio ed evidentemente perché si parla di prove precostituite. Naturalmente, nulla esclude che la violazione del divieto che comunque viene a consumarsi (sebbene fuori del processo) incontri le sanzioni di legge: ma le stesse non avranno influenza alcuna sul piano dell'efficacia probatoria.’ Supra note 47, para 7. [↑](#footnote-ref-58)
59. Neil MacCormick, Reasonableness and Objectivity, 74 *Notre Dame Law Review* 1575 (1998). [↑](#footnote-ref-59)
60. Tribunal of Turin, n. 4885, 28 September 2007. [↑](#footnote-ref-60)
61. Daniele Iarussi, L’utilizzabilità delle prove acquisite a sostegno del licenziamento disciplinare, 9 *Il Giurista del Lavoro* 42 (2008). [↑](#footnote-ref-61)
62. Legislative Decree n. 196 of 30 June 2003 (Italian Personal Data Protection Code). [↑](#footnote-ref-62)
63. Id. [↑](#footnote-ref-63)
64. Tribunal of Turin, n. 4885 *supra* note 57 paras 7, 5–8. [↑](#footnote-ref-64)
65. *Id.* at paras 2 (2), 10–17. [↑](#footnote-ref-65)
66. *Id.* at para 5. [↑](#footnote-ref-66)
67. *Id*. at paras 7–12. [↑](#footnote-ref-67)
68. *Id.* at paras. 7, 7–8. The specific effects of IOEs are set in the Criminal Procedures Code in articles: 62, 63, 103, 188, 195, 197, 203, 234, 254, 270-271, 200. Decree of the President of the Republic n.447, 22 September 1988. [↑](#footnote-ref-68)
69. Codice di Procedura Civile*, supra* note 40 article 222. [↑](#footnote-ref-69)
70. *See* Neil MacCormick, Legal reasoning and legal theory 4 (1994). [↑](#footnote-ref-70)
71. Taruffo, *supra* note 3. [↑](#footnote-ref-71)