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RETROACTIVITY, ABUSE OF PROCESS AND THE RULE OF LAW: PRELIMINARY CRITICAL REMARKS ON *SIMONCINI V. SAN MARINO* CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS (14396/24)***

1. *Introductory Remarks. Outline of the Factual Background of the Case*

The role of the European Court of Human Rights (ECtHR) in defining the standards of protection binding on States has become increasingly crucial over the years, not only to ensure adequate protection for the direct victims of violations, but also to enable States to align their legal systems with the essential components of the rule of law.

This function performed by the ECtHR's case-law is of great importance because, through its judgments on State conduct contrary to the European Convention on Human Rights (ECHR), the Court is able to address issues of general interest, which are relevant beyond the specific case under its scrutiny.

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This is particularly evident in matters concerning the use of judicial procedural instruments and the relationship between the legislative and judicial branches, issues on which the Court was called to rule in the recent case of *Simoncini v. San Marino*[1].

These are also central principles of the rule of law, since only through the proper and regular exercise of judicial power is it possible to achieve the full realisation of justice and democracy[2].

This article therefore aims, after providing a brief overview of the facts and the domestic judicial proceedings (Sections 1 and 2), to assess to what extent the Court's recent judgment may be considered capable of offering useful guidance for the definition of uniform standards of protection, with particular regard to the proper and independent administration of justice and, consequently, to the rule of law.

In particular, this article seeks to examine to what extent the protection of the fair composition of a judicial body, as an expression of the rule of law, may justify — or fail to justify — retroactive legislation affecting individual rights, notwithstanding the inherently retrospective nature of authentic interpretation. It further considers whether the distinction between 'general interest' and 'imperative reasons of public interest' can still be regarded as a genuinely consistent criterion, as well as whether this assessment varies depending on the context in which the dispute arises (section 3).

Moreover, this article aims to illustrate certain uncertainties in the ECtHR case law, whilst proposing possible solutions designed to identify the requisite degree of clarity in defining the limits of the abuse of the right of individual application, in order to avert any potential negative impact on the fundamental principles of the rule of law (section 4).

In the Republic of San Marino, the Judicial Council (*Consiglio Giudiziario*) is a body responsible for representing and safeguarding the judicial system and the judiciary, composed of a balanced mix of "political" members (members of Parliament belonging to the Parliamentary Commission for Justice and the Minister of Justice) and "judicial" members (judges, including the Chief Justice, who is responsible for overseeing the courts and the judiciary), as provided for by Qualified Law no. 145/2003 and subsequent amendments. This Law was amended in 2011 (Qualified Law no. 2/2011 of 16 September 2011), in 2019 (Qualified Law no. 1/2019 of 26 February 2019) and in 2020 (Qualified Law no. 1/2020 of 20 February 2020).

Depending on the functions it is required to perform, the Judicial Council may convene in ordinary session or in plenary session (CGP). The Heads of State (the *Reggenza*) have the authority to convene and preside over the CGP, although they do not have the right to vote.

Within this framework lie the facts that gave rise to the application against the Republic of San Marino for the alleged violation of Article 6 and Article 8 of the European Convention on Human Rights, reportedly resulting from legal irregularities in the problematic

[1] ECtHR, *Simoncini v. San Marino*, app. n. 14396/2024, 19 February 2026. The judgement has been delivered by the Fifth Section and will become final in the circumstances set out in Art. 44.2 of the ECHR, namely when the parties communicate that they do not intend to request referral to the Grand Chamber or after the expiry of a three months delay from the date of the judgment without such a request by the parties (that is to say 19 May 2026) or, finally, when the panel of five judges of the Grand Chamber rejects the request according to Art 43 of the ECHR.

[2] The importance is perhaps even greater for those States which, also due to their smaller populations, appear less frequently as respondents before the ECtHR from a purely statistical perspective. Indeed, the rarer the opportunity to receive valuable guidance for assessing compliance with European human rights protection standards – also as a constitutive element of the rule of law – the more significant such guidance becomes.

composition of the CGP, which is said to have adopted measures detrimental to the applicant, a first-instance judge in San Marino (*Commissario della Legge* - CoL), appointed in 2019 and then revoked in 2020 by the CGP.

Given that one of the most significant issues concerns the retroactive effects of legislative measures, it is necessary to first summarise the main facts and events in chronological order.

The composition of the CGP, according to art. 7(5) of Qualified Law no. 145/2003 as modified by Qualified Law no. 2/2011, includes members of the Parliamentary Commission for Justice, the Minister (*Segretario di Stato*) of Justice, the Third Instance Judges, the Chief Justice and – information particularly relevant for the analysis of the case – three Judges of Appeal and five first-instance judges (*Commissari della legge* - CoL).

The five CoL and the three Judges of Appeal should be selected among the ones «confirmed in office on a permanent basis with the highest seniority in that position», but if the number of magistrates in the CGP is lower than the number of the other "political" members, the composition must be supplemented «with other magistrates of the same instance as that of the absence or, if the number continues to be lower, with Commissari della legge, even if not yet confirmed in office on a permanent basis»[3].

On 5 March 2018, considering that only two Judges of Appeal were in charge, the composition of the CGP was integrated by a CoL confirmed on a permanent basis, even if another Judge of Appeal was in place on a fixed non-renewable term.

Subsequently, another Judge of Appeal was appointed on a provisional basis for a three-year probationary term.

On 27 March 2018 the CGP provided an interpretative explanation in order to clarify if should be preferred the new Judge of Appeal, even if not on a permanent position, or the CoL confirmed on a permanent basis: the CGP clarified that the supplementation must first take into account judges in the same category, irrespective of their permanent status, so preferring the Judge of Appeal on a fixed term basis as a member of the CGP.

Once its own composition – which was upheld in subsequent meetings – had been clarified by this interpretation, on 14 September 2018, the CGP initiated a recruitment procedure for a new CoL, in which the applicant before the ECtHR also participated.

Meanwhile, during the CGP meetings of 30 November 2018 and 12 February 2019, some members raised perplexities, concerns, and complaints regarding the regularity of the composition of the CGP, both with reference to the regularity of the interpretation adopted during the 27 April 2018 meeting and to the participation as a member of the CGP with voting rights of the Chief Justice, for which position a figure external to the judiciary of San Marino, with proven expertise in court administration, had in the meantime been appointed. Consequently, due to the irregular composition of the CGP, all decisions made at its meetings held after April 27 should have been considered null and void.

Similarly, further concerns had been raised regarding the procedure to be followed for the recruitment of the new CoL, with particular reference to the selection criteria and the absence of an adequate report[4].

On 26 February 2019, the Sammarinese legislator intervened by adopting Qualified Law no. 1/2019 in order to clarify the doubts raised in the previous meetings of the CGP and, subsequently, the CGP, by majority decision, appointed the applicant as CoL, following his success in the selection procedure; he consequently took office on 22 March 2019.

[3] Translation in English available at para. 57 of the judgement of the ECtHR.
[4] Further details available at para. 11 ff. of the judgement of the ECtHR.

On 19 April 2019, the administrative measure appointing the applicant as CoL was challenged by two other candidates who had been unsuccessful in the selection procedure (procedure no. 13/2019[5]).

On 20 February 2020, Qualified Law no. 1/2020 was adopted, further amending Qualified Law no. 145/2003 on the judicial system, by removing the Chief Justice's voting rights and excluding him from the "judicial component" of the CGP.

The rest of the composition of the CGP was clarified through an authentic interpretation legislative intervention included in art. 3 of the Qualified Law no. 1/2020: «The Judicial Council in plenary session is composed primarily of magistrates confirmed in office on a permanent basis, that is to say, that they have passed the probationary period, where applicable. Only in the event that the number of magistrates confirmed in office on a permanent basis is lower than that of other members, the Judicial Council in plenary session shall be supplemented according to the other criteria laid down in the law»[6].

On 28 September 2020, the CGP, taking into account the legislative intervention of authentic interpretation (Qualified Law no. 1/2020), acted through a measure of spontaneous decisional self-review (*autotutela decisoria spontanea*), a legal instrument of self-protection that is well established and generally accepted within the Sammarinese legal system, annulling the appointment of the applicant. This action was based on a legal defect in the composition of the CGP that had initiated the recruitment procedure, insofar as it had included a judge who had not been confirmed on a permanent basis, contrary to the provisions of Qualified Law no. 1/2020.

In the subsequent recruitment procedure that was then initiated, the applicant was not selected and his participation in the selection process was therefore unsuccessful.

2. *Key Insights Emerging from the Review of the Domestic Proceedings*

In 2019, as already mentioned, two potentially eligible candidates involved in the same selection process, filed an administrative appeal against the procedure and the appointment of the appellant as *Commissario della legge* (CoL). They contested the legality of the procedure on several grounds, including the irregular composition of the CGP, in particular the presence of an appeal judge not yet permanently appointed, the lack of reasoning in the decision and the failure to notify other interested candidates. Although the appellant had been informed of the proceedings, he initially decided not to participate in the proceeding no. 13/2019.

In March 2021, the proceedings were dismissed (*archiviazione*) because the appellants had lost interest, having, in the meantime, been appointed as *Uditori Commissariali,* a judicial body in San Marino, with limited functions of assisting judges at first instance. The appellant's subsequent attempt to object to the dismissal of the proceeding was rejected.

In the context of proceedings no. 7/2021, the appellant lodged an appeal against the decisions to dismiss the case, affirming that the judge at first instance (CoL) should have recused himself due to conflict of interest, as he had attended the CGP meeting at which those two candidates were appointed.

[5] See below sect. 2.

[6] Translation provided at para. 61 of the judgement of the Court.

In May 2022, the Judge of Appeal for Civil Liability Actions of Magistrates (JACLM), acting as an administrative appeal judge, dismissed the appeal.

Consequently, the appellant initiated a *querela nullitatis* of the 27 May 2022 decision before the judge for extraordinary remedies in *civil* matters. The case was assigned to the judge responsible for extraordinary remedies in *criminal* matters, who declared the appeal inadmissible, on the grounds that such a procedure was not provided for under domestic law.[7]

Alongside his attempt to intervene in proceeding No 13/2019, the appellant lodged a new administrative appeal (No 37/2020) in November 2020 against the CGP's decision, which had annulled his appointment, challenging, for the first time, the application of Qualified Law no. 1/2020.

He thus contested the legitimacy of the retroactive legislative measure, which he considered to lack any "imperative reason of general interest", but designed for the sole purpose of removing certain judges. He then cited procedural irregularities (including a lack of documentation, insufficient reasoning and the irregular composition of the decision-making body), alleging that the proceedings had been unfair and that his right to a fair trial had been violated under Article 6 of the ECHR.

The applicant also attempted to initiate two further administrative proceedings (nos. 14/2021 and 25/2021) in order to challenge the appointment procedure of the other two candidates, in which he had participated unsuccessfully. Requests to join those cases were rejected. Proceedings nos. 14/2021 and 25/2021 were dismissed.

During the proceedings, both the CoL and the other first-instance judges recused themselves because they were either involved in the case or had a personal interest. Consequently, the case was assigned to the Judge of First Instance for Civil Liability Actions of Magistrates (FCLM), a post which was vacant at the time.

In January 2023, the newly appointed FCLM rejected all complaints. First, he refused to join the proceedings with others: some had already been dismissed, and others concerned parties other than CGP. He further dismissed the allegation regarding the lack of documents, finding that all relevant documentation had been provided.

The proceedings also provided an opportunity to state that, with regard to constitutional validity, Law no. 1/2020 constituted an authoritative interpretation with retroactive effect. It did not merely represent one of the possible interpretations of the provision, but identified the interpretation deemed most "probable" and "reasonable" ("*ex-ante* plausibility of the authentic interpretation")[8].

As will be discussed in further detail in Section 3, classifying this provision as a law of authentic interpretation will entail consequences that are far from insignificant. Accepting such a classification implies, in fact, the recognition of an intrinsic quality of this type of interpretation – namely, retroactivity – effectively raising the question of all its consequences in terms of protection of individual rights, legitimate expectations, equality of arms, and, at the same time, legal certainty.

The nature of an authoritative interpretation – as already highlighted in the *pro veritate* opinion – was evident both from the literal wording of Article 3 («Article 7, paragraph 5 (…) must be interpreted as meaning…») and from the content of the provisions concerning the composition of the Judicial Council in plenary session and the requirements for its judicial members. In particular, it was stated that these posts should, as a matter of priority, be filled

[7] See ECtHR, *Simoncini v. San Marino*, cit., para. 29 ff.
[8] See ECtHR, *Simoncini v. San Marino*, cit., para. 107

by judges appointed on a permanent basis, i.e., those who, where applicable, had successfully completed their probationary period[9].

On that basis, the FCLM had the opportunity to reaffirm that Qualified Law no. 145/2003 contained no ambiguity regarding the hierarchy of criteria to be applied in determining the composition of the CGP. The possible participation of fixed-term magistrates was, in fact, subject to the condition that the number of permanent magistrates was lower than the number of members of the Commission for Justice Affairs.

However, as demonstrated by the doubts raised during the plenary meetings of the Judicial Council on 27 April 2018 and 12 February 2019, this interpretation was not straightforward. On the one hand, a broad interpretation of the composition of the CGP, such as that applied in the case in question, allowed for the inclusion of judges who had not yet been confirmed; on the other hand, under a more restrictive approach, the participation of judges on probation would have been permissible only in exceptional cases.

As discussed in Section 3, the retroactive effect of the law was thus justified by fundamental public interest reasons, namely, to ensure the legality and proper functioning of the judiciary. Therefore, whilst acknowledging that the annulment had affected the applicant's position, the judge found no indication of any serious or manifest injustice, nor any evidence of an intention to favour other candidates. In other words, the retroactive interpretation was considered in line with the principles of reasonableness and the applicant's rights (Articles 6, 8 and 13 of the ECHR), insofar as the CGP was found to have lawfully exercised its self-review power.

From the perspective of alleged violations of domestic law, the FCLM also dismissed all the applicant's further complaints, in particular those concerning the alleged abuse of office by the CGP. It held that the annulment fell within the CGP's discretionary powers and could therefore be carried out *ex officio*. Moreover, the presence of an appeal judge not yet permanently appointed in the CGP was considered, in itself, sufficient to vitiate the appointment.

The applicant subsequently appealed against the first-instance decision (no. 3/2023), seeking a suspension of enforceability and the JACLM's abstention. The former request was dismissed by the Constitutional Court. He also raised a question as to the constitutionality of the 2020 law. By a judgment of January 2024, the appellate judge dismissed the appeal and ordered the applicant to pay the costs, describing the application as confused, dysfunctional and potentially abusive, also in view of its dilatory character.

On the merits, the judge found, first, that the annulment of the appointment was justified by the unlawful composition of the CGP and was not punitive in nature, thus being compatible with Article 7 ECHR; secondly, that the 2020 law, although retroactive, was necessary and justified by the need to ensure a tribunal "established by law". It was thus considered "reasonable" as it was consistent with an interpretation already inherent in the underlying purpose of the provision, "predictable", as already contested by the other applicants (later appointed), and "proportionate" as it pursued interests of a public nature, thereby complying with Article 8 ECHR. In other words, the JACLM held that, in those circumstances, the public interest – linked to democratic principles and confidence in the judiciary – prevailed over the applicant's individual interest. At the same time, the Court found that the applicant had been guaranteed full access to remedies, in accordance with Articles 6 and 13 of the ECHR. The applicant was ordered to pay the costs.

[9] ECtHR, *Simoncini v. San Marino*, cit., para. 39.

The appellate judgment of January 2024 was subsequently challenged, one month later, by means of an additional action for *querela nullitatis*, which was declared inadmissible by the judge responsible for extraordinary remedies, on the ground that such a remedy was not available against administrative decisions.

By 2024, all domestic remedies had therefore been definitively exhausted and dismissed. The national courts concluded that the original appointment had been unlawful due to the defective composition of the CGP and that its annulment had been necessary to ensure a tribunal "established by law". Subsequently, three disciplinary proceedings were initiated against the applicant in respect of subsequent conduct, resulting in a warning (the subject of a separate application before the ECtHR), a reprimand, and a one-month salary suspension[10].

3. *Authentic Interpretation and Legal Certainty: Between Formal Recognition and Substantive Limits*

The *ex officio* annulment of the applicant's appointment by the GCP has highlighted the importance of re-examining, fourteen years on from the landmark case of *Agrati and Others v. Italy*[11], the evolution of the ECtHR's approach regarding the lawfulness of decisions based on retroactive interpretative laws[12].

This appears all the more significant when it is considered that, as stated, the Strasbourg Court's role in defining binding standards of protection for States has progressively strengthened. It follows that there is an urgent need for a critical examination of a case situated within an area now more fragile than ever, where unresolved tensions between the rule of law and legal certainty continue to intertwine. In particular, the case raises systemic questions about the legitimacy of retroactive legislative measures that affect the composition of a judicial body, calling into question the balance between systemic requirements and the protection of legitimate individual expectations.

Ultimately, this is a paradigmatic test case to ascertain the extent to which, according to the ECtHR, legislative retroactivity that does not merely clarify the law but decisively affects established legal situations can still be deemed tolerable – in the contemporary context – thereby reopening the debate on the substantive limits of authentic interpretation.

The central subject of the dispute, therefore, remains the self-qualified law of authentic interpretation[13], which, according to the Government, constituted a mere interpretative clarification of the disputed Article 7(5) of Qualified Law no. 145/2003.

Whilst acknowledging this formal characterisation, the ECtHR challenged its retroactive effect[14], an element which constitutes an intrinsic feature of authentic interpretation itself.

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[10] Although these issues fall outside the specific scope of this article and will therefore not be examined in further detail herein, it should be pointed out that the three disciplinary proceedings, launched subsequently against the applicant, have also been referred to and examined by the ECtHR (ECtHR, *Simoncini v. San Marino*, app. no. 3106/24, 9 April 2026).

[11] ECtHR, *Agrati and others v. Italy*, app. n. 43549/08, 7 June 2011.

[12] R. NEVOLA, *La retroattività della legge nella giurisprudenza della Corte europea dei diritti dell'uomo. Tomo secondo: pronunce rese nei confronti di altri Paesi,* 2013, p. 203 ff.

[13] See ECtHR, *Simoncini v. San Marino*, cit., para. 122.

[14] See ECtHR, *Simoncini v. San Marino*, cit., para. 123.

In fact, laws of authentic interpretation are based on the premise that they merely clarify the meaning that the interpreted provision should have had from the outset, and for this very reason, they are "necessarily" retroactive. However, it is not uncommon for them, whilst presenting themselves as simple interpretative clarifications, to substantially affect the content of previously applicable legislation, resulting in a genuine legislative innovation. In such cases, retroactivity no longer amounts to mere recognition of the provision's original meaning but risks undermining legal certainty and the public's trust, thereby coming into conflict with the principles of the rule of law and due process[15].

It is therefore evident that the phenomenon of authentic interpretation, as a distinctive manifestation of the legislative function, possesses intrinsically ambiguous characteristics and has frequently been characterised as an intervention hostile to the judiciary, highlighting its potential to affect the balance between the legislative[16] and judicial functions and, for this reason, recognised only within strict limits[17].

It is, in fact, an institution situated in a grey area between interpretative activity and legislative drafting, often making it difficult to distinguish the mere clarification of the original meaning of the law from a genuine innovative intervention in the legal system[18].

Such a conclusion, however, would risk being reductive. Case law has, in fact, progressively recognised the legitimacy of laws of authentic interpretation – and therefore their retroactive effect – not only in cases of objective legislative uncertainty or conflict, but also when the legislature intends to counter a settled judicial trend deemed inconsistent with its original legislative intent, provided that the chosen interpretation is nonetheless grounded in the text and the rationale of the original provision[19].

In the *Simoncini* case, the interpretative intervention was justified precisely on the basis of this second form of uncertainty[20], of a "subjective" nature, arising from the

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15 K. BERNER, *Authentic Interpretation in Public International Law,* in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV),* 2016, p. 845 ff.

16 In order to assess whether a measure can be deemed compatible with the rule of law, or indeed whether it serves to uphold it, it is important to emphasise that, for the purposes of an authentic interpretation – as generally understood – the legislator does not in any way supersede the judge. The legislator, in fact, operates on a different level – that of the general sources of law – unlike the judge responsible for the practical application of the law (G. LAVAGNA, *L'interpretazione autentica nella giurisprudenza costituzionale. Da persistente causa di contrasto ad ipotetico dialogo tra Corte costituzionale e Corte EDU,* in *Nomos,* 2020, p. 19). In the present case, however, the ECtHR, whilst not examining the matter on its own merits, condemned the interference by the San Marino legislature in the pending dispute (ECtHR, *Simoncini v. San Marino*, app. n. 14396/2024, 19 February 2026, para. 120 ff.)). It must, however, be emphasised that the principle of the separation of powers, together with the obligation to respect each other's institutional powers, remains one of the fundamental limits on the legitimacy of a retroactive provision (I. RIVERA *(a cura di), La legge di interpretazione autentica tra Costituzione e CEDU,* in *Servizio Studi della Corte costituzionale,* 2015, p. 13). As a matter of fact, only the body that originally enacted the provision being interpreted – that is, the legislature in the exercise of its inherent power of authentic interpretation – is able to confer upon the result of that interpretation the same legal force as the original provision. He therefore merely clarifies the law – as emphasised by the San Marino government (ECtHR, *Simoncini v. San Marino*, application no. 14396/2024, 19 February 2026, para. 120) – whilst other entities, although they create law through interpretation, are unable to confer the same legal value on their interpretations (K. BERNER, *Authentic Interpretation in Public International Law,* cit., p. 845 ff.).

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18 G. LAVAGNA, *L'interpretazione autentica nella giurisprudenza costituzionale,* cit., p. 2.

19 I. RIVERA *(a cura di), La legge di interpretazione autentica tra Costituzione e CEDU,* cit., p. 11 ff.

20 On this point, the case law of the ECtHR has consistently affirmed the importance of legal certainty as an inherent aspect of the rule of law and an essential prerequisite for a democratic society. Legal certainty constitutes, in fact, one of the main safeguards against the arbitrariness of public power and is an indispensable element to gain citizens' trust in institutions. In this regard, the Court has clarified that the expression

consolidation of a line of case law deemed by the legislature to be inconsistent with the intention originally expressed by the law.

3.1. *Individual Rights and Reasons of General Interest: Which Boundaries for the (Ir)retroactivity of Law?*

Interpretative legislation can be considered legitimate only to the extent that, whilst affecting the subjective legal situations of individuals, it is supported by an adequate and proportionate justification capable of reasonably balancing the sacrifice imposed. Retroactivity, therefore, cannot be an arbitrary means of undermining the principle of legitimate expectations, but must be grounded in objective requirements[21]. It follows that legislative intervention of an interpretative nature may be deemed admissible only if supported by a suitable justification and by proportionate compensation for the caused disadvantage[22]. From this perspective, legitimate expectation, as an essential element of the rule of law, constitutes an important limit on the law's retroactivity[23].

Legitimate expectations, however, are generally assessed according to broad and flexible criteria, designed to grant the legislature a significant margin of discretion. It follows that, even when the interpretative law appears difficult to reconcile with the original wording of the provision being interpreted, this does not automatically render it unlawful, but rather constitutes a prerequisite for a review of "reasonableness"[24].

As regards the relationship between the lawfulness of the law of authentic interpretation, by virtue of its inherent retroactive effect, and Article 6(1) of the ECHR, it should be noted that the Court has, over time, provided numerous guidelines aimed at limiting the use of this instrument, whilst recognising, in principle, its admissibility in terms of its effects.

In particular, according to the ECtHR, rules of authentic interpretation must be subject, again, on the one hand, to a rigorous review of their compliance with the principle of the protection of legitimate expectations and legal certainty; and, on the other hand, to a strict scrutiny of reasonableness, necessary to guarantee the independence of the judicial function[25].

"prescribed by law" requires not only the existence of a domestic legal basis, but also a certain quality of the law, namely, a degree of clarity and precision sufficient to enable the citizen to understand the consequences of their actions. However, whilst acknowledging that absolute predictability of the law is not realistically achievable – since, as the Court observes, «experience shows this to be unattainable» – it remains firmly accepted that the legislator must establish sufficiently clear regulatory frameworks and that, where this proves impossible, it is the task of interpretation «to be able to adapt to changing circumstances» (ECtHR, *The Sunday Times v. the United Kingdom*, app. n. 6538/74, 26 April 1979, para. 49). Perhaps unsurprisingly, this principle is explicitly recognised in the Preamble to the ECHR, which refers to the "rule of law" as part of the common heritage of political traditions and ideals of the Contracting States. In this context, in the case of *Brumărescu v. Romania* (1999), the Court held that the right to a fair trial under Article 6 para. 1 of the ECHR must also be interpreted in the light of the principle of legal certainty, noting that 'one of the fundamental aspects of the rule of law is the principle of legal certainty' (ECtHR, *Brumărescu v. Romania*, application no. 28342/95, 28 October 1999, para. 61).

[21] G. LAVAGNA, *L'interpretazione autentica nella giurisprudenza costituzionale,* cit., p. 8.

[22] I. RIVERA *(a cura di), La legge di interpretazione autentica tra Costituzione e CEDU,* cit., p. 16.

[23] G. LAVAGNA, *L'interpretazione autentica nella giurisprudenza costituzionale,* cit., p. 14.

[24] M. MASSA, *Le leggi interpretative retroattive nella diversa impostazione di Corte EDU e Corte costituzionale,* in *Le questioni aperte*, in *Questione Giustizia,* 2019, p. 487.

[25] R. DICKMANN, *La legge d'interpretazione autentica viola il diritto al giusto processo di cui all'art. 6 della CEDU? (nota a Corte cost., 26 novembre 2009, n. 311),* in *Federalismi.it,* 2009, p. 6.

In any event, according to the ECtHR, an indispensable requirement for considering a law of authentic interpretation, or any retroactive legislation, compatible with Article 6 of the ECHR is the existence of «compelling grounds in the general interest» (*impérieux motifs d'intérêt général*)[26].

Nevertheless, the assessment of the existence of such grounds falls not only to the Strasbourg Court, but also to the contracting States, since it concerns a systematic evaluation of political, economic, and social factors which the ECHR leaves within the sphere of State competence[27]. Nor could it be otherwise, given the position held by the individual States, namely, the best ground to assess such general interests that concern matters closely connected with the very exercise of legislative power.

This, therefore, reflects on the one hand, a particularly significant recognition of the margin of appreciation afforded to the Member States, the emphasis on which is also of considerable importance as a response to the far-reaching impact of the Strasbourg Court's case-law[28]. On the other hand, national courts also exercise their own margin of appreciation and adaptation, which enables them to assess Strasbourg case-law in light of the specific features of the domestic legal order within which the ECHR provision is to be implemented[29].

Referring judges, entrusted with the role of ordinary judges of the Convention, therefore have the task of applying its provisions in accordance with the interpretation provided by the Strasbourg Court, a competence expressly conferred upon it by the States themselves[30]. In other words, in order to be considered legitimate, the interpretative qualification must be "reasonably" justified by compelling grounds in the general interest whenever, in the presence of extensive pending litigation and a line of case-law unfavourable to the State, it may result in a violation of the principle of equality of arms.[31]

It therefore remains well established that retroactivity must be considered primarily with due regard for individual rights, assessed in relation to the specific circumstances of each case, and in light of the general principles that limit the exercise of public power, such as reasonableness, proportionality and substantive justice. After all, while the interpreted provision remains formally unchanged, the rule of authentic interpretation inevitably affects its possible normative meanings[32].

From this perspective, the ECtHR is called upon to strike a balance between the grounds of general interest invoked by the State to justify the legislative intervention and the

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[26] ECtHR, *Zielinski and Pradal and Gonzalez and others v. France*, apps. nos. 24846/94, 34165/96, 34173/96, 28 October 1999, para. 57; ECtHR, *Forrer-Niedenthal v. Germany*, app. n. 47316/99, 20 February 2003, para. 64; ECtHR, *Scordino v. Italy*, app. n. 36813/97, 29 March 2006, para. 126; ECtHR, *Scanner de l'Ouest Lyonnais and others v. France*, app. n. 12106/03, 21 June 2007, para. 31; ECtHR, *Arras and Others v. Italy*, app. n. 17972/07, 14 February 2012, para. 42.

[27] *Ivi*, p.7

[28] O. POLLICINO, *Margine di apprezzamento, art. 10, c. 1, Cost. e bilanciamento "bidirezionale": evoluzione o svolta nei rapporti tra diritto interno e diritto convenzionale nelle decisioni nn. 311 e 317 del 2009 della Corte costituzionale*, in *Forum di Quaderni Costituzionali*, 2009, p. 2.

[29] E. LAMARQUE, *The Italian Courts and Interpretation in Conformity with the Constitution, EU Law and the ECHR*, in *European Rights*, 2012, p. 24 ff.

[30] M. MAGNONI, *Sui rapporti tra interpretazione autentica (con effetto retroattivo) e Convenzione europea dei diritti dell'uomo: i limiti alla discrezionalità del legislatore nazionale*, in *Osservatorio sulle fonti*, 2010.

[31] I. RIVERA *(a cura di), La legge di interpretazione autentica tra Costituzione e CEDU,* cit., p. 1.

[32] M. MASSA, *Le leggi interpretative retroattive nella diversa impostazione di Corte EDU e Corte costituzionale,* in *Le questioni aperte, Questione Giustizia,* 2019, p. 484.

individual rights affected by such intervention. This balancing exercise, in most cases, is resolved to the detriment of national legislative policy choices.

Strasbourg review is, in fact, characterised by greater operational flexibility and by a predominantly case-by-case approach, based on the concrete assessment of the circumstances and the effective weighing of the interests involved, rather than on systematic considerations related to the structure of the domestic legal order[33].

This is confirmed by the fact that the ECtHR tends to give precedence to the protection of already vested individual rights, overriding State justifications based on public order or general interest whenever the legislative intervention results in an adverse retroactive interference[34].

Therefore, within the ECHR system, even in the absence of an express Convention provision specifically devoted to the principle of non-retroactivity, this principle has progressively emerged through case law: the legislature may adopt retroactive provisions affecting rights derived from laws already in force. However, the principles of the rule of law and the right to a fair trial prevent legislative power from interfering with the administration of justice to influence the outcome of pending litigation, unless this is justified by compelling grounds in the general interest. Such grounds are subject to particularly strict scrutiny when the legislative intervention results in an undue procedural advantage for the State as a party to the proceedings[35].

3.2. *Critical Observations on the Application of the Principles to the Simoncini Case*

In the *Simoncini case*, the Court acknowledged that the proper composition of the CGP pursued a "general interest"[36]; however, it excluded that such an interest was of a "compelling" nature and therefore capable of justifying the retroactive interference of the legislature in the pending proceedings[37].

By contrast, both the JACLM[38] and the Government had argued that the proper composition of the CGP constituted an essential element of the rule of law («legal certainty, separation of powers, the autonomy and independence of the judiciary, due process and the protection of legitimate expectations»)[39], directly affecting the legitimacy of the judicial system and public confidence in the administration of justice. It was therefore an interest that was undoubtedly significant at the institutional level.

The Court, however, held that such an interest did not display the compelling degree of necessity required by its case-law, stressing that the issue concerned only a limited sphere, since it involved a single member, and that the effects of the measure also extended into the

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[33] I. RIVERA *(a cura di), La legge di interpretazione autentica tra Costituzione e CEDU,* cit., p. 17 ff.

[34] ECtHR, *Stran Greek Refineries and Stratis Andreadis v. Greece*, app. n. 13427/87, 9 December 1994, para. 49; ECtHR, app. n. 24628/94, *Papageorgiou v. Greece*, 22 October 1997, para. 37; ECtHR, *Maggio and others v. Italy*, 31 May 2011, para. 43; ECtHR, *Agrati and Others v. Italy*, cit., para. 58; ECtHR, *De Rosa and others v. Italy*, 11 December 2012, para. 47; ECtHR, *Stefanetti and others v. Italy*, 15 April 2014, para. 39.

[35] M. MASSA, *Le leggi interpretative retroattive nella diversa impostazione di Corte EDU e Corte costituzionale,* in *Le questioni aperte, Questione Giustizia,* 2019, p. 485 ff.

[36] See ECtHR, *Simoncini v. San Marino*, cit., para. 124.

[37] See ECtHR, *Simoncini v. San Marino*, cit., para. 169.

[38] See ECtHR, *Simoncini v. San Marino*, cit., para. 47.

[39] See ECtHR, *Simoncini v. San Marino*, cit., para. 173.

future and therefore did not require immediate intervention. It thus regarded the legislative intervention as essentially instrumental.

It therefore appears that, in the case law of the ECtHR, even when a provision is classified as genuinely interpretative, its retroactive effect is frequently regarded as an indication of a possible incompatibility with Article 6 of the ECHR. The case in question thus leads us to ask whether the protection of the proper composition of a judicial body, as an expression of the *rule of law*, may not be sufficient to justify a retroactive law – an element that is inherent and intrinsic to the very function of authentic interpretation – which affects individual rights that are now well-established. This gives rise to the need to reconsider the enduring predictability of the distinction between general interests and an imperative reason of general interest, as a criterion for legitimising retroactive legislative interference.

In order to comply with this criterion, it is worth briefly reviewing those (few) cases in which the ECtHR did not find a violation of Article 6 of the ECHR, recognising the existence of compelling reasons of public interest capable of justifying the legislative measure.

The first case concerned a retroactive law adopted in the particularly sensitive area of fiscal stability and public finance, which the applicants challenged as incompatible with Article 6(1) of the ECHR. With regard to the justifications presented by the State, the Court stated that, although «any reasons adduced to justify such measures must be treated with the greatest possible degree of circumspection», nevertheless «Article 6(1) cannot be interpreted as preventing any interference by the authorities with pending legal proceedings to which they are a party»[40].

In particular, in the case in question, the Court recognised the existence of "compelling public-interest motives", noting that the legislative measure did not concern only the appellants' position, but rather the legitimacy of the acts themselves, which formed the legal basis for the collection of substantial tax revenues received by the State since 1986. The annulment of those acts would, in fact, have affected not only the applicant building societies, but also banks, other deposit-taking institutions and, potentially, a very large number of taxpayers, with obvious repercussions for the overall financial stability of the system.

A similar approach is also found in *OGIS-Institut Stanislas and Others v. France (2004)*, where, once again, the Court emphasised the need to closely scrutinise the risks inherent in the adoption of retroactive legislation affecting pending proceedings, particularly in relation to the principle of equality of arms and the equilibrium of the social security and contribution system.

On that occasion, however, it concluded that the French legislature's intervention was based on a clear "impérieuse justification d'intérêt général"[41], identified in the need to fill a legislative gap and to restore equal treatment between private and public school teachers. Particularly significant in this judgment is also the assessment of the appellants' conduct, who had attempted to exploit that legislative gap – "profiter d'une aubaine" – prompting the Court to exclude the possibility of a legitimate expectation worthy of protection on the basis of an advantageous situation arising from a legal defect.

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[40] ECtHR, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom,* apps. nos. 21319/93, 21449/93 and 21675/93, 23 October 1997, para. 112.

[41] ECtHR, *OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and Others v. France*, apps. nos. 42219/98 and 54563/00, 27 May 2004, para. 71.

Finally, again in the case of *Vegotex International S.A. v. Belgium* – which also concerned tax matters and the protection of the balance of public finances – the Court identified the safeguarding of the principle of legal certainty as a "compelling ground of general interest" capable of justifying the legislature's retroactive intervention. In particular, the contested provision was intended to counteract the destabilising effects of a recent ruling by the Belgian Court of Cassation, which had called into question an established administrative practice regarding the limitation period for tax debts. The Court observed that the appellant company could not claim to have had a genuine legitimate expectation regarding the maintenance of this favourable position, having merely «hoped, rather than expected to benefit from the case-law of the Court of Cassation»; therefore, the applicant company could not claim to be surprised by the subsequent reaction of the legislature aimed at restoring legal certainty and the stability of the tax system[42].

It is therefore apparent that it is not the subject matter of an imperative general interest that constitutes a legitimate justification for retroactive legislation, but rather a multitude of factors connected to it, which must be rigorously assessed and balanced, raising once again the crucial question of how to determine when a retroactive legislative measure may be classified as unlawful interference or legitimate exercise, and whether this assessment varies depending on the context in which the dispute arises.

This perspective is prominently evident in the *Simoncini* case, in which the distinctive characteristics of the Republic of San Marino play a significant role in the Court's assessment, raising the risk of shifting the standard of legality from an examination of the provision itself to a consideration of the particularities of the legal system at issue. The question, therefore, remains as to whether different standards may apply to small states and whether this factor may be relevant when determining levels of protection. In particular, there is a need to consider whether a state's small size may constitute a valid criterion for (not) justifying a different degree of tolerance with regard to retroactive legislative interference[43]. Moreover, such a characteristic could, in essence, be found in any small-scale social or institutional context, making it even more difficult to identify a genuinely consistent and uniformly applicable criterion.

[42] ECtHR, *Vegotex International S.A. v. Belgium* [GC], app. n. 49812/09, 3 November 2022, paras. 79-80.

[43] The *Simoncini* case brought to the attention of the ECtHR, in addition to the asserted violation of the right to a fair trial under Article 6 of the ECHR, the alleged violation of the right to respect for private and family life under Article 8 of the ECHR. Although this aspect falls outside the specific scope of this article, it should be emphasised that the two violations appear to be closely interconnected. Whereas, on the one hand, the Court states that a genuinely justified measure must be applied consistently and non-selectively (ECtHR, *Simoncini v. San Marino*, app. n. 14396/2024, 19 February 2026, para. 124), on the other hand it recognises that the dispute context is relevant; in particular for the purposes of Article 8, given that in a small legal system it is inevitable that a measure which appears to be general will affect a limited number of individuals. The above does not necessarily imply intentional selectivity; rather, it reflects a structural consequence of the legal system's scale. It is precisely this emphasis on the state dimension that reinforces the impression that the Court may have attached exceptional weight to the particular structure of San Marino's microstate, in contrast to the objective of legal certainty.

4. *Abuse of Right of Application: Need for a Function-oriented Reconceptualisation of the Legal Category Identified by the ECtHR*

One of the relevant aspects faced by the ECtHR in its judgement concerns the exercise of the right of individual application, also referred to as "abuse of petition"[44]. This concept is broadly understood as the misuse of procedural instruments available to the parties, and it is also reflected in the text of Art. 35.3(a) ECHR and in the case-law of the ECtHR[45].

The issue of "abuse of petition", defined in highly heterogeneous terms, is also known in national legal orders as "abuse of process"[46] and it is increasingly prominent in both domestic and international law. It raises significant concern, as its precise identification is essential to ensure that the exercise of judicial power by courts remains genuine, namely that procedural actions do not adversely affect the proper establishment of the truth.

This kind of abuse was also invoked in the present case, as certain procedural conduct in the domestic proceedings and before the ECtHR raised concerns regarding the scope of application and the actual reach of the notion of abuse of process within the ECHR system.

The determination of this issue is of particular importance, as it is capable of providing coherent guidance and minimum standards for Member States, which are increasingly called upon to address this procedural phenomenon, often with significant substantive implications[47].

The case-law of the ECtHR on "abuse of petition" encompasses several "typical" categories, alongside a "residual" one.

Although these categories differ in terms of the objective nature of the relevant conduct, they are all united by the common requirement of a subjective element of intent, which must be established with a sufficient degree of certainty[48].

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[44] See ECtHR, *Simoncini v. San Marino*, cit., para. 70 ff.

[45] See *infra*, in this section.

[46] The rationale for using this different expression lies in the fact that abusive conduct may arise not only at the initial stage of the proceedings, but also during their course. This is the case, for example, with the omission of relevant supervening information and the misleading use of procedural instruments within the proceedings (as well as the use of inappropriate or offensive language, should such conduct also be regarded as constituting an "abuse": see *infra*).

[47] Consider, for instance, the recent introduction of the Directive (EU) 2024/1069, which requires Member States to adapt their domestic legal systems in order to provide effective remedies against abusive or manifestly unfounded proceedings brought against individuals engaged in public participation, such as journalists, activists, academics, and NGOs. On this point, reference may be made to E. A. ROSSI, *La direttiva (UE) 2024/1069* («anti-SLAPPs»). *Analisi di diritto internazionale privato*, in *Eurojus*, 2025.

[48] In a case concerning the administration of medication for assisted suicide (ECtHR, *Gross v. Switzerland*, app. n. 67810/10, 30 September 2014, para. 28), the ECtHR declared the application inadmissible as an abuse of the right of petition within the meaning of Article 35.3 (a) ECHR. The Court initially found, in 2013, a violation of Article 8 on account of the lack of clarity in the domestic legal framework governing the conditions and circumstances under which assisted suicide was permissible. However, unbeknownst to both the Court and the Swiss Government, the applicant had already ended her life in 2011 – after lodging her application – having lawfully obtained a prescription for a lethal dose of sodium pentobarbital. The Court was informed of this development only in 2014, while the case was pending before the Grand Chamber, which ultimately found an abuse of the right of application on account of the deliberate omission to disclose both the obtaining of the prescription and the applicant's death. However, as also emerges from the joint opinions, the decision was not unanimous, particularly with regard to the relevance of the subjective element – namely, the intention to commit an abuse – for the purposes of establishing such abuse (see also sect. 4.3).

Among the typical situations in which the Court has identified an abuse of petition is, first and foremost, the lodging of applications based on false facts or circumstances[49]: in such cases, the Court has declined to examine the merits, considering that the application had been deliberately designed to obtain a favourable judgment by misleading the judicial body through the submission of untrue information.

This kind of abuse may also be committed in case of incomplete information[50] or relevant omission[51] concerning an essential factor for the examination of the case[52].

Similarly, the ECtHR has declared inadmissible – on grounds of abuse of petition – applications that are quibbling, manifestly ill-founded, or repetitive[53], as such procedural conduct hampers judicial activity by complicating the establishment of facts and the application of the law, while also resulting in a waste of judicial time and resources, to the detriment of the effective examination of genuine disputes.

The Court has also identified abuse of process in the use of vexatious, contemptuous, threatening, or provocative language in procedural submissions[54], exceeding «the bounds of normal, civil and legitimate criticism»[55]. The Court's approach to defining these limits has

[49] See, for instance the case *Bencheref v. Sweden*, app. n. 9602/15, 5 December 2017, where the ECtHR declared the application inadmissible as an abuse of the right of petition on account of the applicant's deliberate misrepresentation of a core fact (his nationality), which was intended to mislead the Court.

[50] In its decision in the case *Hüttner v. Germany* (dec.), no. 23130/04, 19 June 2006, the Court declared the application inadmissible for abuse of the right of application, because the applicant provided «incomplete and therefore misleading information» regarding «the very core of the case and no sufficient explanation is given for the failure to disclose that information», not having informed the Court about «the loss of his victim status more than one year before he lodged his application with the Court». Differently, see the case *Kowal v. Poland* (dec.), no. 2912/11, 18 September 2012, where the Court did not identify the omission as concerning a pre-existing and central fact, because the omitted information related only to subsequent developments and did not affect the core of the complaint (namely, the authorities' failure to enforce a judicial decision for a certain period), nor did it disclose any bad faith on the part of the applicant. Accordingly, the Court declined to characterise the conduct as abusive.

[51] The European Court of Human Rights has also considered, as already noted in the case of *Gross v. Switzerland*, cit., paras. 33-34, that deliberate omissions of information concerning events or circumstances arising while proceedings are pending before it may be relevant. A relevant omission has been also identified in *Kerechasvili v. Georgia*, app. n. 5667/02, 2 May 2006 concerning the failure to inform the Court about the circumstance that the national authorities had honoured their obligations and in *Predescu v. Romania*, app. n. 21447/03, 2 December 2008, paras. 26-27, concerning the failure to inform the Court of the death of the person holding the disputed right (ownership of the property at issue), who had initiated and been a party to the domestic proceedings.

[52] See again *Kerechasvili v. Georgia*, app. n. 5667/02, 2 May 2006, and *Al-Nashif v. Bulgaria*, app. n. 50963/99, 20 June 2002, para. 89, where the Court held that no abuse of the right of application had occurred, as the omission of information was not deliberate nor sufficiently serious in the circumstances.

[53] The Court clarified this issue in its decision *Anibal Vieira & Filhos, LDA and Ferreira da Costa v. Portugal*, app. n. 980/12 and 28385/12, 13 November 2012, noting that the conduct of applicants who bring before the Court a series of vexatious and manifestly unfounded applications, similar to an application previously declared inadmissible, must be deemed abusive (see also *M. v. United Kingdom*, app. n. 13284/87, 15 October 1987, and *Philis v. Greece*, app. n. 28970/95, 17 October 1996).

[54] See *X and Others v. Bulgaria*, app n. 22457/16, para. 146, where the Court reiterated that an application may be regarded as abusive where the applicant uses particularly vexatious, insulting, threatening or provocative language in correspondence with the Court or in procedural submissions, provided that such language exceeds «the bounds of normal, civil and legitimate criticism». In that case, although the applicants' representatives employed highly disrespectful expressions, including serious accusations against identified individuals and public authorities, the Court declined to find an abuse, having regard to the emotional context of the case and the fact that the applicants themselves could not be held directly responsible for those remarks.

[55] See, for instance, *Zafranas v. Greece*, app. n. 4056/08, 4 October 2011, para. 26, where the Court, even if confirmed that expressions «particularly vexatious, insulting, threatening or provocative – whether directed against the respondent Government, its agent, the authorities of the respondent State, the Court itself, its

not always been consistent, partly due to the difficulties in assessing the degree of offensiveness of conduct or statements, and it has occasionally adopted a more restrictive approach to the abuse of process[56].

Likewise, breaches of the duty of confidentiality required during friendly-settlement negotiations[57] have been considered relevant for the purposes of establishing an abuse of process, even if – also for this case of abuse – the Court does not seem to have clearly established the nature of the abuse of the right of individual application: in particular, the case-law of the Court shows that the Court's approach to the confidentiality rule – as well as to the abuse of the right of individual application – is both strict in principle and flexible in application, because while formally framed in absolute terms, its enforcement depends on a contextual assessment of the applicant's conduct and intent[58], not clarifying if it should be considered an absolute obligation or not [59].

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judges, its Registry or the staff of the Registry», clarified that «it is not sufficient for the applicant's language to be merely lively, polemical or sarcastic; it must exceed the limits of normal, civic and legitimate criticism to be classified as abusive» (in the specific case, the term 'absurd' used by the applicants was deemed as not reaching the level required to be characterised as vexatious, insulting, threatening or provocative).

[56] See ECtHR, *Varbanov v. Bulgaria*, app. n. 31365/96, 5 October 2000, para. 36, where the Court excluded the existence of an abuse due to the offensive language used by the applicant towards the State Agent. By contrast, the insults directed at the judges, accusing them of being biased, were deemed to have crossed the boundaries of tolerance (ECtHR, *Řehák v. the Czech Republic*, app. n. 67208/01, 18 May 2004).

[57] It should be noted that, under Article 39.2 of the ECHR and Rule 62 of the Rules of Court, negotiations conducted with a view to reaching a friendly settlement are confidential. Indeed, article 39 of the Convention provides that, at any stage of the proceedings, the Court may place itself at the disposal of the parties with a view to securing a friendly settlement based on respect for human rights as defined in the Convention and its Protocols; that such proceedings shall be confidential; that, where a settlement is reached, the Court shall strike the case out of its list by a decision limited to a brief statement of the facts and of the solution adopted; and that it may reject any application it considers inadmissible under that provision at any stage of the proceedings. Rule 62 of the Rules of Court further specifies that, once an application has been declared admissible, the Registrar, acting on the instructions of the Chamber or its President, shall contact the parties with a view to securing a friendly settlement, the Chamber taking all appropriate steps to facilitate such a settlement; it also reiterates that such negotiations are confidential and without prejudice to the parties' submissions in contentious proceedings, and that no written or oral communication, offer, or concession made in that context may be referred to or relied upon in those proceedings.

[58] See the case *Miroļubovs and others v. Latvia*, app. n. 798/05, 15 September 2009, where the Court, addressing the issue of breach of the confidentiality of friendly-settlement negotiations and its possible qualification as an abuse of the right of individual application under Article 35.3 (a) of the Convention, revealed a potentially ambiguous application of the abuse doctrine, balancing the need to preserve the integrity of the procedure with the requirement of a concrete and sufficiently established breach. It reiterated that, pursuant to Article 39.2 of the Convention and Rule 62.2 of the Rules of Court, negotiations aimed at reaching a friendly settlement are subject to a strict duty of confidentiality, which prohibits the parties from disclosing information relating to such negotiations, including through the media or other public channels. The Court confirmed that a violation of this obligation may justify declaring an application inadmissible as abusive; however, such a finding requires sufficiently certain evidence of the applicant's direct responsibility in the disclosure, as mere suspicion is not sufficient. It also clarified that not all disclosures are necessarily prohibited, in particular where the information is already in the public domain (for example, information contained in the Court's official communications).

[59] In *Deceuninck v. France*, app. n. 47447/08, 13 December 2011, the ECtHR emphasised that the rule of confidentiality governing friendly-settlement negotiations is of an absolute nature and does not allow for a case-by-case assessment based on the extent of the information disclosed (see also *Balenović v. Croatia*), app. n. 28369/07, 30 September 2010 and *Lesnina Veletrgovina d.o.o. v. the former Yugoslav Republic of Macedonia*, app. n. 37619/04, 2 March 2010). This is because procedural rules are essential to ensuring the proper administration of justice and legal certainty, and that litigants are entitled to expect their consistent application: in this context, the confidentiality of friendly-settlement negotiations serves a particularly important function, namely to shield both the parties and the Court from any form of external pressure. In the specific case the Court found an

Finally, the Court has developed a residual category of abuse of process, reserving for itself a discretionary margin of appreciation to refrain from examining applications in which the conduct at issue is manifestly contrary to the purpose of the individual right of petition under the European Convention on Human Rights, thereby impairing the proper functioning of the judicial mechanism for the protection of human rights or, more generally, the conduct of the proceedings[60].

It therefore appears possible, even though the ECtHR has never explicitly done so, to distinguish instances of abuse according to the function they serve.

First of all, the Court appears to have subsumed two distinct functions of abuse of process under the same effect of declaring an application inadmissible. On the one hand, abuse has a "sanctioning" function, targeting improper conduct such as the use of inappropriate language or breaches of the duty of confidentiality during negotiations.

On the other hand, abuse concerns conduct deliberately aimed at obstructing the establishment of the truth and the proper administration of justice, seeking to maximise the chances of success in litigation, even at the cost of hindering the functioning of judicial bodies and the orderly conduct of proceedings (for example, repetitive or vexatious requests, manifestly ill-founded claims, or the submission of false facts underlying the application).

In the *Simoncini* case, the Court was called upon by the San Marino Government to take a position on specific conduct of the applicant, potentially capable of giving rise to an abuse. First of all, the Court examined the Government's objection concerning the applicant's alleged reliance on false facts, drawing an effective distinction between the interpretation of the legal framework and practice in the domestic system – relevant to the merits of the case – and the deliberate distortion of irrefutable facts with a view to deceiving the Court, the latter being conduct relevant for the purposes of establishing an abuse[61].

Similarly, the San Marino Government argued that the applicant's submission of an excessive and unnecessary number of documents relating to the domestic proceedings was also relevant, while at the same time deliberately omitting to produce pertinent documents and information[62].

For both complaints[63], the Court did not identify any abusive conduct capable of justifying the application of the mechanism provided for in Article 35.3(a). However, even

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abuse, because the applicant and his counsel had knowingly disclosed to the press details of the negotiations, thereby breaching the duty of confidentiality, revealing a malicious intent and a manifestly unfair use of the procedure and to discredit the Government's position. This case seems to illustrate the potentially fluctuating nature of the Court's approach: while the confidentiality rule is framed in absolute terms, its application in practice depends on a careful and context-sensitive assessment of the applicant's conduct and responsibility, thereby introducing an element of flexibility in an otherwise strict procedural regime. In this regard, see the case *Popov v. Moldova (no. 1)*, app. n. 74153/01, 18 January 2005, para. 48, where the Court, even if confirming the relevance of the violation of the confidentiality of friendly-settlement negotiations to identify an abuse, excluded it in the concrete case.

[60] See *Miroļubovs and others v. Latvia*, app. n. 798/05, 15 September 2009, para. 65, and *Anibal Vieira & Filhos, LDA and Ferreira da Costa v. Portugal*, app. n. 980/12 and 28385/12, 13 November 2012. From the case-law of the ECtHR it seems clear, in this regard, that any conduct of an applicant that is manifestly contrary to the purpose of the right of application enshrined in the Convention and that hinders the proper functioning of the Court or the orderly conduct of proceedings may be classified as abusive, understanding the concept of "abuse" within the meaning of Article 35.3 of the Convention «in its ordinary sense, in accordance with general legal theory», that is to say, the fact that the holder of a right exercises it outside its intended purpose.

[61] See ECtHR, *Simoncini v. San Marino*, cit., para. 77.

[62] See ECtHR, *Simoncini v. San Marino*, cit., para. 78.

[63] On closer inspection, the Court also took a position on the alleged disclosure of information relating to the friendly settlement negotiations, noting that the Government had failed to demonstrate that the applicant had

taking into account that these statements do not appear to have been thoroughly reasoned in the Court's judgment, nor to fully correspond to the application of the Court's general principles to the specific case, the issue of abuse of process raises a number of critical aspects and practical concerns in relation to the essential features identified by the Court in building this legal category within its system.

4.1. *Vagueness of the Definition of "Abuse", Heterogeneity of the Situations Encompassed within the Category, and Concerns Regarding the Uniformity of Its Consequences*

A first aspect that deserves attention is the broadness of the notion of abuse, within which the ECtHR has encompassed both situations warranting a "sanctioning" response in cases that have not directly hindered the exercise of its judicial function, and – more seriously – situations in which the parties have, more or less deliberately, negatively influenced and obstructed the Court's ability to perform its functions properly.

These constitute two distinct types of abuse, differing in nature but leading to the same consequence: the inadmissibility of the application. The Court appears to enjoy a wide margin of discretion in assessing conduct relevant for a finding of abuse; however, an analysis of its case-law does not reveal consistent or uniform criteria of evaluation. Its approach seems essentially case-by-case, which does not enhance the predictability of the legal consequences attached to potentially abusive conduct and, consequently, undermines legal certainty.

One possible way to guide the Court's assessment would be to distinguish forms of abuse according to the functions they serve, and to differentiate the consequences accordingly. With regard to "sanctioning" forms of abuse, it is reasonable that the Court retain a broader margin of discretion, allowing it to take proper account of the specific circumstances and context of the conduct at issue. Relevant factors may include, for example, the gravity of the language used, the scope and means of dissemination of offensive or confidential information, the persons to whom such conduct was directed, and its actual impact on the proper administration of justice and on the outcome of proceedings at the domestic level or before the Court. In this way, the Court could also calibrate the "sanctions" attached to such abusive conduct, distinguishing between cases of sufficient gravity to justify inadmissibility and those warranting less severe measures, such as disciplinary or financial sanctions or compensation.

By contrast, for other forms of abuse, the margin of interpretative discretion should be significantly narrower, as such conduct directly affects the administration of justice and the integrity of the judicial function. A more stringent approach would also have a deterrent effect, requiring parties to comply with duties of honesty, probity and procedural fairness, and discouraging dilatory or aggressive litigation strategies, such as excessive document production or the deliberate omission of pages from submissions, which impose an undue burden on the Court and divert its attention from the central issues of the case[64].

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disclosed confidential material, but had merely referred to the publication in the press of the communication of the case to the Government, information that is public and freely accessible on HUDOC, the ECtHR's public case-law database.

[64] See ECtHR, *Podeschi v. San Marino*, app. n. 66357/14, paras. 87-88, where the Court firmly reiterated that it cannot be required to deal with manifestly abusive conduct by applicants or their representatives which generates "gratuitous work" for the Court, incompatible with its functions under the Convention. At the same time, however, the Court adopted a cautious approach in the specific case, finding that, although the dissemination of inaccurate information to the press was highly regrettable, it could not be established that such

In practice, the consequence of inadmissibility should be reserved for instances of abuse of process in which the parties fail to place the Court in a position to adjudicate freely, knowingly, and effectively, while other forms of misconduct should be addressed through different sanctions directed at the parties or their legal representatives. Conduct such as the deliberate omission of relevant pages from a document, submission, or judgment, as well as the filing of an excessive volume of pleadings and documents beyond the limits set by the Court – of such magnitude as to render a thorough examination practically impossible, particularly where superfluous material is included – should, irrespective of their concrete and demonstrable impact or of the Court's ability to detect and disregard them, nonetheless be subject to sanction.

4.2. *Potential Tension or Legitimate Coexistence Between Abuse of the Right of Individual Application and Exhaustion of Domestic Remedies?*

The Court has repeatedly clarified that conduct displayed by applicants in domestic proceedings may also be relevant in assessing the existence of an abuse of process[65]. This approach was reaffirmed in *Simoncini*[66], where the Court relied on such factors to examine certain problematic procedural behaviours occurring at the national level[67].

It therefore seems legitimate to question whether the current definition of "abuse of the right of application" developed by the Court – particularly insofar as it encompasses the reiteration of the same complaints across different fora – may, to some extent, come into tension with the requirement of exhaustion of domestic remedies, which the Convention imposes as a precondition for bringing a case before the European Court of Human Rights[68].

Indeed, the risk of a finding of inadmissibility for failure to exhaust all available domestic remedies may prompt applicants to multiply proceedings before national courts in

conduct amounted to abuse, leaving open the possibility that it resulted from a good-faith error or inexperience with the Court's procedures.

[65] The case-law of the ECtHR confirmed that the notion of "abuse of the right of application" is not confined to conduct before the Court itself, but may also encompass procedural behaviour at the domestic level where it reveals a pattern of misuse of legal remedies, whether through trivialisation, repetition, or strategic multiplication of proceedings, thereby undermining the proper functioning of both national courts and the Convention system. In this regard see, for instance, *Bock v. Germany*, app. n. 22051/07, 19 January 2010, where the Court took into account the applicant's conduct at the domestic level – namely, the trivial nature of the claim pursued and the disproportionate use of judicial mechanisms – in assessing the abusive character of the application, emphasising that recourse to the Convention cannot serve purposes manifestly unrelated to the protection of human rights. Similarly, in *Dudek v. Germany*, app. n. 12977/09, 15856/09 and 15890/09, 23 November 2010, the Court likewise considered the applicant's litigation strategy before domestic courts, characterised by the multiplication of repetitive and largely identical claims, as a relevant factor in finding an abuse, insofar as such conduct placed an excessive burden on the judicial system and was incompatible with the proper administration of justice. More recently, in *Mamić and Others v. Croatia*, nos. 21714/22, 25102/22 and 25367/22, the Court again assessed the applicants' behaviour in domestic proceedings – particularly the use of parallel and duplicative remedies and the reiteration of substantially identical complaints before different fora – as indicative of an attempt to instrumentalise judicial mechanisms, ultimately contributing to a finding of abuse. In the same sense see also ECtHR, *Ferrara and others v. Italy*, app. n. 2394/22, 16 May 2023, par 43.

[66] ECtHR, *Simoncini v. San Marino*, cit., para. 76.

[67] See *supra*, sect. 2.

[68] According to Art. 35.1 of the Convention, «[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken».

order to demonstrate compliance with this admissibility requirement. Conversely, where such actions are repetitive, unnecessary, or pursued before inappropriate *fora* for the protection of the applicant's rights – as in *Simoncini*, where the applicant resorted to extraordinary or questionable remedies such as *querela nullitatis* – there is a risk that such conduct may be characterised as an abuse of process.

The coordination between these two principles is not always straightforward and raises an issue of clear general importance, both in clarifying the scope of the notion of abuse of process and in delineating the limits of the requirement to exhaust domestic remedies.

The most appropriate criterion would appear to be one based on the specific function of the domestic remedy at issue. Where the use of a particular remedy can provide effective redress and of avoiding recourse to the ECtHR, it should be pursued prior to seizing the Court. By contrast, other remedies, even if potentially favourable to the applicant, should be regarded as superfluous for the purposes of the exhaustion requirement and, as such, more likely to fall within the scope of "abuse" if pursued indiscriminately.

It should also be recalled that it is the responsibility of State authorities to ensure that domestic proceedings are conducted in accordance with the fair trial guarantees set out in Article 6 ECHR. Accordingly, it falls to the States to identify and address potential abuses of process by the parties where such conduct negatively affects the administration of justice and the fairness of judicial proceedings. Indeed, a failure by the State to comply with this positive obligation may itself give rise to a violation of Article 6 ECHR, where the authorities have not prevented or remedied the adverse effects of abusive conduct by the parties.

4.3. *Ambiguity Regarding the Relevance of Intent in Abusive Conduct*

Regarding the subjective element of intent in committing an abuse, the Court has likewise adopted a rather variable approach, presumably linked to the need to take into account the specific circumstances of each case.

The *Simoncini* case fits within this line of case-law, as the Court once again addressed the requirement of the subjective element in establishing an abuse of process, clarifying that «while it is true that the applicant has presented copious documentation and submissions (related to a plethora of domestic proceedings undertaken), not all of which were necessary to the processing of the present case, there is no indication of a deliberate intent to impede the proper functioning of the Court or the proper conduct of the proceedings and it cannot be said to constitute abusive conduct (…), [n]or can it be said that the Court has been misled by any omission (such as missing documentation) which concerned the very core of the case»[69].

It emerges from the Court's reasoning that it identified the absence of any abusive intent on the part of the applicant in relation to the extensive – albeit partly unnecessary – documentation submitted and accordingly excluded the existence of an abuse of the right of application. The Court thus placed significant weight on the applicant's subjective-psychological element in ruling out an abuse of process: the lack of intent to hinder the proper conduct of the proceedings was considered both sufficient and decisive in assessing the potentially abusive nature of the applicant's conduct. However, in earlier case-law the Court appears to have adopted a somewhat inconsistent approach, not always attributing

[69] ECtHR, *Simoncini v. San Marino*, cit., para. 78.

decisive importance to the applicant's intent for the purposes of establishing an abuse, thereby giving rise to a rather fragmented jurisprudence.

As noted by Judge Silvis in his concurring opinion in the aforementioned *Gross* case[70], the issue of establishing a deliberate intention to engage in conduct aimed at misleading the Court was initially addressed by limiting findings of inadmissibility for abuse of the right of petition to situations where a clear intention to deceive had been established: that approach, however, set an unnecessarily high threshold for identifying an abuse of the right of application, effectively requiring the Court to engage in speculative reasoning in order to overcome the evidentiary hurdle of establishing, with "sufficient certainty"[71] , the applicant's subjective awareness at the procedural level.

This evolution is also reflected in earlier and subsequent case-law[72]: as confirmed in the present judgment, it appears that the Grand Chamber has now effectively closed the door to findings of abuse in exceptional cases without an express determination, to the requisite standard of proof, of the applicant's intent to mislead the Court. Such a restrictive approach is open to criticism: it arguably weakens the requirements of procedural "hygiene", insofar as it makes the assessment of abuse overly dependent on subjective motivations rather than on objectively verifiable elements[73].

In *Simoncini*, the Court appears to adopt an oscillating stance with regard to the requirement of subjective intent in establishing an abuse of the right of petition. While it formally reiterates the need to demonstrate a deliberate intention to mislead the Court, its concrete assessment of the applicant's conduct suggests a more nuanced and, arguably, less stringent application of that requirement.

5. *Concluding Remarks: Reassessing Justice Between Formal Guarantees and Substantive Rule of Law Constraints*

The case of *Simoncini v. San Marino* represents a test case for re-examining the principle of legal certainty, an essential pillar of the rule of law, here subject to scrutiny in its most contentious aspects: the predictability, clarity and generality of the law. This is a particularly fragile area, underpinning the entire ECHR system, which, in the authors' opinion, can be examined from two main perspectives: the retroactivity of legislation and the integrity of the right to individual recourse.

The question becomes even more significant as it intersects with the composition of a judicial body, which was inevitably affected by a law of authoritative interpretation, thereby leading to the central issue of the relationship between judicial independence, institutional functionality, and the procedural autonomy of the State.

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[70] ECtHR, *Gross v. Switzerland*, cit., concurring opinion of Judge Silvis.

[71] See *supra*, sect. 4.

[72] In *Nold v. Germany* (app. n. 27250/02, 29 June 2006, para. 87), the applicant's intention to deliberately mislead the Court was not yet considered a necessary condition for finding an abuse of the right of application, as that requirement remained subject to exceptions in extraordinary circumstances, in line with prior case-law. By contrast, in *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, app. n. 38433/09, 7 June 2012, para. 97), the Grand Chamber clarified that omissions of information may amount to an abuse of the right of application, but that «even in such cases, the applicant's intention to mislead the Court must always be established with sufficient certainty».

[73] ECtHR, *Gross v. Switzerland*, cit., concurring opinion of Judge Silvis.

The first objective of this contribution was therefore to ascertain whether, under current circumstances, legislation presented as an authentic interpretation can still be regarded as lawful when it inevitably impacts already well-established legal situations; thereby reopening the debate on the substantive limits of authentic interpretation. In particular, this article sought to examine the extent to which the protection of the proper composition of a judicial body can(not) justify retroactive legislative intervention affecting the claimant's legitimate expectations.

The judgment confirms the Court's traditional restrictive approach to laws with retroactive effect. Although the Court recognises the existence and necessity of an authentic interpretation, it continues to view its retroactive effect with suspicion, almost as if it were, in itself, an indication of possible incompatibility with Article 6 of the ECHR rather than being an inherent element of this type of interpretation.

The distinction between the 'public interest' and 'imperative grounds of public interest' – formally reaffirmed as insurmountable limits to the adoption of such a law – proves, in practice, to be increasingly elusive and difficult to apply in a predictable manner. The *Simoncini* case illustrates this ambiguity: whilst the proper composition of a judicial body undoubtedly lies at the very heart of the rule of law, it was not deemed sufficient to meet the threshold of "imperative necessity" required to justify retroactive intervention.

The question, therefore, remains whether this assessment is, in fact, determined more by circumstantial factors and the specific context in which the dispute arises, rather than by the application of a genuinely consistent and predictable criterion. It is the ECtHR itself, moreover, that has emphasised this aspect, highlighting the unique structure of the microstate of San Marino and giving the impression that it is precisely this institutional dimension that has influenced the assessment of the proportionality of the legislative measure, perhaps in tension with the stated objective of ensuring legal certainty. This is a matter of undoubted general interest that merits further examination, particularly to ascertain whether such an approach might result in the emergence of differentiated standards of protection under the Convention.

A second particularly significant issue addressed by the ECtHR in its judgment concerns the exercise of the right to individual application and, in particular, the concept of "abuse" of this right, understood as the misuse of the procedural instruments available to the litigants. This category, expressly referred to in Article 35(3)(a) of the ECHR and progressively developed by the case law of the Strasbourg Court, plays a central role in safeguarding the proper functioning of the Court's jurisdiction. The precise definition of this concept, however, raises significant issues, since it determines whether the exercise of judicial functions can be ensured to remain genuine and not be compromised by procedural conduct designed to hinder the proper assessment of the facts or to exploit the proceedings. Even in the present case, certain conduct by the applicant, both in domestic proceedings and before the Court, has raised questions regarding the actual scope of application of this inadmissibility clause.

The analysis of this issue in the *Simoncini* case highlights how this category, although formally established in the ECtHR's case law, continues to present significant scope for uncertainty in its application. Although the various typical forms of abuse – ranging from the presentation of false facts to the excessive or selective production of documentation, and even the repeated use of superfluous procedural remedies – are united by the need to establish a subjective element of intent, the practical application of this requirement often appears inconsistent and not always coherent. In the present case, the Court ruled out the

existence of abusive conduct, distinguishing between the mere interpretation of the domestic legal framework and the deliberate falsification of facts intended to mislead the European court. However, the particularly brief reasoning on this point and the tolerance shown towards the complexity and redundancy of the applicant's procedural strategy highlight a persistent ambiguity in the definition of abuse itself.

This raises a number of unresolved doubts. First of all, the concept of abuse appears to be excessively broad and to encompass vastly different situations. A second critical aspect concerns the relationship between the abuse of the right of application and the exhaustion of domestic remedies. Finally, the strong emphasis on the subjective element of intent seems to set a particularly high standard of proof, ultimately limiting the effective application of the abuse clause. *Simoncini* confirms this trend: whilst formally reiterating the need for a deliberate intent to obstruct the Court's proper functioning, the practical assessment appears more flexible and less rigorous.

In conclusion, the *Simoncini* ruling confirms the centrality of the rule of law within the framework of the ECHR, while also highlighting persistent uncertainties in the interpretative criteria currently employed to safeguard it. The tension between formal recognition and substantive limitations – both regarding retroactive legislation and the parties' procedural conduct – remains unresolved. Rather than offering a fully coherent system of predictable standards, the judgment reflects a broader trend in the Court's case law towards a case-driven approach, which, whilst ensuring flexibility in protecting the specific case, risks undermining the clarity and predictability of the ECHR's guarantees. It is precisely within this tension that the interest lies in future in-depth analysis aimed not only at verifying the systematic coherence of such solutions, but above all at identifying clearer definitions and more stable criteria, capable of offering national legal systems predictable parameters for the effective protection of the rule of law (and legal certainty).