

Italian Supreme Court Decision

Presentation of case and law¹. With the sentence of the 28th March 2002, passed in the court chambers, as foreseen in article 129 of the Italian Penal Code, following the request for a penal conviction, the Judge for Initial Enquiries at the Court of Verona dismissed as unsound the case against the practitioners of “chiropractic” Luca Bennati and Michele Spangaro, regarding the offence laid out in articles 110 and 348 of the Penal Code, brought against the defendants because, in competition also with each other, and without possessing the required qualifications, they unlawfully practised

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regarding Penal Appeal Court – 6th section – Sentence of 10th April - 21st July 2003, n°. 30590 Presentation of case and law¹. With the sentence of the 28th March 2002, passed in the court chambers, as foreseen in article 129 of the Italian Penal Code, following the request for a penal conviction, the Judge for Initial Enquiries at the Court of Verona dismissed as unsound the case against the practitioners of “chiropractic” Luca Bennati and Michele Spangaro, regarding the offence laid out in articles 110 and 348 of the Penal Code, brought against the defendants because, in competition also with each other, and without possessing the required qualifications, they unlawfully practised the medical profession, examining numerous patients, preparing case histories, making medical diagnoses, recommending clinical tests and x-rays, prescribing medical or therapeutic treatment, treating patients directly with suitable manipulations, without this being prescribed by a doctor. The Judge observed that, given the “radical uncertainty” shown also by the administrative bodies responsible for controlling such practitioners (from the Ministry for Health, to the Region, to the Local Health Authority N° 20 of Verona), which in itself should lead to the acquittal of the accused, as in article 5 of the Penal Code, the only line of interpretation to be followed is that laid out in constitutional order N° 149/88, which decrees that article 348 of the Penal Code should punish only those who unlawfully practice a profession for which special State qualification is required and that, therefore, the offence lies precisely in practising a profession for which the State requires a special qualification, by those who do not hold such a qualification. Hence the conclusion that, since the State does not require any qualification to practise the profession of “chiropractor” and since only the law could, on the strength of article 2229 of the Civil Code, demand enrolment in specific registers or lists to carry out an intellectual profession, the practice of any professional service is protected by article 35, comma 1, of the Constitution and, in parallel, any private initiative is free, according to article 41 of the same Constitution. In any case, although it may be true that in practising the profession of “chiropractor” certain activities carried out may be “comparable to those of the medical profession”, such as “preparing case histories and diagnoses, reading x-rays or prescribing courses of treatment”, all this does not alter the nature of the profession, because legitimate subjects would be unreasonably prevented from practising “chiropractic” deliberately, since they would consider preliminary evaluations to be necessary in order to “match the treatment to the actual needs of the patient”. Finally, as regards the prescription of courses of treatment, this activity may be considered to be intrinsically linked to the practice of the “chiropractic” profession.² The Public Prosecutor proposed an appeal to the Court of Verona, arguing a violation of article 348 of the Penal Code as well as the manifest lack of logic of the grounds stated. In both regards the argument is that the accusation charged the accused of practising “chiropractic”, as a “specific manual intervention on a given skeletal area, especially of the spine, with the aim of correcting functional alterations or limited modifications of joint function”, according to the provisions of Health Ministry circular N° 79/1982. The actual charge was to be sought in the fact that both Bennati and Spangaro had carried out interventions rightly belonging to the medical profession; so much so that the list of incriminated behaviours based on precise witness evidence constitutes the application of a constant jurisprudence of legitimacy, in the sense that those who are not qualified to practise medicine can carry out neither diagnosis nor prescription of remedies and how they are to be administered. The judge of that case would thus be committing a multiple series of legal errors, stating that the complementary nature of the activity carried out by the “chiropractor” justified practices “comparable” to those of the medical profession; thus overlooking that any intervention meant to include the establishment of the origin of discomfort or physical or mental alteration of the individual and any intervention preordained to achieve the healing or improvement of the patient’s condition must necessarily imply the intervention of a doctor.³ Prior to today’s hearing in the court chambers, Bennati and Spangaro submitted evidence supporting the reasons of the contested sentence.⁴ The appeal is valid. We should, first of all, recall how the judge of that case improperly cited constitutional order 149/88, as a decree legitimising the practice of chiropractic by persons unqualified to practise the medical profession, thus macroscopically misunderstanding the actual decree contained in the said order. On that occasion, the court, with reference to article 10 and 25 of the Constitution, was assigned the question of the legitimacy of article 348 of the Penal Code, raised during a lawsuit against three U.S. citizens who had practised the profession of “chiropractor” in Italy without possessing the necessary State qualification, in the sense that the regulation in question (which is a ‘blanket’ penal law) lacks the necessary integrative references, in that, on the one hand, qualifications issued in the United States of America are not recognised in our Republic and, on the other hand, there does not exist in Italy any degree course in Chiropractic nor, consequently, any corresponding professional qualification, so that the penal law cannot be applied without violating article 25 of the Constitution (moreover, article 10 of the Constitution proved relevant only in case of an order of remission, whence the impossibility of closely examining the offence committed against it). Having observed that the regulation in question punishes only those who unlawfully practise a profession for which a special State qualification is required and that, therefore, the offence punished by article 348 of the Penal Code consists precisely in the practice of a profession, for which the State requires special qualification, by those who do not possess such qualification, the Court considered the matter to be manifestly inadmissible through irrelevance. The remitting judge himself had, in fact, recognised that the Italian State does not require any qualification for the profession of “chiropractor”, which our laws do not consider, whilst article 2229 of the Civil Code assigns to law the duty of defining the intellectual professions for which enrolment in specific registers or lists is necessary. Thus, given the

“indifference” of ordinary law, the Court inferred that “it is of no relevance that chiropractic can be included in the category of professions, since, as long as the State does not see fit to discipline it and to require special qualifications for its practice, it is clearly professional work, defended by the Constitution in accordance with article 35, comma 1, in all its forms and applications, and is a free, private initiative in accordance with article 41 of the Constitution”, with the consequence that “article 348 of the Penal Code proves to be absolutely inapplicable because the law does not consider this act to be an offence”. Hence it can clearly be seen that the abovementioned “indifference” of Italian law towards the profession of “chiropractor” stands if, and as long as, the activity actually practised does not imply the performance of “operations” that only those qualified for the medical profession can lawfully carry out.⁵ This Court holds constant to the line of interpretation according to which article 348 of the Penal Code is a ‘blanket’ penal law. This proposition, moreover, needs partial rethinking, following constitutional sentence N° 199/93, without this leading to marked repercussions on the lines of interpretation in question, centring said sentence on the observation of the principle of strict lawfulness in deciding what constitutes an offence. This presupposes the existence of various judiciary standards qualifying any specific professional activity, which would lay down the requirement for a special State qualification and for enrolment in a specific register, thus defining the so-called “protected professions”. Consequentially the Court concludes that any lack of legislation cannot be filled by the judge laying down general or abstract rules. Thus the regulation in question certainly does not defend “corporative”-type interests, but the common interest for the regular exercise of professions for which a special qualification and enrolment in a register are required (cf. the previously mentioned constitutional sentence N° 199/93). Consequentially, behaviour constituting unlawful practice must consist of the performance of one or more actions reserved exclusively for professional activity (section six, 29th November 1983, Rosellini). So much so that it becomes clear that it is not the name of the profession exercised that determines the type of activity as being exclusive to the medical profession, but the actual operations carried out, unless the activity (with reference to activities bordering with the medical profession) can in itself be defined as the exercise of “competences” reserved for the medical profession; also, where the profession is regulated by law, when it exceeds the limits laid out by the law, this constitutes unlawful practice of the medical profession. In a framework where the definitive point of reference is the principle expressed by article 32 of the Constitution, according to which “The Republic defends health as a fundamental right of the individual and in the common interest”, through constitutionally-minded verification of ordinary regulations (including incriminating regulations), following a line of interpretation consolidated in the judge’s pronouncement of the legitimacy of the laws (cf., ex plurimis, constitutional sentence N° 184/86).⁶ Regarding the former category, where the type of offence is that mentioned in article 348 of the Penal Code, and again with reference to activities exclusive to medical doctors, this Court has stated, for example, that the professional activities of the optometrist (in an unusual parallel it should be said with the profession of chiropractor in the “professional profile” drawn up by the Italian Chiropractic Association, which document will be briefly considered further on), which could not be provided for in the regulations for the profession of optician, does not necessarily imply exercising the medical profession; leaving to the individual judge the job of verifying whether the professional practices correspond to a mere activity of instrumental measurement and observation, and to a simple activity of ocular gymnastics in which case optometrists should be considered auxiliaries to doctors and carry out functional operations for the fulfilment of the work of the medical profession, thus rendering the offence groundless - or whether these activities, in their essence, necessarily imply choices and evaluations of a diagnostic nature, typical of medical activities (section six, 3rd April 1995, Schirone). Along the same line, it has been stated that the medical profession manifests itself in the ability to recognise and diagnose illnesses, in prescribing a cure, in administering treatments, including those differing from ordinary practice. Moreover, it should be suitably noted that the decree that the offence of unlawful practice of the medical profession is committed by whoever expresses diagnostic opinions and advice, and prepares courses of treatment for a patient, specifies that such conduct also includes psychotherapy, since the defining trait of the profession is the purpose of healing, and not the scientific means used. Any type of treatment, therefore, even if it uses non-traditional or non-conventional means, carried out by those not qualified to practise, implies the offence given in article 348 of the Penal Code; thus, disregarding the decision on this matter, grounds were upheld for the offence of unlawful practice of the medical profession by workers in an unauthorised centre where patients underwent, amongst other things, sessions of psychoanalysis (section two, 9th February 1995, Avanzini). More recently, confirming a judgement dating from some twenty years ago (section six, 6th April 1982, De Carolis), it was found that acupuncture constitutes exercise of the medical profession, in that it is an invasive therapy which, as well as causing a typical hypnotic and anaesthetic effect on the patient, is subject to all the risks linked to operations of that nature, such as serious injuries caused by invasions in inappropriate parts of the body, not to mention the risk of infections through the use of “instruments” not properly sterilised according to the current standards and periodically inspected by the health authorities (section six, 27th March 2003, Carrabba). And it is interesting to note that whilst, at the time of the first decision, acupuncture was not a subject taught by Italian universities, when the second decision was pronounced, the Faculty of Medicine and Surgery at the University of Rome “La Sapienza” announced “the activation of a second-level Masters course in acupuncture for the year 2003, for which the admission qualification is a degree in medicine and surgery or in dentistry”. The same aforementioned section – which dealt in a truly organic manner, and with precise reference to individual “invasive” and “non-invasive” activities, with the problem of the practice of so-called “alternative medicine”, whence the marked repercussions, also with reference to the type of offence now being examined by this Court – was thus led to conclude with the sentence that «acupuncture is performed through actions belonging to the medical profession, not only by the choice of therapy for the illness to be treated, but also by its intrinsic application methods, which may be defined as “clinical”» (thus, again, the broad and thorough investigation by section six, 27th March 2003/Carrabba). Again, this decision was made paying careful attention to the fact that the jurisprudence of this Court is orientated towards including in the offence of exercising the medical profession “the conduct of those who make diagnoses and issue prescriptions for homeopathic products, because such activities are part of the exercise of a

medical activity that presupposes, for its lawful practice, the possession of a valid and suitable qualification; noting that if “homeopathic” remedies are not recognised by the State, they are certainly not prohibited, but are subject to the free choice of the patient in agreement with his medical doctor, by whom the prescriptions must be written; again applying article 348 of the Penal Code, the offence in question was therefore considered to be committed when the activity is not carried out by a person exercising the medical profession and consists in the diagnosis and prescription of remedies suggested and of how they are to be administered” (section six, 25th February 1999, Cattaneo). Correctly, the decision of this Court, recalled several times, emphasised how the jurisprudence of legitimacy has assimilated the interpretative construction initiated by constitutional sentence N° 199/93, which recognised in article 348 of the Penal Code a standard which, far from causing a mechanical referral to other sources of legislation as structural elements of regulation, gives a thorough and complete outline of this type of offence in all its essential composing parts. This can be explained by the fact that the actions constituting the offence “become illegal through the perpetration of the act or acts by which a person “unlawfully” exercises any given profession for which a special State qualification is required”. With which “the measure of qualification does not include, per se, an element that “positively” places it in the structure of the offence in question, which, therefore, could not exist without it, but rather represents the necessary condition which “negatively” affects the juridical ability of the subject to exercise that specific profession, qualifying his/her conduct as unlawful and therefore an offence”. Qualification it should be added – “rather than acting as a discriminatory element that excludes the illegality of a certain conduct formally referred to in the legal model outlined in the incriminating legislation, works as a negative condition preventing us from linking the act, in its material form, to the abstract figure outlined by the legislation”. On a functional level, “the fact that the State, in defence of the common good, requires a special qualification to exercise certain professions, is a phenomenon that, on close inspection, is not far-removed from the vast range of situations in which qualification or authorisation measures bear weight over subjective qualified positions, determining whether or not penal sanctions can be applied in cases where the proper limits of those subjective positions are not respected”. Consequentially, “if the unqualified or unauthorised conduct can perfectly well be defined unlawful as such, since for this purpose the prescriptive content of the penal legislation is sufficient, there is no reason to doubt that article 348 of the Penal Code also describes an example of this type of offence, perfect in all its distinguishing features, without necessarily having to specify, as a further descriptive element of the case, the exact nature, content and limits of the specific measure with which a given person is qualified to exercise a certain profession”. Therefore the conclusion is that the penal legislation considers the absence of the special qualification that the State requires to exercise that profession, to be a necessary and sufficient element in defining this type of offence. The content and proper limits of each qualification, however, are not part of the defining structure of this type of offence, but constitute no more than a fundamental condition that the judge is called upon to evaluate case by case. The judge’s pronouncement of the legitimacy of the laws cited now becomes significantly important not so much regarding the primary or secondary nature of the legislation which, according to once-dominant legal practices, was a valid integration of article 348 of the Penal Code, as to examine the regulation of the so-called “bordering” professions in the indispensable comparison with the activity of the medical doctor, because what designates the work of the interpreter is the necessity is to succeed in correctly establishing the conduct, so as to verify whether it includes actions typical of the medical profession which, according to Presidential Decree N° 221/50, can be exercised by those who, as well as having completed their degree and passed the required qualification exams, are enrolled in the relevant register (thus, again section six, 27th March 2003, Carrabba; also, 9th February 1995, Avanzino; 11th May 1990, Mancariello, in the sense that, regarding the medical profession which manifests itself in recognising and diagnosing illnesses, in prescribing a cure, in administering treatments, including those differing from ordinary practise, the offence of unlawful practice of the medical profession is committed by whoever expresses diagnostic opinions and advice, and prepares courses of treatment for a patient). 8. In the second category which is less relevant, and centres on cases where legislation lays out detailed regulations, in negative, for the activity exercised (a theme which, moreover, by virtue of constitutional sentence N° 199/93, now assumes a purely descriptive value) it was ordained that the offence of unlawful practice of the dental profession is committed by dental technicians who carry out procedures reserved for dentists on patients who come to them, in that, by virtue of article 11 of Royal Decree N° 1334/28, all direct relations between patients and dental technicians are excluded, the latter being authorised “only to construct dental prostheses on models derived from oral impressions... provided by dental surgeons... with instructions on the type of prosthesis required (article 11 of the above-mentioned royal decree: in this case the Court observed that the judge had correctly found that the accused should respond for the crime ascribed to him in that he had. 1) examined a patient’s bridge, prescribed x-rays and then expressed his opinion on them; 2) examined a patient complaining of toothache, asking him to lie on the examination table, examining his mouth and stating that further treatment was necessary, 3) examined a patient, prescribed x-rays, and promised to prepare a quotation; 4) examined a patient’s mouth, prescribed x-rays and, following this, the application of dental apparatus (section six, 9th November 1992, Cagalli; section one, 12th February 1997, De Luca). Once again, it was found that the offence of unlawful practice of the medical (or paramedical) profession is committed by the biologist who, albeit qualified for laboratory analysis work, takes a venous blood sample for the purpose of analysis; with the specification that this operation, whilst being part of the ordinary administration of medical practices, if it is not carried out by professionally capable persons using precise techniques and methods, can harm or even endanger the health of the person treated, and is the exclusive territory of the medical profession or of the paramedical professions, such as professional nurses or midwives, for whom the relevant qualification is provided for in law; in addition, if it is true that article 3, comma 2, of law N° 396/67, containing “the Order for the Profession of Biologist”, permits registered biologists to perform activities other than those listed as typical in comma 1 of said article, this disposition also expressly states that such further activities must be included in the competences of the biologist by laws or regulations, and no regulatory source, be it legislative or regulatory, authorises biologists to take blood samples for the purpose of analysis (section six, 6th December 1996, Manzi). 9. Attempts made in

a legislative context to constitute a "statute" of similar activity would also appear to be of considerable significance for the purpose of defining the professional work of "chiropractors". As can be seen from the report accompanying bill of law N° 1605, on the initiative of Senator Tomassini (bearing the title "Recognition and judicial regulation of chiropractic as a primary health profession"), brought before the Presidency 15th July 2002 (Senate of the Republic XIVth legislature), chiropractic originated as a free profession in the United States of America around the year 1890, an effectively separate profession, but not yet alternative to traditional medicine, and featuring certain fundamental common traits, that is, in being a primary profession (i.e., for university graduates), involving direct contact with the patient, leading to the right and duty to diagnose, and being a profession with the right to make use of diagnostic radiology". In its turn, the report accompanying bill of law N° 1113, on the initiative of Congressman Marco Zacchera, presented 29th June 2001 (House of Representatives XIVth legislature), in numbering chiropractic among the new therapeutic techniques, pointed out the urgency of the need to "fill a serious legislative loophole, which allows the appearance of various degenerative phenomena such as the abuse of trust, doubtless quackery by unqualified practitioners, the creation around Italy of training courses that do not offer any guarantee of reliability and safety, all this by taking advantage of current juridical uncertainty". Both these acts of parliamentary initiative qualify the work of chiropractors at least in current terms - as exclusive to the medical profession. In practice it represents the application of the scientific discipline that "is based on the principle that the body's innate capacity to tend towards a healthy balance is regulated and conditioned by the nervous system"; it concerns the origin, diagnosis, treatment and prevention of functional disturbances, specifying that it also deals with "the pain syndromes and neuro-physiological effects relating to static and dynamic disorders of the muscular and skeletal system and that the correct recognition, diagnosis and treatment of subluxations is a specific activity of great professional content, which is the sole competence of doctors in chiropractic", (articles 1 and 2 bill of law N° 1605). Or, again, considering that chiropractic "is a holistic scientific discipline and a healing art and that it concerns the origin, diagnosis, care, therapy and prevention of functional disturbances, and it is specified that it also deals with the pain syndromes and neuro-physiological effects relating to static and dynamic disorders of the neuro-muscular-skeletal system" (articles 1 and 2 of bill of law N° 1131). Both these acts of parliamentary initiative provide for a university degree course in chiropractic (with a minimum length of six or five years) leading to qualification to practice the free profession of chiropractor, subject to passing a specific State examination, and requiring the establishment of a professional register. Regarding the competences of the graduate in chiropractic, it is proposed that the professional can examine, analyse and diagnose, provide care, manipulate and treat the human body using manual, mechanical, energetic and nutritional methods and is authorised to use diagnostic radiological equipment according to their training, whilst not authorised to administer medication nor to carry out surgical operations (article 8, bill of law N° 1131 and bill of law N° 1605). If, on the one hand, these acts of parliamentary initiative, placed in the context of a legislative procedure still underway, appear to constitute a "statute" of chiropractors (at least in part) distinct from that of the medical profession (unusual but, perhaps, easily understandable and in particular the prohibition to administer medication), on the other hand, they outline an approach of certain interpretational validity for the purpose of verifying the grounds for appeal laid out for examination by this Court. All this precisely according to the criteria pointed out by jurisprudence with reference to cases of the first category (i.e., those characterised by the lack of qualificatory regulations), because they describe activities which at least according to current regulations are exclusive to the medical profession (cf., once again, section six, 23rd March 2003, Carrabba). Furthermore, the "Professional Profile" of chiropractic produced by the Italian Chiropractic Association, on the basis of a "comparative legislative approach", gives diagnostics and the (complementary) examination of patients as the fundamental "legal duty" of chiropractors. Thus, here again, designating the activity in question as reserved for the medical profession, to which the practices of chiropractic can be referred, albeit with the distinctions highlighted above, which, moreover, remain irrelevant until such a time as new legislation may be passed. So much so that, for example, according to the legislation of the United States of America, chiropractic can also constitute a course of specialisation following a university degree in medicine.¹⁰ The sentence impugned must therefore be annulled, and committed to the Court of Verona for further deliberation. The judge in that seat will comply with the legal principles given above. For these reasons the Court annuls the sentence impugned and commits it to the Court of Verona for further deliberation.