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Antigone and Portia (*) (**)

Tullio Ascarelli †

1. The problem of the law is a problem of all men, and is one that each of us must confront on a daily basis. Therefore, maybe, when symbolising its terms, we can call upon wise men before appealing to academics, and upon poets before turning to scholars.

And this is why the mind naturally shifts its focus onto what is, possibly, the most perfect of all plays: Sophocles' Antigone. Indeed, it is no coincidence that Hegel frequently refers to it in his *Philosophy of Right*. Let us recall the tragedy. Oedipus, who gouged out his own eyes, abandons Thebes upon learning of the tragic fate that had led him, unaware of the truth, to kill the cruel traveller who was actually

* Conference delivered in 1955 at the Italian-Chilean Institute of Culture in Santiago, published in *Rivista Internazionale di Filosofia del Diritto*, 1955, 756-766. For a more in-depth analysis of some ideas mentioned herein, see – in addition to the studies contained in this volume – the preface to my work entitled *Studi di diritto comparato e in tema di interpretazione*, Milano, 1952, and my paper *Interpretazione del diritto e diritto comparato,* republished in *Saggi di diritto commerciale,* Milano, 1955; and for examples as regards the difference between *regulae juris* and concepts pertaining to a typological reconstruction of reality (a distinction which Engisch now has also referred to), in addition to the above, see also my papers *Considerazioni in tema di personalità giuridica* and *Sul concetto di titolo di credito*, republished in the aforementioned *Saggi di diritto commerciale*. This paper is dedicated to the memory of Filippo Vassalli and will be included in the studies in memory of the late Professor. (*Ascarelli's original note*)

** Translation by Camilla Crea, Associate Professor of Private Law, University of Sannio, School of Law. Thanks to Keith Baverstock and to an anonimous referee for their precious advice in some translating choices. This translation refers to the text of the essay 'Antigone and Portia' republished in T. Ascarelli, *Problemi giuridici*, I (Milano: Giuffrè, 1959), 3-15 (henceforward DOC B) for it is the most quoted. Significant discrepancies with the first version (published in *Rivista Internazionale di Filosofia del Diritto*, 1955, 756-766: henceforward DOC A), as well as with the latest version of the same essay included in *Studi giuridici in memoria di Filippo Vassalli* (Torino: Utet, 1960), 107-117 (henceforward DOC C) are documented in the translator's footnotes.

the father he had never known; and then to take his own mother as his bride upon obtaining the kingdom awarded to him for saving his city, freeing it from the Sphinx whose riddle he answered correctly. Oedipus' legitimate successor is Creon. And the two daughters born from Oedipus' incestuous relationship – Antigone and Ismene – reside at the court of Creon. But Antigone's two brothers, Oedipus' sons, Eteocles and Polynices, take up arms against each other, with Polynices forming an alliance with Argos, in order to seize Thebes. The Argive army is repulsed and both brothers die in the ensuing battle, each one killing the other. Polynices dies as an enemy of Thebes and Eteocles as its defender. Burial rites are granted to the latter, but refused for the former and Creon orders the death penalty for anyone daring to defy the law he has imposed. But Antigone rebels against the law and attempts to bury her brother, proudly reminding Creon of the unwritten laws of the Gods which decree the equality of all men before Dis Pater. However, Creon intends to carry out the sentence, even failing to succumb to the pleas of his own son, Haemon who is hopelessly in love with Antigone. Antigone is buried alive inside a tomb. But Tiresias appears, foretelling Creon of the divine vendetta. In the end Creon gives in, but it is too late. Furious with his father, Haemon reaches Antigone in her tomb and takes his own life, throwing himself upon his beloved's body.

The preordained tragedy unfolds inexorably. Marked by fate, it shows us a conflict which is present at all times and in all places, and which occurs over and over again. Its real subject is man in his universally and eternally human dimension. Man is Oedipus' answer to the Sphinx's riddle; man who the Chorus of Antigone sings of, in his industriousness and in his dignity.

Man is unable to accept a social rule[1] simply because observed or imposed by a higher authority. He seeks justification for it which

[1] Within the Italian law tradition the term 'norm' means legal norm: eg N. Bobbio, 'Trends in Italian Legal Theory' 8 *American Journal of Comparative Law*, 329-340 (1959). This holds true also for Tullio Ascarelli. Nevertheless, in his writings, depending on the context, 'norm' can signify both the text to be interpreted and the result of interpretation, while the term 'rule' generally refers to social norm. This ambiguity and complexity was perhaps wanted by the author. This is why we have opted for a literal translation of these terms. For further explanations see also our essay in this issue C. Crea, 'What is To be Done? Tullio Ascarelli on the Theory of Legal Interpretation' 1 *The Italian Law Journal*, 181-205 (2015).

cannot be provided solely by the frequency with which it is observed, or by the authority's efficiency in ensuring an effective sanction. He wants to attribute it to an order whose ultimate justification also lies in a concept and in a belief which marks right and wrong.[2]

In this way, the norm places itself in opposition to the rule actually observed, setting itself as a criterion of judgment of the latter. And the conflict reproduces itself between any historically imposed norm and the norm whose imperative the individual feels in his conscience. It reproduces itself within the very conscience of the individual as a deep conflict between an accepted norm and a divergent evaluation of the said norm, as the gentle figure of Ismene would also seem to remind us, attracted and frightened at the same time by Antigone's audacity.[3]

And so there is the eternal dialogue of Antigone and Creon, eternal dialogue and eternal and preordained tragedy because it springs from the contrast between two equally present positions that are shown to us in their purity in Sophocles' tragedy.

On the one hand, the historically imposed and justified norm; on the other, the individual conscience which refers to the absolute which she feels as a divine command. Positive law and natural law are set against each other as opposing states.

Creon is not the tyrant Antigone thinks he is. Antigone is not anarchic as Creon thinks she is. Because they represent the antipodes of the dialectic of law in the ongoing opposition of any rule or norm and its evaluation.

Ongoing opposition. Creon's law does not just respond to the

[2] DOC C (n ** above, 108) also includes: 'The history of civilisation is the history of ethics, the history of human industriousness that cannot be separated from the concepts connected with it; these concepts are not superimposed on it, but rather are identified with it, are prompted by it and, together, are its instrument. Because we cannot go forward in our daily activity without being aware of the justness of this, without being aware of the justification of our actions'.

[3] DOC C (n ** above, 108) also includes: 'The imperative shall be experienced by the believer as a divine command and found once more in a divine revelation; it shall be singled out by the logician in a pre-established rational order; in any case, it shall impose itself as an absolute accepted in its conscience by the individual who cannot, therefore, refuse to obey it, whatever the scope of the historically imposed norm it opposes. So the historically imposed norm is counterposed to the imperative's absoluteness, freely assessed by the individual, who can, therefore, condemn it when faced with the imperative of the individual conscience, and refuse to obey it.'

State's human needs. It was imposed prior to the event and in compliance with the limit of non-retroactivity. It was imposed while exercising legally-acknowledged sovereignty. It is based on the human conflict between the city's enemy and its defender. But Antigone opposes a greater law to Creon's human law, invoking the high, unwritten laws of the Gods which Creon is unable to disregard. She opposes the equality of all men in death to the human distinction between the city's enemy and defender. And the reasoning behind both viewpoints can be argued, as commented by the Chorus in the dialogue between Haemon and Creon. Both argumentations are well-founded, since they are on different levels. And they are the argumentations of the dialogue of law. On the one hand the positive law as interpreted by self-proclaimed jurists, on the other the voice of conscience, which always judges and is able to judge the justice of each and every human law.

This dialogue has come to the fore again within the contemporary European scene, shaken by the torment and bloodshed that has marked our recent history. It seems to want to fall back on man's eternal problems rather than on social and individual conflicts and events,[4] and so returns to the tragedy and representation of ancient myths.

France represented the same belief in its resistance and sacrifice in Anouilh's Antigone.[5] And what strikes us in this new presentation of an eternal motif is the humanisation of Creon, almost justified within the limits of his position. Nevertheless, a humanisation from which Antigone's resistance and revolt draws greater awareness and intensity. At this stage the tragedy has lost its terribleness because not only is its unfolding preordained, it is also well-known. Creon attempts to explain the reason for his position and to show how the

[4] DOC C (n ** above, 109) is partially different: 'social and individual conflicts that grabbed the attention of 19th-century playwrights'.

[5] He is referring to Jean Anouilh's *Antigone* (perhaps that of Paris: Didier, 1942; this play was adapted and traslated in English by L. Galantière as *Antigone* (London: Samuel French and New York: Random House, 1946)). It was an implicit commenting on the Nazi occupation in France, an encouragement to resist the usurpation. For a comparison between Sophocles' Antigone and that of Anouilh see S. Tiefenbrun, 'On Civil Disobedience, Jurisprudence, Feminism and Law in the Antigones of Sophocles and Anouilh' 11 *Cardozo Studies in Law and Literature*, 35-51 (1999).

State cannot be ruled with The Lord's Prayer, to cite as Machiavelli. But as regards the position of Antigone – who clearly confesses that the sole reason for her conduct is her conscience, that her actions are for herself and to satisfy an intimate need – it is strengthened rather than weakened by this, revealed in its necessity.

2. Legal thinking has repeatedly tried to overcome the contrast by refusing to classify the unjust norm as legal, and by classifying as legal only the norm which, in turn, can be justified[6] by the commandment related to a divinity, or by a rationally determined moral order. Violation of the said norm cannot help but be accompanied by a divine sanction through the mysterious actions of a Fate or the anger of a God. Tiresias' voice admonishes Creon and foretells the tragic sequence unleashed by the law he imposed which goes against the divinely acknowledged equality of all men before Dis Pater.

But the dramatic nature of human life and, at the end of the day, its freedom, lies in this ongoing presence of a positive norm, imposed throughout history and approved by humankind, even if subject at all times to evaluation in the event of a different request in the individual's conscience.

And the contrast arises and unfolds throughout history, through each individual's effort to create an order that complies with his or her own conscience. The process of composing throughout history, in the sense of ongoing mastery and creation which each individual is called upon to contribute to in accordance with his conscience, is set against the insolubility of the contrast. This contrast is expressed in the timeless tragedy which constantly repeats itself, setting an unchangeable, never-to-be accomplished order against a life downgraded to necessary sin. So the dialogue between Creon and Antigone becomes the dialogue of the development of law throughout history. And the need for moral conscience translates into the need for reform or revolution, into the need for a new order which is accomplished in the dialectic of history, into norms which are approved by positive law and then always interpreted and improved on. Natural law is no longer abstractly counterposed to

[6] DOC C (n ** above, 110) also includes at this point: 'in a norm removed from history, its contrasts and its strengths'.

positive law, but represents the need for its improvement as regards each positive law.

So, what is a necessary tragedy in the pessimistic Greek concept – doing away with blame or responsibility given the fatal preordainment of each individual's actions, inexorably connected in accordance with a mechanical causality – becomes a drama of the individual conscience when asserting its own freedom and responsibility. The moral imperative independently experienced by man replaces the mechanically operative fate that makes Oedipus blinder even while his eyes are still open. Drama replaces tragedy with the assertion of freedom, which signifies confident assertion of history, positive and dense with meaning, where man is called upon to cooperate. Assertion of history, that is, assertion of an unfolding of events which surpasses a timeless, reversible mechanicality.[7]

3. Proof of the conflict and drama is the sacrifice and suffering with which the individual's need is certified as compliant with an ethical imperative. Antigone is well aware of the fact that she risks death by defying Creon's law. She is aware that her defiance would have no value without the sacrifice that shows its purity and reveals the absoluteness of the imperative with which her action complied. The triumph of the new need is only accomplished with performance of the sacrifice; solely in that way the ethical imperative can, in turn, aspire to become a positive norm.[8] The initially bold Creon starts to show uncertainty at the announcement of the tragedy involving both Antigone and Haemon. And so the Chorus, still hesitant in following the opposite reasoning of Creon and Haemon in their dialogue, urges the king to revoke the punishment and violate the law. Creon rushes to do so in order to prevent the tragic ending which will seal the victory of the principle Antigone asserted so magnificently, but it is too late to change the course of events. The said principle consists in having the same compassion for all the dead, erasing conflict and hostility, making friends and enemies equally deserving of a compassionate burial, because conflicts historically generated by our

[7] These last three sentences are not present in DOC A (n ** above, 760) and in DOC C (n ** above, 110).

[8] The sentence differs in DOC C (n ** above, 111): 'the ethical imperative can in turn inspire a positive legal norm'.

earthly life have no sense or meaning except at the moment when opposing parties clash. And yet they subsequently come together in a broader vision which encloses them as albeit differing parts of a picture where each part finds its justification and none is lacking in a positive function.

Socrates' smile seems to respond to Antigone's sacrifice. Despite his unjust sentence, he refuses to escape as insistently urged to do so by his friends because he does not feel he can evade the laws of the city even if unjust. He is unable to evade the system which he accepted as a citizen, including the undeserved consequences. The fact is that the symbol of moral rebellion is sacrifice, and its intensity almost measures the purity of the rebellion, and hence justifies it.

4. But the dialectic of legal thinking unfolds daily, even if in more subdued manner, in the ongoing intense interpretation. It becomes dramatic when the clash between the historically imposed norm and the individual's conscience cannot but represent a revolutionary conflict which sacrifices that need of certainty – which all norms in their positivity always respond to – for a request in whose regard positive legal order appears to be real disorder. Because what then is the value of the norm? And this is where the figure of Portia comes to our aid, barely concealing an ironic smile under her robe. More clever than heroic, wise and knowledgeable rather than fanatically brave, and perhaps, in her poetic depiction, with a slight hint of astuteness, emphasised and ennobled by the feminine figure that brings out a smile while putting forward her case in the guise of a doctor of law from Padua (*'dottore patavino'*). Portia's intelligence, combined with a hint of probabilism and, morally speaking perhaps even ambiguity, is set against what could be defined as Antigone's Calvinist Puritanism. The human triumph of interests, defended through a winning interpretation that presents itself as a remunerable professional activity, is set against the death of Antigone who only asserts the victory of her truth by sacrificing herself.

The contrast between the two figures could not be more pronounced, and yet both of them show us the paths taken by law in its development and transformation.

Let us recall the storyline of the Merchant of Venice. Antonio asks a moneylender for a loan in order to help his friend Bassanio, who is

in love with Portia, whose hand Bassanio succeeds in winning by correctly guessing the casket containing her portrait. Shylock, offended by the unfair humiliation he has suffered as a Jew, grants the loan but only on the condition that he can cut a pound of Antonio's flesh if the loan is not repaid on time. The deadline elapses and a trial is held as the sum has not been repaid. All seems to be lost for Antonio when Portia arrives on the scene, disguised as a male doctor of law from Padua.[9] She confirms the validity of the loan agreement but then points out that the said agreement does not allow for even one drop of blood to be shed. Antonio emerges victorious and Shylock is forced to forfeit his life and estate. He succeeds in obtaining the Duke's pardon and his life will be saved if he converts to Christianity while his estate is saved through bequeathment to his daughter and son-in-law.

And so, the *deus ex machina* of this play, which ends on a happy note, is Portia's interpretive skill. Portia confirms the validity of the loan agreement; she does not go against it, nor does she label it as unjust. But she interprets it, and through this interpretation she renders it null and void. Positive law is safe but also surpassed. The problem is not the legitimacy of the law, but its exact scope. The ethical imperative which the law condemns is replaced by a more subtle game whose premise is the legitimacy of positive law, and which is solely concerned with determining its scope in the storyline of a more complex game of conflicting interests. Drama gives way to smiles.

Portia's problem concerns the interpretation of an agreement but said agreement should be looked on as law since it would not seem that the playwright wished to make any distinction. His creativity presents us with the problem of interpreting the norm.

Which could be the law to be applied in this case? And what is then the actual scope of the law or agreement, which are always and necessarily (as well as strictly speaking as regards the latter) drafted in an abstract manner, when faced with the concreteness of the case

[9] I would like to note, in praise of the University of Padua, an expression in Portuguese which would seem to be related to the University of Padua's reputation throughout the centuries. *Naô entender patavino* in Portuguese means to not understand, to not understand a problem ..... which only Padua's scholars could resolve. (*Ascarelli's original note*)

with all its resolutions? Portia's reasoning serves to raise the persistent problem of interpretation in a poetic manner, the subtle determination of the exact scope of the norm when faced with a real case; this is the inevitable path to guaranteeing the application of norms and considering them positive law. Nor is it of importance, for our purposes, that the Shakespearian tragedy deals with an agreement rather than law; that the interpretation Portia defends is exemplary or unsound in the case in point.

Portia's reasoning is the constant reasoning of all interpreters. The playwright shows us what is the possible argumentation of all jurists in the reasons put forward by the fake doctor of law from Padua. In brief he seems to want to poke fun at the pernickety techniques of interpretation, as well as to show us its infinite resources.

If we are to consider the case as symbolically exemplary, as we ought to, it is of little importance whether or not the Venetian laws of that time were those cited by Portia.

It is of little importance whether or not the agreement signed by Antonio was valid in accordance with Venetian laws of the period in which the play is set – Kohler was to look more closely at this. The drama is not resolved by rejecting the agreement, but by confirming its validity, interpreting it and destroying it.

Indeed, it is the interpretive criterion, at least as a point of departure, that is the first and simplest of interpretive canons, even if completed by the age-old saying of *ubi voluit dixit*. The contrast between the agreement and a moral need which condemns it, is not resolved through the revolutionary act of denying the agreement. The contrast is bypassed, as some would say, through interpretation.

Indeed, interpretation is and is not the interpreted element. It is a construction and a reconstruction of this which explains, develops, limits and essentially modifies it, relating back to the interpreted element at all times while still modifying it. Portia appears to smile at us in order to remind us that at the end of the day all laws are as they are interpreted. Every law corresponds to the interpretation of it which is accepted and, basically, this interpretation reconstructs the law and can make it different from how it was first intended; it changes it over time. It adapts and modifies it, develops or makes it worthless. The interpreter's needs and beliefs are also asserted in this interpretation so that moral disapproval – which, nevertheless, is not

brought against the norm on an ethical level by denying it – gets down to work, interpreting and modelling the norm, as a criterion of prevalence between opposing and conflicting human interests in determining the scope of the norm. Moral disapproval respects the norm (thus remaining sensitive to the need for order and certainty that the latter represents at all times) but at the same time it alters the norm and hence adapts it to an ever-changing equilibrium of conflicting forces and evaluations. An ongoing re-creation.

Because every single norm is expressed in words and every single norm refers to one legal '*fattispecie*'.[10]

So, the interpreter constantly creates a type of social reality according to the application of the norm, just as he organises a hierarchy of norms depending on their application. And the interpreter's hopes, traditions and beliefs are asserted in this work of creating and ordering; through the ordering of norms and the typological reconstruction of reality. So we can set the typological construction of reality according to the application of norms against the *regula juris* which simply summarises a set of law provisions. The norms would not be able to be interpreted and applied without this construction.[11]

[10] '*Fattispecie*' can be translated as 'hypothetical fact situation' (see J.H. Merryman, 'The Italian Style I: Doctrine' *Stanford Law Review*, 39, especially 49 (1965-66)). This meaning is clarified by the additional sentences included in DOC C (n ** above, 114): 'But it is the interpreter's task to determine how to frame the concrete case as regards the norm in relation to its various and different characteristics (only some of which can be taken into account by the norms). It is the interpreter's task to specify the '*fattispecie*' taken into consideration by the norm with regard to the concrete case and to make a cut in that ongoing reality where, as Manzoni recalled, it is instead absolutely impossible to place all the wrong on one side and all the right on the other.' For the record Alessandro Manzoni was an Italian poet and novelist, very famous for his *I Promessi Sposi (The Betrothed)*, edited by C.W. Eliot, The Harvard Classics, Vol. 21 (New York: PF Collier & Son, 1909-14). This historical novel is ranked as a masterpiece of European literature of the nineteenth-century, dense of patriotic claims of the Italian Risorgimento, aimed at combining history and poetry (and invention): see, A. Manzoni, *On the historical novel. Del romanzo storico*, translated with an Introduction by S. Bermann (Lincoln and London: University of Nebraska Press, 1984), 3-50.

[11] The sentence differs in DOC A (n ** above, 763) and DOC C (n ** above, 114), ie: 'So we can set the categories used to order reality according to the application of norms against the *regula juris* which simply summarises a set of law provisions. The norms would not be able to be interpreted and applied without these categories'.

The history of law and the history of legal thinking end up by merging into each other since the very scope of the former depends on the development of the latter.[12]

Blood could be added to the pound of flesh; it would be shed in order to cut the flesh and therefore, would have had to flow in order to achieve the purpose clearly stated in the agreement. Or instead, should a restrictive interpretation prevail, pharisaically linked, some might say, to the wording of the agreement so as to exclude the possibility, literally not stated, of blood having to be shed? The Duke accepts the second interpretation and the scales tip in favour of this given the implicit disapproval of the agreement, thus rendered worthless thanks to an interpretive ploy whose real strength of conviction comes from a moral need. The playwright's smile seems to warn us not to mistake the interpretive ploy for a rigorous display of logic. But behind the playwright's smile there is also the conflict between the need for certainty, proudly demanded by Shylock, and the need to adapt the norm to moral evaluations; between the individual sovereignty stated in the agreement and the social needs, as someone is bound to say, which push for rejection of it. The

[12] Ascarelli added a note of clarification in DOC C (n ** above, 114, fn 2): 'Legal thinking is possibly the field where our studies are the most lacking despite Wieacker's recent work – which was, perhaps, mainly concerned with the development of Roman legal science and with development in Germany.

In my opinion, legal systems can only be understood with regard to their relations and differences by referring to the history of legal thinking. In this way, a criterion of preliminary intelligence for their comprehension can be established. Because the various systems stand out one from the other for the diversity of their dogmatic frameworks, including the theories of sources of law and of interpretation themselves. Only through this can we become aware of that statality of law which is, instead, presumed when classifying the different positive laws in accordance with the sovereignity of each state. In turn, the varying history of the individual countries is reflected in the diversity of dogmatic categories; the various laws do indeed take on differing characteristics through the dogmatic categories.

Perhaps, in this area, the all-important fact is the formation of the modern state as it left behind the wars of religion in the sixteenth century. It is then that the contrast between the common law and civil law systems is established on the one hand. While, on the other, a turnaround in legal thinking occurs as a result of the triumph of the sovereign state and of the renewal following humanism. That change translates into the historicism of cults, into the affirmation of legal positivism as regards legal systems by now become national, and then into the rationalist jus naturalism's anxiety for reform.'

interpretation's declarative function and its creative value are to be found in the elaboration of Portia's reasoning. Confirmation of the agreement's validity and the impossibility of changing it, of the need to apply a law or an agreement even when unjust – because otherwise nothing could be taken as certain any longer – is followed by a subtle interpretation. An interpretation which makes the agreement null and void, quashing its value with such violence as to push readers to change sides and suspend their judgment. The cruel destiny of the creditor, inhumanly scorned and convicted of money-lending, did not correspond to the harshness of the agreement, and the harsh agreement did not represent the weapon of the oppressed. So that it is Shylock himself that dramatically towers over the others in this Shakespearian play, while does Portia's clever interpretation represent, in turn, a subtle yet fierce vendetta?

In the end, the interpretation itself refers to a norm and precedent which must, in turn, be interpreted because the outcome of interpretation is, in turn, subject to interpretation.[13] The success of this outcome is marked by general approval and the norm is made and interpreted thanks to this, with varying forces and conceptions that oppose or promote its approval, coming together in that conflicting concord which is, in any case, the path of history.

5. Perhaps someone can recall a passage from the Talmud. Two rabbis were talking about the interpretation of law. And the first rabbi, in order to prove his interpretation, called upon the waters of the river to change direction and flow upwards, thus confirming his theory. And since the second rabbi failed to accept the validity of this proof, the first rabbi invoked the heavenly voice to make itself heard thus resolving the matter. And the voice made itself heard and confirmed the proposed interpretation. But the second rabbi proceeded to object to this haughtily: 'And what role does God have to play in the arguments of men? Is it not written that the law was given to men and shall be interpreted according to the opinion of the majority?'. And when the Lord heard this bold reply, he smiled and said 'My sons have defeated me'!

[13] DOC A (n ** above, 764) and DOC C (n ** above, 115): 'subject to individual assessment'.

Creation is ongoing and man contributes to this.[14]

Law is never a given, but an ongoing creation to which the interpreter contributes in an ongoing manner, as does every member of society, and this is precisely why it lives in history and indeed with history.

The relationship between the law and its interpretation is not similar to the relationship between a reality and its mirror, but is like that between the seed and the plant. Hence, the law lives only with its interpretation and application, which, after all, is not just its mere declaration, but creation of law, nonetheless characterised by its continuity with the fact it springs from. The contrast between a given and static law and a purely explicative interpretation of the former needs to be replaced by the unity of a law, which unfolds and develops in its interpretation.[15] Indeed the theory of interpretation has the task of making us aware of how law really develops in its interpretation while still maintaining continuity with the fact it springs from.[16]

6. The law, given to men and for men, is always as it is interpreted

[14] For a general overview, refer to C. Tresmontant, *Etudes de métaphysique biblique* (Paris: J. Gabalda et Cie, 1955); Id, *Essai sur la pensée hebraique* (Paris: Éditions du Cerf, 1953). For the passage of the Talmud referred to and various discussions regarding the 'Heavenly Voice', see A. Cohen, *Le Talmud* (Paris: Payot, 1950), 91.

The 'law' par excellence is the law that was given on Mount Sinai. The problem regarding interpretation of a humanly given law leads us to the problem of a law accepted as revealed.

All the tendencies of legal thinking are reflected in the problem of interpreting law. (*Ascarelli's original note*)

(Note that in DOC A (n ** above, 765, fn 2) and in DOC C (n ** above, 116, fn 3) there is an additional sentence in the same note: 'And it is always on this ground that the Platonising tendencies – which acknowledge man's actions as aimed at grasping in its purity a truth that has degraded within the world – will contrast with the historicising tendencies (or Jewish-making tendencies if we follow the interpretation of biblical metaphysics of the aforementioned works) that see an ongoing creation in the world'. (*Translator's additional information*)).

[15] DOC C (n ** above, 116) also includes the following sentence: 'This unity, so obvious from the historical perspective, cannot be artificially substituted by a 'legal' contrast in a dual truth system'.

[16] The following note is added in DOC C (n ** above, 116, fn 4): 'In my opinion, this also occurs inasmuch as each law, when being applied, refers to a type of social

and applied. Because, first and foremost jurists must identify the applicable law among the many produced throughout history in order to meet the need for certainty and order which, at the end of the day, the obligatoriness of positive law rests on. With the aim of remaining faithful to the need for certainty and order it springs from, jurists initially resort to a higher norm which determines its legitimacy[17] when identifying the applicable law. But when all is said and done, jurists not wanting to make use of extra-human elements, must relate to a spontaneous affirmation of a norm which coincides with the observance of a rule, even if, instrumentally speaking, affirmation and rule concern the position of norms and not their content. Because, otherwise, all that jurists would have is the postulate of a primary norm, but, in this way, giving up the possibility to justify that application of the law, which alone gives meaning to law.

After identifying the norm to be applied, jurists will, in turn, class it as applicable and in view of its application.

Thus jurists will take their point of departure from history and will go back to look at history at their point of arrival.

And so the conflict arises perennially and is settled perennially. It arises and is settled in history because the various reasons are not the opposing entities of a Manichean antinomy, but rather abstractions of the moments of an ongoing evolution: between the rule and the norm; the norm and its evaluation; revolutionary contrast and interpretive reformism; with Antigone's triumphant sacrifice and with Portia's subtlety.

reality, so the interpreter is persuaded, for the same needs of applying the law, to refer to a type of reality and thus contributes to renewing the norm and developing the law.

This is why legal categories distinguish themselves from mere *regulae juris* summarising the norm, and are an instrument for their interpretation and application, in turn implying a typological reconstruction of reality. And for this reason (as subsequently clearly demonstrated in history) the history of law and the history of legal thinking necessarily merge into sides of the same coin'.

[17] The sentence is different in DOC A (n ** above, 766) and in DOC C (n ** above, 117), ie: 'jurists initially resort to a formal criterion moving from each norm to a higher norm which determines its legitimacy'.

What Is to Be Done? Tullio Ascarelli on the Theory of Legal Interpretation

Camilla Crea*

Abstract

The teachings of Tullio Ascarelli, a well-known scholar of commercial law and of comparative law on the international scene, has left a lasting mark on Italian legal culture insofar as they are one of the most elegant and complex expressions of the 'revolt against formalism' and the need to go beyond the folklore of the 'old Italian style'. The centrality of the theory of legal interpretation, in constructing and developing the complexity of the legal experience, is filtered and strengthened herein by referring to literary works. In particular, 'Antigone and Portia' is a means for communicating, at a transnational level, the eternal dialectic existing between the certainty of positive law and the need to develop it through the interpretation and application of all legal texts, between the declarative nature of the interpretation and its creativity. Jurists and judges, the good ones, are supposed to mediate between these two antipodes, in the always perfectible – because always historicised – quest for a reasonable, equal and, as far as possible, just interpretation of concrete cases. Far beyond Law and Literature movements, beyond Feminist legal theories, beyond the natural law tradition, the apparent contrast is re-proposed and recomposed within the harmony of history, by immersing law, as an ongoing action, in society and in the flow of human activity.

I. Why Antigone and Portia and Why Tullio Ascarelli

Socratic maieutics taught that questioning is the necessary instrument of knowledge since it expresses awareness of ignorance and of the eternal inadequacy of knowledge.

Therefore, it is worthwhile asking what is the reason for re-proposing Tullio Ascarelli's 'Antigone and Portia' nowadays, sixty years on, and continuing a dialogue with him, without rhetoric or sophistry.

A preliminary, somewhat simplistic answer lies in the fact that it

* Associate Professor of Private Law, University of Sannio, School of Law.

seems that this essay is not particularly well-known in the international debate and has never been translated into lingua franca.[1] A sort of review was published in a Chilean journal.[2] In a *notas bibliográficas* to the collection of writings *Problemi giuridici*, Alamiro De Ávila Martel,[3] a renowned legal historian and expert on Roman law, focused his attention on this essay as a manifesto of the complete volume, able to express Ascarelli's illustriousness through the evocative force of literary language.

This is no coincidence, for 'Antigone and Portia' reproduces the paper delivered at the Conference held at the Italian-Chilean Institute of Culture in Santiago in 1955; its various places of publication include the aforementioned collection[4] (to which the review and current translation refer) and subsequently, with some changes, *Studi giuridici in memoria di Filippo Vassalli* dated 1960.

But this is not, nor could it be, the sole reason. Ascarelli has left a lasting mark on the history of legal culture;[5] he is truly one of the

[1] Mention is made in A.G. Chloros, 'What is natural law' 21 *Modern Law Review*, 609, fn 4 (1958), in reference to natural law; and in D.A. Skeel Jr, 'Lawrence Joseph and Law and Literature' *77 University of Cincinnati Law Review*, 921, 937 (2008-09), promoting the beginnings of the Italian Law and Literature movement. But as will be clarified later, these are not the meanings of Ascarelli's essay; cf also D.J. Chavarri, 'El Mercader de Venecia (Shakespeare) y la Interpretación de la Ley' *Revista del Centro de Investigaciones en Filosofía Jurídica y Filosofía Social*, vol 21, 11, 15 (1996).

[2] A. de Ávila Martel, 'Tullio Ascarelli: Antigone e Porzia' *Revista chilena de historia de derecho*, 83 (1961), recalling Ascarelli's speech heard, presumably in person, in Chile in 1955. On 6 September 1955, inter alia, Ascarelli was appointed '*miembro honorario de la Facultad de Ciencias Jurídicas y Sociales*' of the University of Chile (http://www.analesderecho.uchile.cl/index.php/ACJYS/article/viewArticle/6007/5874) (last visited 20 October 2015).

[3] For more information about this author F. Vicencio Eyzaguirre, 'Alamiro de Ávila Martel (1918-1990): historiador, bibliógrafo y numismático' *Revista chilena de historia y geografía. Sociedad Chilena de Historia y Geografía,* 163-214 (1996). He was known in Italy and wrote a paper 'El Derecho Romano en la Formación de los Juristas Chilenos del Siglo XVIII', in VVAA, *Studi giuridici in memoria di Filippo Vassalli* (Torino: Utet 1960), 395-402.

[4] T. Ascarelli, 'Antigone e Porzia', in Id, *Problemi giuridici*, I (Milano: Giuffrè, 1959), 3-15 (DOC B); earlier in *Rivista Internazionale di Filosofia del Diritto*, 756 (1955) (DOC A); later in VVAA, *Studi giuridici in memoria di Filippo Vassalli* n 3 above, 107-117 (DOC C).

[5] For a sketch of his extraordinary personality, as a man and as a jurist see,

most representative names of the twentieth century, at least as far as Italy is concerned, and possibly not only.

His works in the fields of commercial law and on money were quoted and well-known abroad, especially from the 1940s through to his early demise. Many of these were also published in Portuguese and Spanish[6] and associated with the period of his forced exile in Brazil which, as a Jew, he experienced as a consequence of the racial laws enforced in Italy.[7] His teachings have had a major influence in

among the many: N. Bobbio, 'L'itinerario di Tullio Ascarelli', in VVAA, *Studi in memoria di Tullio Ascarelli*, I (Milano: Giuffrè, 1969), LXXXIX-CXL (this volume includes a bibliography, albeit out of date, of Ascarelli's works: at XIX-LIII); S. Rodotà, 'Ascarelli, Tullio', in VVAA, *Dizionario biografico degli italiani* (Roma: Treccani, 1962), IV, 371-372; P. Grossi, 'Le aporie dell'assolutismo giuridico (Ripensare, oggi, la lezione metodologica di Tullio Ascarelli)' (1997), in Id, *Nobiltà del diritto. Profili di giuristi* (Milano: Giuffrè, 2008), 444-504; lastly, for a commendable and well-documented biography, and for useful bibliographical information about the many, mainly Italian authors, who focused on Ascarelli's work, cf M. Stella Richter Jr, 'Ascarelli, Tullio', in I. Birocchi et al eds, *Dizionario biografico dei giuristi italiani* (Bologna: Il Mulino, 2013), I, 108-111; Id, 'Tullio Ascarelli avvocato' *Rivista delle società*, 190-201 (2013).

[6] Eg: *Principios y problemas de las sociedades anónimas,* translated by R. Cacheaux Sanabria (México, DF: Imprenta Universitaria, 1951); *Sociedades y asociaciones comerciales,* translated by S. Sentís Melendo (Buenos Aires: Ediar Editores, 1947); *Iniciación al estudio del derecho mercantil* (Barcelona: Bosch, 1964); *Introducción al derecho comercial y parte general de las obligaciones comerciales*, translated by S. Sentís Melendo (Buenos Aires: Ediar, 1947); *Teoría de la concurrencia y de los bienes inmateriales*, translated by E. Verdera and L. Suárez-LLanos (Barcelona: Bosch, 1970); *Problemas das Sociedades Anônimas e Direito Comparado* (São Paulo: Saraiva, Livraria acadêmica, 1945), (São Paulo: Saraiva, 1969), (Campinas: Bookseller, 2001), (Sâo Paulo: Quorum, 2008); *Negocio juridico indirecto* (Lisboa: Jornal do Foro, 1965); *Teoria geral dos títulos de crédito,* translated by N. Nazo *(*São Paulo: Saraiva, 1943), (São Paulo: Saraiva, 1969), (Campinas, SP: Servanda, 2009); *Panorama do direito comercial* (São Paulo: Saraiva, 1947), (Sorocaba: Minelli, 2nd ed, 2007); for the Spanish version of the latter book, see *Panorama del derecho comercial*, translation from original Brazilian version, by J.M. Jayme Urrizzaga (Buenos Aires: Depalma, 1949); *Ensaios e pareceres* (São Paulo: Saraiva, 1952); *Apresentação do Brasil*, translation of the second Italian version of *Sguardo sul Brasile,* by O. de Castro (São Paulo: Edições Sal, 1952); *Derecho mercantil*, translation by F. De Jesú Tena (México, DF: Distribuidores Porrúa, 1940).

[7] As regards his deep influence on the Brazilian legal system, reference to numerous papers contained in the following is useful: A. Junqueira de Azevedo, H.T. Tôrres and P. Carbone eds, *Princípios do novo Código Civil brasileiro e outros*

Latin America, as can be seen from the re-publication of his works, also in recent years. Numerous reviews of his writings also appeared in foreign journals,[8] both in German and in English.

His personality as a fervent scholar and supporter of the comparative method, mindful of the debate and movements

temas: homenagem a Tullio Ascarelli (São Paulo: Quartier Latin, 2nd ed, 2010; the first edition is from 2008); cf also N. De Lucca, 'A influência do pensamento de Tullio Ascarelli em matéria de títulos de crédito no Brasil' *Revista Magister de Direito Empresarial, Concorrencial e do Consumidor*, no 1, 17-35 (2005); P.A. Forgioni, 'Tullio Ascarelli, a teoria geral do direito e os contratos de distribuição' *Revista de Direito Mercantil Industrial, Economico e Financeiro*, no 137, 30-48 (2005); Id, 'Tullio Ascarelli e os contratos de distribuição' *Revista Magister de Direito Empresarial, Concorrencial e do Consumidor*, no 2, 11-35 (2005); R. Nogueira Barbosa, 'Tullio Ascarelli e o direito tributario do brasil' *Direito tributario atual*, 2703-2743 (1990); Id, *Tullio Ascarelli e o direito tributario do brasil* (São Paulo: Instituto Brasileiro de Direito Tributario, 1979); F. Konder Comparato, 'O direito brasileiro na visão de Tullio Ascarelli' *Revista de direito mercantil*, no 38, 11 ff (1980); Id, 'Origem do direito comercial. (Traducao do primeiro capitulo do corso di diritto commerciale – introduzione e teoria dell'impresa, a. Giuffre, 1962, de Tullio Ascarelli)' *Revista de Direito Mercantil Industrial, Economico e Financeiro*, no 103, 87-100 (1996).

[8] J. Dach, 'Reviewed work: *Studi Giuridici Sulla Moneta* by T. Ascarelli (dott. A. Giuffrè: Milano, 1952)' 2 *The American Journal of Comparative Law*, 550-552 (Autumn, 1953), describing Ascarelli as one of the few in the international scene, 'who have published comprehensive works dealing with the whole body of laws relating to money'. The book the said review refers to 'is a collection of essays published between 1923 and 1951, some of them taken from his *La Moneta, Considerazioni di Diritto Privato* (Padova, 1928), which have become classics.'; P.J. Eder, 'Reviewed Works: *Lezioni di Diritto Commerciale. Introduzione* by T. Ascarelli; *Saggi di Diritto Commerciale* by T. Ascarelli; *Principes de Droit Commercial* by J. van Ryn' 4 *The American Journal of Comparative Law*, 280-284 (Spring, 1955), where Ascarelli's writings are praised and the common law lawyer's fondness for Italian law, which opted to unify civil and commercial law (unlike Belgian law of the period, described by van Ryn), comes to light. For reviews in German, see: F.A. Mann, 'Reviewed Work: *Obbligazioni Pecuniarie (Geldschulden) (Artt. 1277–1284), Commentario del Codice Civile a cura di Antonio Scialoja e Giuseppe Branca. Nicola Zanichelli, Bologna, und Soc. Ed. del Foro Italiano* by Tullio Ascarelli' *Zeitschrift für ausländisches und internationales Privatrecht* 25. Jahrg., H. 2, 343-346 (1960); J. Bärmann, 'Reviewed Work: *Problemi Giuridici, 2 Bände* by Tullio Ascarelli' *Archiv für die civilistische Praxis* 161. Bd., H. 5, 470-474 (1962); the review by A. Tunc, 'Tullio Ascarelli.—Problemi giuridici (Problèmes juridiques), Milan, A. Giuffrè' *Revue internationale de droit comparé*, vol 13, no 2, 393-394 (April-June, 1961).

promoting the unification of law at an international level,[9] is equally well-known. He obtained honorary degrees from several foreign universities, such as the National University of Brazil in Rio de Janeiro, and the Universities of São Paulo Porto Alegre, Santiago de Chile and Brussels[10] and, if he had not died, also from the University of Chicago and the Sorbonne in Paris.

Of particular relevance is Ascarelli's portrait made by Gino Gorla in the *American Journal of Comparative Law*.[11] Ferdinand Stone recalled it with empathy in a short yet incisive page *in memoriam* published in the *Tulane Law Review*,[12] of which Ascarelli was a contributing editor for some years. André Tunc, too, dedicated an article to his memory: it appeared in the *Revue internationale de droit comparé*, to his memory.[13]

He was an eclectic, broad-spectrum academic, 'a prolific writer', but above all 'a man richly endowed with initiative, an animator of ideas, the inspiration of pupils and friends'.[14]

II. The Centrality of the Theory of Legal Interpretation: Historical-critical Anti-formalism and the 'Revolt' against the 'Folklore' of the 'Old Italian Style'

The key issues of Ascarelli's thinking are to be found in his studies

[9] He was a member of the Society for International Law: F. Ferrara, 'Tullio Ascarelli' *Rivista di diritto civile*, I, 113, 114 (1960); as regards his involvement in movements for the unification of law, H. Cãmara, 'Inter-America Legislative Unification of Bills of Exchange and Promissory Notes' 11 *New York Law Forum*, 503, 504-505 and 514-515 (1965); International Association Rep. Conf., 237, 341 (1934); above all see his speech documented in '*1959 Unification du Droit*', 393, 436, 469, 471, 474, 499 (1959).

[10] M. Stella Richter Jr, 'Ascarelli studente' *Rivista delle Società*, 1237, 1256, fn 60 (2009) (also referring to G. Osti, *Commemorazione di Tullio Ascarelli* (Bologna, 1960), 5).

[11] G. Gorla, 'In Memoriam. Tullio Ascarelli' 9 *American Journal of Comparative Law*, 328, 332-333 (1960).

[12] F. Stone, 'In Memoriam' 35 *Tulane Law Review*, 1 (1960-61).

[13] A. Tunc, 'Nécrologie: Tullio Ascarelli' *Revue internationale de droit comparé*, vol 12, 238-240 (January-March, 1960); also M. Broseta, 'Tullio Ascarelli' *Revista de derecho mercantil*, 97-102 (1960).

[14] G. Gorla, n 11 above, 332; the description is also cited by F. Stone, n 12 above, 1.

of the theory of interpretation, closely related to a vision of law and the legal method, rooted in history and comparison with other legal systems, including, even if not exclusively, those of common law. These issues represent a kind of leitmotiv of his works[15] and some emblematic examples can be found herein.

The need to go 'beyond legal concepts', the ongoing 'quest of value judgments', the awareness that interpreting law is 'a creative and not simply a declarative activity'[16] come to light in 'Antigone and Portia'.

The latter statement, shared in the Italian context with Calamandrei[17] inter alia, actually finds its original, if not more complete, position in the method gradually constructed by Ascarelli, linked with a clear, complex, yet perfectible framework. In an attempt to simplify, these are some of the guidelines of his method: a) centrality of interpretation and application insofar as an internal component of the necessary development of law; b) creativity of interpretation in the 'continuity' with the pre-established legal system; c) historicisation and typification of the interpretative process according to the dynamic and broad-spectrum socio-economic reality (historical-evolutive and pragmatic approach); d) centrality of the interpreter's appraisal and *reasonable* use of legal argumentation, also for the purpose of self-control and external control (democratic) of the results of interpreting.

[15] M. Meroni, *La teoria dell'interpretazione di Tullio Ascarelli* (Milano: Giuffrè, 1989); as well as, F. Casa, *Tullio Ascarelli. Dell'interpretazione giuridica tra positivismo e idealismo* (Napoli: Edizioni Scientifiche Italiane, 1999); M. Reale, 'La teoria dell'interpretazione nel pensiero di Tullio Ascarelli' *Rivista internazionale di filosofia del diritto*, 231-246 (1983). Ascarelli's legal hermeneutics were diffused in Brazil firstly thanks to his *Problemas das Sociedades Anônimas e Direito Comparado* (1945) n 6 above, with specific reference to 'A idéia do Codigo no direito privato e a funçao da interpretaçao', subsequently translated into Italian 'L'idea di codice nel diritto privato e la funzione dell'interpretazione', in T. Ascarelli, *Saggi giuridici* (Milano: Dott. A. Giuffrè, 1949), 41-81; recently E.R. Grau, 'Ascarelli, a interpretação, o texto e a norma', in A. Junqueira de Azevedo, H.T. Tôrres, and P. Carbone eds, n 7 above, 33-40.

[16] G. Gorla, n 11 above, 333.

[17] J.H. Merryman, 'The Italian Style: III Interpretation' 18 *Stanford Law Review*, 583 (1965-66), comparing the role of Ascarelli and of Calamandrei. Cf also the following n 54.

Throughout his early writings,[18] there was actually a clear separation between the jurist's exegetic-dogmatic viewpoint and the historical-philosophical one. Thus the creative function of the interpreter and the openness of the legal system can only be justified from the latter perspective. Eventually such initial 'dual truth'[19] was progressively abandoned with great intellectual honesty: a change of perspective that is clearly outlined in the essay translated herein. This can also be seen by comparing the first version of the essay with the last,[20] through a philological analysis.

The evolution of Ascarelli's thinking – as far as the complexity and the unity of the legal experience is concerned – originate from his background in commercial law, with its attention to empirical data,[21] and from the perceived inadequacy of codified law (and its traditional legal models) as regards an industrial, mass production society. Furthermore they derive from the in-depth examination of other legal systems.

By immersing himself in other juridical environments and their history, the tireless 'legal traveller'[22] learns and takes on board ideas

[18] T. Ascarelli, 'Il problema delle lacune e l'art. 3 disp. prel. cod. civ. (1865) nel diritto privato' *Archivio giuridico Filippo Serafini*, 235-279 (1925), then in Id, *Studi di diritto comparato e in tema di interpretazione* (Milano: Giuffrè, 1952), 209-246; Id, 'Recensione a Marcel de Gallaix, La réforme du code civil autrichien' *Rivista internazionale di filosofia del diritto*, 651, 652 (1925).

[19] 'Dual truth' is already mentioned in T. Ascarelli, 'Contrasto di soluzioni e divario di metodologie' (1953), then in Id, *Saggi di diritto commerciale* (Milano: Giuffrè, 1955), 527, 564 (referring to his first essay, focusing on *lacunae* of legal order: see n 18 above). The change of approach is highlighted by: L. Caiani, 'Tullio Ascarelli e il problema del metodo', in Id, *La filosofia dei giuristi italiani* (Padova: Cedam, 1955), 143; M. Meroni, n 15 above, 162; N. Bobbio, n 5 above, XCVIII.

[20] Cf T. Ascarelli, 'Antigone e Porzia' (called DOC C) n 4 above, 116.

[21] We refer also to the influence of Cesare Vivante (a scholar of commercial law and teacher of Ascarelli) who taught the centrality of the 'nature of things' through to the extreme consequence of considering it as a source of law: A. Asquini, 'Il pensiero giuridico di Tullio Ascarelli' and G. Ferri, 'Il pensiero giuridico di Tullio Ascarelli', in VVAA, *Studi in memoria di Tullio Ascarelli* n 5 above, respectively LXXIII-LXXXIV and CXLV; as regards the critical debate that arose in Italy from said approach, N. Bobbio, 'La natura delle cose nella dottrina italiana. Appendice B', in Id, *Giusnaturalismo e positivismo* (Milano: Edizioni Comunità, 1975), 225-238; T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 82; and Id, 'Prefazione', in Id, *Studi di diritto comparato* n 18 above, XX.

[22] According to the self-definition voiced on numerous occasions by Ascarelli

from many foreign authors (including Wendell Holmes, Benjamin Cardozo, Roscoe Pound, the method of François Geny,[23] and Brazilian literature itself which already made a clear distinction between *ius* and *lex*). He then inserts them into the Italian context through numerous works on the theory of legal interpretation that are perhaps asystematic from a topographical point of view, but, at the same time, coherently connected one with the other. And this is when the apparent dichotomy of evaluative perspectives joins together in the man-jurist, who could not help being tied to the past and projected towards the future, in accordance with a never-ending research process that failed to reach completion because it is always historicised.

The result is acknowledgement of the interpreter's creative function. Such an affirmation is more or less an acquired fact in today's legal culture even if debate is still rife with regard to the levels of creativity and ways in which the interpreter's creative function can be performed.[24] Quite natural in other experiences (such as common law),[25] this fact was not so easily acceptable for the Italian jurist in the post-World War II years. A refined American academic, John Henry Merryman clearly grasped this, considering Ascarelli as one of the exponents of a 'new Italian style' arising from the 'revolt against formalism'.[26] This revolt was indeed an expression of the crisis of law

himself, and emblematic of the fight against legal provincialism and of openness to the spatial and not just temporal complexity of the legal experience, deeply linked to the sociability of law: P. Grossi, n 5 above, 450-453 and 465.

[23] P. Costa, 'L'interpretazione della legge: François Gény e la cultura giuridica italiana fra Ottocento e Novecento' XX *Quaderni fiorentini*, 367-495 (1991).

[24] As M. Cappelletti urged in his *Giudici legislatori? Studio dedicato alla memoria di Tullio Ascarelli e Alessandro Pekelis* (Milano: Dott. A. Giuffrè, 1984), 10, 63-65.

[25] P.J. Eder, n 8 above, 281 referring to Ascarelli's article on 'Judicial Interpretation and the Study of Comparative Law' contained in his *Saggi giuridici* n 15 above. On the other hand, the affinity with American realism is highlighted by many: M. Reale, n 15 above, 235; and, specifically J.H. Merryman, n 17 above, 600, who, however, does not forget to underline Ascarelli's depth of thought and its universal importance at least as regards the various civil law systems.

[26] The expression, as is well known, comes from M.G. White, *Social Thought in America: The Revolt against Formalism* (New York: Viking Press, 1949); it was adopted within the Italian context by Norberto Bobbio who included various tendencies through this symbolic locution: '(1) the critique of legal positivism and

which jurists were called upon to deal with, and of a need for political, cultural and legal transformation, closely linked to the new values of the Italian Constitution.

Ascarelli's position was anti-formalist, not so much moderate as critical, fighting against that 'folklore' of suppositions so obstinately rooted in the Italian culture.[27] Indeed, he describes himself as a heretic, unpopular with his peers.

During the years of Fascism, formalism had also had the unquestionable role of maintaining a basic democratic attitude within the Italian context. However, after the regime fell from power, formalism remained. This happened for fear that the social aims – forming the foundations of functionalist approaches – could go back to being bad aims, even if at that moment they had become democratic. And so, some continued to prefer the idea of a certain (apparently), complete and unchangeable legal system over the fallibility of human beings.[28] Irrational fear of the regime held onto the alleged rationality and infallibility of law. During those years, the legacy of the German pandectists and of codification found expression, respectively, in the absolutism of legal concepts, including that of legal order, and in the idolatry of positive law. Obsequious respect of the principle of separation of powers tended to relegate the judge's role to that of a mere *bouche de loi,* a mechanical and neutral executor of rules. In this way, the myth of certainty, completeness and immutability was expected to be incarnated.

Anarchic pressures linked to free law movements as well as

support of natural law; (2) the critique of the theory of law as a creation of the state in order to revive and to enlarge the institutional theory of law; (3) the critique of legalism seeking to open the way for reconsideration of the problem of the sources of law; (4) the critique of juristic conceptualism envisaging a less rigid form of interpretation and a jurisprudence more open to the empirical study of law.' (N. Bobbio, 'Trends in Italian Legal Theory' 8 *American Journal of Comparative Law*, 329, 330 (1959)).

[27] J.H. Merryman, n 17 above, 585; N. Bobbio, n 5 above, CXVI.

[28] At the time of fascism, formalism was used in Italy to conserve a basic democratic attitude, while the functionalist approach – in other words of a law attentive to social purposes which Roscoe Pound, among others, had promoted in the United States during the same period – came to be identified with the regime: G. Calabresi, 'Two Functions of Formalism: In Memory of Guido Tedeschi' 67 *University of Chicago Law Review*, 479, 482 (2000).

tendencies for a return to natural law[29] were set against such conservative rigidity. Furthermore, at the same time, reasonably progressive pressures emerged, aimed at optimising – in the light of history – the need to adapt legal-norms to the constantly changing economic and social situation[30] (and to the correlated conflicts of interest).[31] Of particular relevance in this context was the close connection with the advent of constitutional principles, technically posthumous to the Italian Civil Code.[32] Indeed their subversive and problematic power,[33] insofar as a precondition of the whole legal order, was understood perfectly by Ascarelli.

In this way the theory of interpretation flourishes as the main, if

[29] F. Carnelutti, 'L'antinomia del diritto naturale' *Rivista di diritto processuale,* 511-525 (1959); but above all Id, 'Bilancio del positivismo giuridico' *Rivista trimestrale di diritto pubblico*, 288-299 (1951).

[30] T. Ascarelli, 'Funzioni economiche e istituti giuridici nella tecnica dell'interpretazione', in Id, *Studi di diritto comparato* n 18 above, 55-98, which reproduces a lesson held at São Paolo University in 1947; Id, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 69-111; for an analysis of the transformation of legal institutions through contractual practice Id, *Studi in tema di contratti* (Milano: Giuffrè, 1952).

[31] It is useful also to note the affirmation during this time in Italy of *Interessenjurisprudenz* (as a criticism of the rigidity of *Begriffsjurisprudenz*) in order to implement an axiological, teleological and evolutive interpretation (even if not creative). This hermeneutical legal approach was represented firstly by another renowned jurist: Emilio Betti (J.H. Merryman, n 17 above, 597-598; E. Betti, 'Hermeneutics as the general methodology of the Geisteswissenschaften', in G.L. Ormiston and A.D. Schrift eds, *The Hermeneutic Tradition: From Ast to Ricoeur* (Albany, New York: State University of New York Press, 1990), 159-197).

[32] The Italian Civil Code dates from 1942. The Constitution came into effect in 1948; the Italian Constitutional Court started its judicial activity on 5 June 1956. For a commendable systematic reinterpretation of all the institutions of Italian civil law in the light of constitutional principles: P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006); Id, 'Norme costituzionali e rapporti di diritto civile' *Rassegna di diritto civile*, 95-112 (1980), now in English 'Constitutional Norms and Civil Law Relations' 1 *The Italian Law Journal*, 17-49 (2015).

[33] T. Ascarelli, 'Processo e democrazia', in Id, *Problemi giuridici* n 4 above, 23; Id, 'Un commentario alla costituzione' (1951), in Id, *Studi di diritto comparato* n 18 above, 307-311; Id, 'L'idea di codice nel diritto privato e la funzione dell'interpretazione', in Id, *Saggi giuridici* n 15 above, 46 ff; already in the first essay on the theory of interpretation, Id, 'Il problema delle lacune e l'art. 3 disp. prel. cod. civ. (1865) nel diritto privato', in Id, *Studi di diritto comparato* n 18 above, 212-215.

not the only, instrument able to reconnect the jurists' role to history as well as to the economic, social and even political reality.

III. 'Ongoing Creativity' between Idealistic Historicism and 'Legal Concretion' of Law as a Complex Experience

Within the described context, Ascarelli's peculiarity is his legal historicism which borrows from the neo-idealism of Benedetto Croce.[34] This evaluative viewpoint enables him to distance himself from a variety of approaches such as jus naturalism (excess of transcendence), legal positivism (excess of rationalism), sociological realism (excess of empiricism) and free law movement[35] (excess of intuitionism and irrationality). But above all, historicism represents the basis for justifying and promoting that legal concretion movement[36] aimed at an understanding of the phenomenon of law as a composite 'experience' and as a 'socio-dynamic' unity, irreducible to only one of its founding elements and inserted within the complexity of law and society.

On these bases, he reminds us that the interpreter's work is not just declarative, but creative, not only in the macroscopic hypothesis of '*lacunae*' or in the presence of indeterminate concepts (or standards of conduct, which he defines as 'windows on the legal order'),[37] but always in relation to all normative texts. Law provisions are never clear, unless upon completion of the whole interpretative process.

[34] The point is largely shared in literature. It is Ascarelli himself who constantly refers to Croce's historicism (eg T. Ascarelli, 'Contrasto di soluzioni e divario di metodologie' (1953), in Id, *Saggi di diritto commerciale* n 19 above, 527, 564) as well as the readings of Giovanni Gentile: P. Grossi, n 5 above, 477-480 (and fn 117). For a memorable work on the historicism of Benedetto Croce cf A. De Gennaro, *Crocianesimo e cultura giuridica italiana* (Milano: Giuffrè, 1974).

[35] From a sociological viewpoint, S. Andrini, 'Percezione sociologica e cultura giuridica: Tullio Ascarelli' *Sociologia*, 34-40, especially 37 (2012).

[36] M. Reale, n 15 above, 237 according to which the dialectic between legal structures and real functions – which fuelled the following philosophical and legal debate – was clarified with great perspicacity by Ascarelli, already in the 1940s.

[37] Recalling the definition of Vittorio Polacco, T. Ascarelli, 'L'idea di codice nel diritto privato e la funzione dell'interpretazione', in Id, *Saggi giuridici* n 15 above, 65.

Interpretation goes beyond the declarative moment 'because otherwise, the very possibility of offering a solution for any case would fail'.[38] It renews the historically-established norm and ensures the perennial vitality and modernity of law in the comparison between facts and values, legal structures and their real economic functions.[39] Therefore, the very historicity of law is based on the creativity of interpretation.

Law, on the other hand, lives in concrete application. The norm's very 'positivity' lies in concrete application (a circumstance that cannot be separated from interpretation); the norm – insofar as abstract and issued at a different time than its practical implementation – cannot contain within it the multiplicity of real cases. Hence, still from a historical viewpoint, the necessary role of the interpreter.

Hence also the centrality of the comparison between legal systems and of the comparative reasoning itself: because it is by looking outwards that one truly understands one's own identity and fosters a virtuous process of knowledge, growth and improvement.[40] Comparative studies elude isolation and the autopoietic self-referentiality of national laws; they represent an antidote to the dangers (and the deceptions) of provincialism,[41] supporting the selection of man's problems without denying the characteristics of legal systems and their differing responses, yet stimulating the quest for the best response or relativising the response given within a specific legal system. Another phase of historicity which is both endogenous and exogenous, in time and in space.

If application is interpretation and, hence, interpretation

[38] T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 71.

[39] Ibid 73.

[40] See the various essays collected in T. Ascarelli, *Studi di diritto comparato* n 18 above, specifically 3-98, 163-208 (widely quoted by J. Puig Brutau, 'Realism in Comparative Law' 3 *American Journal of Comparative Law*, 42, 43-44 (and fns 4, 5, 6), 48-49 (1954); and by E. Genzmer, 'A Civil Lawyer's Critical Views on Comparative Legal History' *American Journal of Comparative Law*, 87, 89 (1966-67)); and T. Ascarelli, 'Interpretazione del diritto e studi del diritto comparato', in Id, *Saggi di diritto commerciale* n 19 above, 481-519.

[41] F. Messineo, 'Tullio Ascarelli', in VVAA, *Studi in memoria di Tullio Ascarelli* n 5 above, LXI.

contributes to the foundation of legal order, interpretation always implies a choice among various possibilities and, consequently, not only an acknowledgement but also a decision, inevitably influenced by the interpreter's sensibility, by his axiological, personal coefficient.

Therefore, legal hermeneutics cannot be neutral, agnostic; rather, it is evaluative and affected by the interpreter's concepts (once again inserted into the specific historical socio-economic and political setting) from the beginning, when the selection of the preconditions of legal reasoning is set out. It is influenced or can be influenced by the very '*communis opinio*' in force at the time of interpretation.

It is necessary – Ascarelli warned – that complete awareness of all of this is acquired. Indeed, fitting interpretation into the tangles of sheer reconstruction and logical deduction means deresponsibilising legal reasoning and concealing paradoxically undeclared 'premises', that are never 'mathematical', never certain or defined a priori.

Nevertheless, interpretation must consider two opposing needs:[42] on the one hand, the 'certainty of law' expressed by the pre-established juridical system (the interpretation's declarative nature stigmatises the requisite of certainty which is fundamental and is an undeniable guarantee of legality, freedom, equality and security of civil life); on the other, the need for constant renewal of legislation, its amendment and even transformation according to the changing reality, to historically subsequent cases – in short, in relation to the flow of life.

Balancing rigidity and flexibility attributes a different essence[43] to the 'declarative' and 'creative' nature of interpretation. One cannot result in fixity, but only in stability; the other cannot overflow into arbitrariness or decisionism. The contrast between the two aspects of hermeneutics joins together in what we could define 'continuing creativity': ie an ongoing action by the interpreter who complies with tradition and, at the same time, projects the legal order into the future and into the concreteness of always new and diversified human interests and facts, into 'living law'.[44]

[42] T. Ascarelli, 'L'idea di codice nel diritto privato e la funzione dell'interpretazione', in Id, *Saggi giuridici* n 15 above, 61-79.

[43] As regards the various meanings of creativity in Ascarelli's thinking, cf M. Meroni, n 15 above, 274-282.

[44] M. Hertogh ed, *Living Law: Reconsidering Eugen Ehrlich* (Oxford: Hart

Continuity can also be verified through reasonable reasoning (not only logical-rhetorical) which uses the legal text as a starting point for formulating a 'socially applicable' norm. In any case, the interpreter's acceptance of this or that criterion of argumentation, of this or that qualification, of this or that hierarchy, at a given time, in a given place, is part of 'a real constitutional structure' and of the tendencies and values that identify themselves in this.[45]

The role of the doctrine itself (in the Italian sense of the term) is not separate from that of the interpreter-judge; indeed, very often the interpretation and application of law is built upon the categories formulated by scholars. Nevertheless, far from presenting themselves as *sub specie aeternitatis*,[46] these legal models are constantly

Publishing, 2009); D. Nelken, 'Eugen Ehrlich, Living Law, and Plural Legalities' 9 *Theoretical Inquiries in Law*, 443 (2008).

[45] Adoption of the reasonable and not just rational and logical-demonstrative reasoning of Chaim Perelman emerges (T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 87-88, fn 19, 91 and fn 22), but above all Ascarelli's awareness of the connection between theory of legal interpretation, theory of the sources of law and the constitutional system of the production of norms (which characterise each country during various historical periods: Id, 'Giurisprudenza costituzionale e teoria dell'interpretazione', in Id, *Problemi giuridici* n 4 above, 157).

[46] T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 75-77 (and fn 7), 79 (and fn 10). Legal categories must be inserted into their real economic-social function; they must be relativised and adapted to the flow of life and history within the environment and system actually in force. The jurist cannot do without them because they steer – just like 'vectors' that translate general concepts – interpretation. Unlike categories such as *regulae juris* of Paulian memory. Indeed the latter are simple formulas summarising sets of rules, useful for educational purposes but of no use as regards interpretation (for a real application of this approach and for further examples, cf T. Ascarelli, 'Considerazioni in tema di personalità giuridica' and 'Sul concetto di titolo di credito', both republished in Id, *Saggi di diritto commerciale* n 19 above, respectively 130-217, and 567-590). As regards the following debate on legal concepts and their functions among Italian scholars cf R. Orestano, *Introduzione allo studio del diritto romano* (Bologna: Il Mulino, 1987), 11; N. Lipari, *Le categorie del diritto civile* (Milano: Giuffrè, 2013); F. Macario and M. Lobuono, *Il diritto civile nel pensiero dei giuristi. Un itinerario storico e metodologico per l'insegnamento* (Padova: Cedam, 2010); G. Perlingieri, 'Venticinque anni della Rassegna di diritto civile e la «polemica sui concetti giuridici». Crisi e ridefinizione delle categorie', in P. Perlingieri ed, *Temi e problemi della civilistica contemporanea (Atti del Convegno per i Venticinque anni della Rassegna di diritto civile, 16-18 dicembre 2004)* (Napoli: Edizioni Scientifiche Italiane, 2005), 543-575.

updated in view of the actual situation they are applied to. This occurs in particular for those categories that reconstruct a type of social reality in relation to legislation: in other words, that must be based on reality. Even a fairly simple text – 'open the door' – imposes a similar typological reconstruction: 'open=open wide, half-close and so forth; open in person; have someone open'. It must be performed 'in keeping with the law provisions (open=immediately; in five minutes; whatever happens; etc.)' and 'in keeping with the sanction and with the *ratio* of proposition' and vice versa, always taking into account the meaning of each term within the overall discourse.[47] Reality changes and, consequently, its processing and re-processing by scholars and by judges changes.

Therefore the interpreter – be he judge or academic, each with his own separate tasks – converges into the complex figure of the jurist who updates, amends and, hence, reformulates and recreates the given *corpus juris* (the seed) through a never-ending hermeneutical process (the plant).

This is why the history of 'judge-made law' and the history of 'doctrine' merge in the unity of the history of law, viewed as a 'legal science': interpretation and application are essential parts of the development of law and internal to this.

Even historical-comparative analysis supports these affirmations: indeed it shows us that the role of interpreter in common law and in civil law is not so distant after all. The pre-established starting points (respectively the case law precedents with the binding *stare decisis*, and the *corpus iuris*)[48] and their relative histories and traditions are

[47] The example is taken from T. Ascarelli, 'Giurisprudenza costituzionale e teoria dell'interpretazione', in Id, *Problemi giuridici* n 4 above, 144, fn 8; it is recalled also by N. Bobbio, n 5 above, CXXVI.

[48] T. Ascarelli, 'Prefazione', in Id, *Studi di diritto comparato* n 18 above, IX-LIII and Id, 'Interpretazione del diritto e studio del diritto comparato' (1954), in Id, *Saggi di diritto commerciale* n 19 above, 481-526 highlighting the convergence between codified laws of Roman origin (where the code was surpassed by special legislation) and common law systems (where the progressive importance of legislation with regard to legal precedents emerged). The convergence was marked by the gradual affirmation of an industrial mass production, also in continental Europe, similarly to what had been happening for some time in England and above all in the United States. It was also marked by the techniques of interpretation, increasingly focused, in both legal families, on recognition of the interpreter's creative role. Cf also Id,

different, but the nature of interpretation is the same. In both legal families, it is necessary to interpret, combining certainty and the ongoing creation of law, in the constant, dynamic comparison with real facts and with the environment in which the hermeneutic action is placed.

There is more to Ascarelli's thinking: the centrality of a kind of *typification* of the very hermeneutic process. If the lawmaker and legal scholarship tend to typify (ie to create evaluating models) for the purpose of classifying, the same holds true for the interpreter-judge in two ways: on the one hand, as an understanding and a typological reconstruction of reality in the previously explained meaning; on the other, as a typification of concrete cases. The latter passage is all-important: indeed, the real case always represents a typical case because the principle applied to it is also a typical one.[49] Each case has to be considered schematically and abstractly, as having typical elements and, hence, reducible to predictable schemes that can possibly be repeated, also in future circumstances.

This type of schematisation is needed to compare cases, and for the use of the precedent (even if lacking in technically binding value in Italy and in continental systems) in subsequent trials, so as to guarantee equality and uniformity when applying the law. Nevertheless, it remains understood that typifications are always surpassed in history, yet they are always necessary in order to prevent 'easy appeals of an equitable decisionism'[50] and to implement creativity of interpretation in keeping with tradition (the *corpus iuris* insofar as ultimately composed of legal norms, but also judicial decisions).

'Certezza del diritto e autonomia delle parti', in Id, *Problemi giuridici* n 4 above, 117, fn 4; A. Torrente, 'Il giudice e il diritto', in VVAA, *Studi in memoria di Ascarelli*, IV, (Milano: Giuffrè, 1969), 2313-2325 (with reference to Italian case law).

[49] M. Reale, n 15 above, 432-433. Ascarelli's idea is borrowed in part from the comparison with English law (P.S. James, *Introduction to English Law* (London: Butterworth, 1959), 13) but expresses and combines with the well-known tendency to create 'types', a characteristic of Italian legal tradition.

[50] T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 78.

IV. Antigone *vs* Portia? Heroic Justice *vs* Interpretative Artifice: From Conflict to Reasonable and Perennial Balancing

The dialogues between Antigone and Creon on the one hand, and Portia and Shylock on the other, symbolise and stigmatise the interpreter-jurist's tension when interpreting and applying norms. The use of Sophocles' tragedy and Shakespeare's Merchant of Venice,[51] known all the world over, is the poetic means for tackling, at a transnational level, the deeper questions of legal thinking, the contrast which inspires it and, at the same time, justifies its ongoing evolution. The reference to literary works is an expedient of universal communication, which casts a bridge – free from the characteristics of each legal order – between continental jurists and common law lawyers.

The cultural suggestions, imbued with humanism, most probably experienced by Ascarelli, were numerous at that time. One need only consider the essay by Giovanni Brunetti '*Il fatto illecito e il fatto immorale nel diritto positivo*' from 1906[52] which used the Merchant of Venice in its study on relations between positive law, morals and legal interpretation, reproducing the debate between Rudolf von Jhering and Josef Kohler (expressly referred to in Ascarelli's essay)

[51] Recalled on several occasions in Ascarelli's writings: eg T. Ascarelli, 'Scienza a professione' *Foro italiano*, 86, 89 (1956); Id, 'Certezza del diritto e autonomia delle parti', in Id, *Problemi giuridici* n 4 above, 125-126; Id, 'Interpretazione e applicazione della legge (Lettera al prof. Carnelutti)' (1958), in Id, *Problemi giuridici* n 4 above, 156.

[52] G. Brunetti, *Il delitto civile* (Firenze: B. Seeber, 1906), 213-263. Dating from the same period, mention can be made of: A. Ascoli and C. Levi, 'Il diritto privato nel teatro contemporaneo francese italiano' *Rivista di diritto civile*, 145-203 (1914); P. Calamandrei, 'Le lettere e il processo civile' *Rivista di diritto processuale civile*, I, 202-204 (1924); later A. D'Amato, *La Letteratura e la vita del diritto* (Milano: Ubezzi & Dones, 1936). Without entering into the vast cultural itinerary of Italian Law and Literature, see: generally, A. Sansone, *Diritto e letteratura. Un'introduzione generale* (Milano: Giuffrè, 2001); the remarkable essay, based on Kafka's 'Before the Law', written by G. Teubner, 'Das Recht vor seinem Gesetz. Zur (Un-)Möglichkeit kollektiver Selbstreflexion der Rechtsmoderne', in S. Keller and S. Wiprächtiger eds, *Recht zwischen Dogmatik und Theorie: Marc Amstutz zum 50. Geburtstag* (Baden-Baden: Nomos Verlag, 2012), 277-296; and the stimulating reflection by P. Femia, 'Benito Cereno in Bucovina', in A. Febbrajo and F. Gambino eds, *Il diritto frammentato* (Milano: Giuffrè, 2013), 23-116.

regarding Portia's judgment, as dealt with by Emil Steinbach. Or looking overseas, the article by Benjamin Cardozo entitled 'Law and Literature' in 1924-25[53] where literary representation was already viewed as a means for understanding the legal experience, the 'law in action' which Ascarelli held so dear.

As regards the figure of Antigone, reference to it was, in a certain sense, fairly popular[54] in Italy at that time. In '*Le Leggi di Antigone*' Piero Calamandrei evoked Sophocles' heroine in order to justify the Nuremberg sentences against Nazi criminals. Subsequently, in his closing argument to Danilo Dolci's trial, he used the same reference in an evolutive and constitutionally-oriented perspective, in order to defend the right to work against public order measures typical of the (past) Fascist period.

[53] B. Cardozo, 'Law and Literature', in M.E. Hall ed, *Selected Writings of Benjamin Nathan Cardozo* (New York: Fallon, 1947), 339 (first version in 14 *The Yale Review*, 699 (1924-25)). This essay is considered to be one of the first in American Law and Literature together with J.H. Wigmore, 'A List of One Hundred Legal Novels' 17 *Illinois Law Review*, 26 (1922-23) (original version, in the same journal: 574 (1908)). Both were authors familiar to Ascarelli who, nevertheless, was mainly inspired by the work from the end of the nineteenth century on the Merchant of Venice by J. Kohler, *Shakespeare vor dem Forum der Jurisprudenz* (1883) (Berlin, 2nd ed, 1919).

[54] P. Calamandrei, 'Le Leggi di Antigone' *Il Ponte* (1946), now in Id, *Costituzione e leggi di Antigone. Scritti e discorsi politici* (Scandicci: La Nuova Italia, 1996), 17; also Id, 'Antigone e la donna giudice' *Il Ponte*, 257-258 (1953) and Id, 'In difesa di Danilo Dolci' *Il Ponte*, 529-544 (1956). The latter essay is the shorthand copy of the closing argument delivered on 30 March 1956 in front of the Criminal Court of Palermo. Here the 'unwritten' laws of Antigone are expressly identified by Calamandrei in the Constitution which defends the right to work and hence justifies – if correctly applied by the judges – Danilo Dolci's act. (He was arrested for having promoted a countdown strike among the unemployed in Sicily. The demonstration consisted in persuading the unemployed to start works to repair an old disused municipal road. But this action violated the public safety act dating from the Fascist period: ie the unjust law opposing the justice advocated by Danilo Dolci and founded on the new values of the Italian Constitution). Two phases can be identified in Piero Calamandrei's thinking: a first phase of strict legality which limited the judge's role to a mere executor of the law; then, a second – historically related to the fall of Fascism and the advent of the Italian Constitution – where the step is made to a wider legality based on the principles of the constitution and on the need for an evolutive interpretation of the whole system of positive rules in light of the new values: G. Pecora, *Uomini della democrazia* (Napoli: Edizioni Scientifiche Italiane, 2007), 85-201.

This is not the place to explore the vast field of relations between Law and Literature. Some may consider the aforementioned writings – and Ascarelli's essay itself[55] – as an example of a preliminary phase of this movement. An early, more neutral phase of 'Law *in* Literature', of utmost importance for a jurist's humanist background, for his perception of the major issues of legal debate, and, above all, as mentioned, for transversal, and to a certain extent, external communication. It should be pointed out, however, that he was always so careful as to avoid extreme contaminations[56] or interferences such as attributing to literary texts an 'operational' and constructive function, including in relation to legal reasoning and/or vice versa.

Indeed, in Ascarelli's essay, the combination of the two theatrical works is by no means random. One completes the other: the metaphors express the problem of law from a historical viewpoint.[57]

[55] In this sense D.A. Skeel Jr, n 1 above, 921, 937.

[56] R.A. Posner, *Law and Literature: A Misunderstood Relation* (Cambridge MA: Harvard University Press, 1988), 91-101 and 111-112 (expressing doubts on Law and Literature movements, except for educational purposes, and reinterpreting the dialogue between Portia and Shylock on the one hand, and the figure of Antigone on the other, as expressions of the conflict between hypertechnical rules and equitable standards, between legalism and equity).

[57] The systematic crisis of law in the face of European needs can be resolved by a science, that legal one which is basically an applied and essentially hermeneutical science (V. Scalisi, 'Il nostro compito nella nuova Europa' *Europa e diritto privato*, 239 (2007)). The interpretation stimulates a debate able to identify an '*unitas*' in the persisting and ineradicable '*varietas*' of cultures and languages that characterise the various European countries. Therefore, the European '*ius commune*', is based on the work of jurists which consists in interpreting but is aimed at justice. This is the message of Ascarelli himself: '*El disfraz de Porzia, de doctor patavino, trae el hálito del nuevo derecho de juristas, el derecho común, que se extenderá por Europa como un reguero de pólvora salido de todas las universidades*.' (A. de Ávila Martel, n 2 above, 83). Tullio Ascarelli, attentive to the debates regarding the unification of law (with specific focus on 'Unification of the Bill of Exchange Law'), expressly stated – in his general report to the International Congress of Private Law in Rome in 1950 – that in order to make such a process 'real': it '*doit porter sur le droit et non sur le texte législatif. Elle doit être conduite d'un point de vue fonctionnel et non formel*' (*'L'unification du droit. Actes du Congrès international de droit privé (Rome Juillet 1950)*' (Rome: Unidroit, 1951), 297); this methodological directive had a major influence on the Commission's activities: A. Levi, 'Un complement pratique a l'Œuvre d'unification de la lettre de change internationale', in *1959 Unification du Droit*, 241-242 (1959). Cf also our n 9 above.

In a vision where legal order – as a complex, as well as unitary legal experience – is not a 'fact' but a 'process', there is no contrast between natural law (the emblem of justice) and positive law (the instrument of 'certainty') but, simply, an infinite and necessary dialectic, within a dynamic and procedural dimension.

Antigone and Creon are not in disagreement since their ways of reasoning are well argued: they are both bearers of values which present themselves eternally in the history of law. Many years later, Judge Posner[58] expresses this well, when he says that in his daily activity a judge cannot fail to take into account both reasons. Defending authority is one thing but it is also important to be able to recognise when authority should reach a compromise.

Ascarelli's reflection does not contain any acceptance of jus naturalism – which would be anti-historical – in contrast to positivism;[59] rather, one finds the ascertainment of the endless dialogue between the historically-established norm (valid, humanly approved and legitimate since it is an expression of sovereign authority and civic values: hence certain and provided with sanction) and its evaluation by the one who has to judge. Such evaluation

[58] R.A. Posner, 'Remarks on Law and Literature' 23 *Loyola University Law Journal*, 182-185, above all 193 (1992).

[59] In philosophical and western thinking, the contrast between Antigone and Creon is symbolically representative of the opposition between jus naturalism-metapositive law on the one hand, and legal positivism on the other, and also between validity and justice and between legalistic formalism and substantialism: F. Brezzi, 'Antigone e le leggi: diritto, etica e politica' *Rivista internazionale di filosofia del diritto*, 381, 395-396 (2014). As regards the complex relation between natural law and positive law in Italian literature, see the essays included in P. Sirena ed, *Oltre il «positivismo giuridico». In onore di Angelo Falzea* (Napoli: Edizioni Scientifiche Italiane, 2012). This old opposition seems to make no sense after the Italian Constitution in so far as all values, recalled by natural law, are now incorporated in its principles (ie the constitutional positivism by P. Perlingieri, 'La grande dicotomia «diritto positivo-diritto naturale»', in P. Sirena ed, just cited, 87-94; the perspective of D. Barbero was very different, *Studi di teoria generale del diritto* (Milano: Giuffrè, 1953), 40; F. Viola, 'Natural Law Theories in the Twentieth Century', available at https://www.academia.edu/10326359/Natural_Law_Theories_in_the_20th_Century (last visited 20 October 2015), 1-102, forthcoming in E. Pattaro and C. Roversi eds, *A Treatise of Legal Philosophy and General Jurisprudence*, vol 12*: Legal Philosophy in the Twentieth Century: The Civil Law World* (Amsterdam: Springer, 2016) (reconstructing the various Natural Law theories and the path towards a process of inclusion of natural law into positive law).

responds to the interpreter's conscience[60] (the ethical imperative of a non-transcendental yet 'inescapable' judgment) and is affected by the needs of social coexistence at the time of the interpretation. This appraisal is an inevitable component of the hermeneutic process and can, at times, impose a revolutionary act (Antigone's sacrifice).

One might ask: is this not perhaps the acknowledgement of the individual's ability to interpret on the basis of and in respect of justice? A deeply humanistic teaching that runs through Italian legal culture over the centuries?

And the dialogue presents itself again, ideally, between the two female figures of Antigone and Portia – two heroines also validated in Feminist legal theories – and between Portia and Shylock in the Merchant of Venice, in accordance with a consideration which greatly recalls Kohler's study of the work by Shakespeare.

There is no more suffering but only smiles. Portia (a woman, yet disguised as a man),[61] with her astuteness, does not deny the pact, or its validity, but goes beyond it using an interpretative artifice based on literal reasoning. The literal criterion is – but only pretextually – used by the doctor of law from Padua to achieve what is to be considered a just and equitable application of the norm (in terms of a socially-accepted norm)[62] in her conscience and in social

[60] The conflict between individual conscience (Antigone) and reason of state (Creon) is highlighted by F. Ost, *Raconter la loi. Aux source de l'imaginaire juridique* (Paris: Odile Jacob, 2004), translated into Italian by G. Viano Marogna, *Mosè, Eschilo, Sofocle. All'origine dell'immaginario giuridico* (Bologna: Il Mulino, 2007), 165. The tragedy is also recalled elsewhere to promote, from the pluralistic viewpoint of a multicultural society, the problems of conscience in the debate regarding the Muslim veil: Id, *Antigone voilée* (Bruxelles: Larcier, 2004).

[61] The disguise seems to represent the equality between man and woman which Ascarelli admired in American society as a 'phenomenon of a high level of civilisation'. Continental America is praised because it has 'no childhood', 'no myths and gods, no fairy tales; a wholly human continent and hence with no God; all made through tenacious, optimistic willpower': G. Auletta, 'Tullio Ascarelli' *Rivista delle società*, 493, 498-499 (1970) (recalling his thinking).

[62] As he explains in a touching letter addressed to Vittorio Scialoja, T. Ascarelli, 'Scienza e professione' *Foro Italiano*, 89 (1956). Therefore, it becomes clear how interpretation that rigidly complies with the norm, hence firstly literal interpretation, shows all its limits in the reasoning of Portia (and of Shylock himself). The letter of the norm (text) is a source of discord and not of certainty, given the several contexts of meaning and value: G. Zagreblesky, 'Sul giudizio di

assessment itself. And equity in Ascarelli's work – as confirmed by the historical evolutive study of Roman law and British law – does not represent justice in real cases. It means, instead, the affirmation of a new principle shared in the new socio-cultural environment, always in a perspective of continuity with tradition (*corpus juris*) that can be argued[63] by normalising, in Aristotelian fashion, the norm's typical (ie normal) scope in light of the abnormality of the case under examination.

Therefore, formalism finds in itself the weapon to outdo itself: the interpretation or better still 'the interpretative criterion' makes it possible to confirm the judge-interpreter's creative power in a no longer dramatic crescendo.

The norm is a historical entity: it becomes such, it only becomes 'positive' after its interpretation and application to a real case, taking into account all the factors affecting the historical process ('economic and ideal; of power and equilibrium').[64] Prior to interpretation there is just a text (or a behaviour), and it does not make a difference whether it is a contract or law provision:[65] what matters is the unitariness of legal hermeneutics, regardless of the diversity of its subject.

The jurist is an 'apprentice wizard'.[66] He cannot simply make texts explicit in accordance with the parameters of deductive logic; instead, he must show intuition and even 'fantasy', combine '*esprit de finesse*' and '*esprit de géometrie*'[67] for the purpose of making the

eguaglianza e di giustizia. A proposito del contributo di Livio Paladin' *Quaderni costituzionali/a. XXII*, 15-16 (2002).

[63] T. Ascarelli, 'Certezza del diritto e autonomia delle parti', in Id, *Problemi giuridici* n 4 above, 114 and 134, fn 17; as regards equity in his thinking, see Id, 'L'idea di codice nel diritto privato e la funzione dell'interpretazione', in Id, *Saggi giuridici* n 15 above, 63.

[64] T. Ascarelli, 'Certezza del diritto e autonomia delle parti', in Id, *Problemi giuridici* n 4 above, 116.

[65] As widely demonstrated by P. Perlingieri, n 32 above, 396; and M. Pennasilico, *Metodi e valori nell'interpretazione dei contratti. Per una ermeneutica contrattuale rinnovata* (Napoli: Edizioni Scientifiche Italiane, 2011).

[66] T. Ascarelli, 'Economia di massa e statistica giudiziaria' (1954), in Id, *Saggi di diritto commerciale* n 19 above, 526.

[67] T. Ascarelli, 'Funzioni economiche e istituti giuridici' (1946), in Id, *Saggi giuridici* n 15 above, 90; Id, L'idea di codice nel diritto privato e la funzione dell'interpretazione', in Id, *Saggi giuridici* n 15 above, 69 fn 107 (recalling the

abstract norm effective in relation to the specific characteristics of the real case, and of translating a 'need looked on as just into generally-applicable formulas'.[68]

By innovating and adapting legal provisions, by balancing tradition and change, interpretation creates not, or not only, with revolutionary action but, in the end, with 'reformist' wisdom. Nor does the reference to the dispute between the two rabbis of the Talmud,[69] at the end of the essay, mean evoking religious fundamentals, divinity and transcendence. The second rabbi says: 'the law has been given to men and will be interpreted in accordance with the opinion of the majority'. And God replies: 'my sons have defeated me'. The interpretation is not only human, but it is also embedded in the history made by man, who is the bearer of social beliefs (at times promoting them and at times opposing them) and of axiological values shared at the time of the interpretation and application of norms. This is the 'secularisation of law'.[70]

The tension is constant: between the norm[71] (in the meaning of

dichotomy of Pascal already applied to legal methodology in the French context by François Gény).

[68] T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 110; but also, Id, 'Prefazione', in Id, *Studi di diritto comparato* n 18 above, XLIII-XLVI.

[69] A. Choen, *Talmud* (1931), Italian translation by A. Toaf, *Il Talmud* (Roma-Bari: Laterza, 1999), 75 ff; for an alternative reconstruction of the dispute G. Teubner, *Il diritto come sistema autopoietico* (Milano: Giuffrè, 1996), 1. The same story is also evoked by A. Barak, *Purposive Interpretation in Law*, translated from Hebrew to English by S. Bashi (Princeton: Princeton University Press, 2005), 156-157. The aim is to show the centrality of the judge's creative role and, above all, the indisputable need for all texts (including sacred writings) to be interpreted in keeping with the meaning and circumstances the text has at the 'historical' moment of its real application. Moreover, said meaning 'is disconnected from the author's intent and may even conflict with it'. As is known, Aharon Barak considers it necessary to conjugate, when interpreting, 'the subjective purpose' (ie 'the subjective intent of the drafter at the time of drafting') with 'the objective purpose of the text' (ie the one which 'is determined at the time of the interpretation, and may well be very different from the actual subjective purpose of the author(s), or even from the objective purpose at a different point in time'): T.A. Balmer, 'Book Review: What's a Judge To Do' 18 *Yale Journal of Law & the Humanities*, 139, especially 145 and 146-147 (2006).

[70] T. Ascarelli, 'Processo e democrazia', in Id, *Problemi giuridici* n 4 above, 24, 27, 33.

[71] Within the Italian law tradition the term 'norm' means legal norm: eg N.

text) and its evaluation by the interpreter; between the text and the norm (viewed as the socially-accepted norm resulting from the hermeneutical process which adapts the text to the real situation and society); between the interpreted and applied norm (hence once again become text) and its subsequent interpretation and application to another case. Nevertheless, such tension can be harmonised, not by logic but by history, within that diachronic process of ongoing creation and 'conflicting concord'[72] that is democracy.

Each member of society – not only the man of law – participates, through interpretation, in this process with no more Manichaeic contrast between State and citizen, nor perhaps between man and State.[73]

V. An Ending without an End

Ascarelli concludes his life with a new start: discovering himself to be a philosopher without being just this, he puts forward the idea of a work about the leading scholars of comparative law.[74] He also proposes a series of works illustrating the history of legal thinking, starting with a study on Leibnitz and Hobbes[75] because, in their

Bobbio, n 26 above, 329-340. This holds true also for Tullio Ascarelli. Nevertheless, in his writings, depending on the context, 'norm' can signify both the text to be interpreted and the result of interpretation, while the term 'rule' generally refers to social norm. This ambiguity and complexity was perhaps wanted by the author. The terminology becomes clearer through a systematic and careful reading of his various essays about interpretation: specifically T. Ascarelli, 'Giurisprudenza costituzionale e teoria dell'interpretazione' (1957) in Id, *Problemi giuridici* n 4 above, 140, 158.

[72] T. Ascarelli, 'Processo e democrazia', in Id, *Problemi giuridici* n 4 above, 29.

[73] T. Ascarelli, 'Interpretazione e applicazione della legge (Lettera al prof. Carnelutti)', in Id, *Problemi giuridici* n 4 above, 156.

[74] K.H. Nadelmann, 'A Volume «Great Comparative Lawyers» and a «History of Comparative Law»', in VVAA, *Studi in memoria di Tullio Ascarelli* (Milano: Giuffrè, 1969), III, 1409.

[75] T. Ascarelli, 'Hobbes e Leibniz e la dogmatica giuridica', introduction to T. Hobbes, *A dialogue between a philosopher and a student of the Common Laws of England* – G.W. Leibniz, *Specimen quaestionum philosophicarum ex iure collectarum* (Milano: Giuffrè, 1960), 3-69. The work was reviewed by P. Stein, *Society of Public Teachers of Law*, 145-146 (1961); by E.C. Denninger, *Archiv für Rechts-und Sozialphilosophie*, vol 47, 429-432 (1961). It was translated into French by C. Ducouloux-Favard, with a preface by A. Tunc (Philosophie du droit, Paris:

diversity, they shared the quest for certainty in law. But for Ascarelli, this certainty is not a premise or a result, but an action conditioned by its historical period, an ongoing action that the interpreter's reasonable evaluation[76] helps create, maintaining critical sense through constant questioning. Because every jurist 'must find a value in law', 'justice in a formal legality'. This is the problem of the adjudication process and of the Constitution. This is the task of the interpreter and his responsibility.[77]

The dialectic in history and in the history of law never leads to ultimate unification, to universal synthesis of Hegelian memory, but it re-proposes itself again and again within the complexity and plurality of law, as applied to human action and by human action.

Perhaps, the tragedy of Antigone could not be expressed, unless by a noble man and jurist, creator of history and thinking, who suffered a great deal during his lifetime and who – incredibly – considered himself lucky because of this. His suffering is, however, compensated by his legacy.

Tocqueville said: there are men 'whom I live a little while every day'.[78] For Italian legal scholars or judges, and perhaps not only, Tullio Ascarelli is one of these men, or at least it would be worthwhile to consider him so.

Dalloz, 1966). This preface was, in turn, recently translated into Italian: D. Monda ed, available at http://bibliomanie.it/ricordo_tullio_ascarelli_andre_tunc_davide_monda.htm (no 39, May-August 2015) (last visited 20 October 2015).

[76] T. Ascarelli, 'Hobbes e Leibniz e la dogmatica giuridica' n 75 above, 67.

[77] T. Ascarelli, 'Processo e democrazia', in Id, *Problemi giuridici* n 4 above, 21.

[78] 'Correspondence of Alexis de Tocqueville and Louis de Kergorley', in Œ*uvres complètes*, t. XIII, 418 (Paris: Gallimard, 1977) referring to Montesquieu, Russeau and, not coincidently, to Pascal.

In Memoriam: Professor J.H. Merryman

Claudia Amodio*

This section of 'The Italian Law Journal' ends on a sad note.

John Henry Merryman, a long time Professor at the Stanford law faculty, an internationally renowned figure in comparative law, a path-breaking scholar in that he was, *inter alia*, the first common law trained lawyer to explore our legal system, passed away at the age of 95, on 3 August 2015.

Native of Portland, Oregon, Merryman joined the Stanford law faculty in 1953, became full Professor in 1960, and was named the Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law in 1971. Despite officially retiring in 1986, he continued teaching as a Professor emeritus until spring 2015.

Recipient of several honours throughout his career, including the American Society of Comparative Law's Lifetime Achievement Award, Merryman will be remembered for being, above all, a truly cosmopolitan scholar,[1] teaching in different countries, learning and writing about their laws.[2]

Throughout more than six decades of devotion to scholarship, he always seemed inspired by a tireless curiosity. More specifically, Merryman had a fascination with what he modestly called, in a thought-provoking essay entitled 'The Loneliness of the Comparative

* Assistant Professor of Comparative Law, University of Ferrara.

[1] While Merryman's view on 'why we should compare laws' is reflected in a certain number of statements throughout his work, the following is especially significant: 'Lawyers are professionally parochial, limited by their national legal system that stop at the border. Comparative law is our effort to be cosmopolitan'. Cf J.H. Merryman, 'The Loneliness of the Comparative Lawyer', in Id, *The Loneliness of the Comparative Lawyer And Other Essays in Foreign and Comparative Law* (The Hague–London–Boston: Kluwer Law International, 1999), 10.

[2] A list of his visiting professorships and honorary degrees would include an impressive number of countries, such as Austria, Chile, France, Germany, Greece, Mexico, and Italy.

Lawyer', an 'enfeebling introspection'.[3] Many comparativists would argue that asking himself difficult questions was actually one of his biggest strength.[4] Not only, indeed, is there an obvious merit in venturing into the unexplored depths of the self – and more generally, there is an healthy tendency in formulating difficult questions in explicit terms – but the empathy with which Merryman approached his many questions was never in detriment of the rigor which always animated his scientific endeavours.

Thus, to say Merryman had a gift for self-reflection and critical interrogation would be an understatement. Truly his scholarly contribution is outstanding, as evidenced by his impressive publications record and the innumerable times his work is quoted in the comparative law literature.

Merryman's keen interest in our legal system, the major product of which is the widely known series of three articles on 'The Italian Style' (with the subtitles 'Doctrine', 'Law', 'Interpretation')[5] that eventually became part, in modified form, of an 'Introduction' to 'the Italian Legal System',[6] is a defining feature of his early work.

As a member of that first generation of comparative lawyers who 'starved for scholarly companionship and, like the Ancient Mariner, wander[ed] the earth looking for a listener',[7] he came to the

[3] J.H. Merryman, 'The Loneliness of the Comparative Lawyer' n 1 above, 12.

[4] Professor Legrand underlines this fact quite persuasively during a well-known interview with Merryman himself: 'Who are our comparatists? Since the instrument of the comparison is the comparatist himself, it seems important that information about the comparatist should be accessible to those interested in evaluating his results. In fact, I argue that a meaningful apprehension of any significant comparative discourse must involve an assessment of the gaze of the comparatist on the law and the law-world which he purports to re-present and, therefore, an appreciation of the referential framework which sustains that gaze. It follows that there is a merit in making explicit the basic assumptions that underlie a comparatist's choice in formulating his questions and identifying the evidence he regards as relevant to answer them.' Cf P. Legrand, 'John Henry Merryman and Comparative Legal Studies: A Dialogue' 47 *American Journal of Comparative Law*, 3-66 (1999).

[5] J.H. Merryman, 'The Italian Style' 18 *Stanford Law Review*, 39, 396, 583 (1965-66). These articles were translated into Italian and appeared almost simultaneously in the *Rivista trimestrale di diritto e procedura civile*.

[6] J.H. Merryman, M. Cappelletti and J.M. Perillo, *The Italian Legal System: An Introduction* (Stanford: Stanford University Press, 1967).

[7] J.H. Merryman, 'The Loneliness of the Comparative Lawyer' n 1 above, 11.

University of Rome during the academic year 1963-64. Those months in daily contact with Gino Gorla, together with his prior meeting with Mauro Cappelletti, at the University of Florence, in the spring of 1962, were critical for the direction Merryman's career was to take, for a sort of natural link between his 'vocation' as a comparative law specialist, and the endeavour in studying an until-then-neglected legal system, emerged. Merryman himself renders it like this: 'When I set out to become a comparative lawyer' – he wrote – 'I made Italian law my center of interest'.[8]

One might argue that such commitment, for which he was awarded with the title of '*Cavaliere della Repubblica*', was the outcome of various associated factors.

First of all, there was a re-evaluation of the contribution by such countries as France and Germany to the evolution of the civil law tradition. This Merryman expressed, in unforgettable terms, in a brief introductory note to his trilogy on 'The Italian style': 'To study French and German law to learn about the Civil law seemed like studying American law to learn about the Common law. I chose Italy because for civil lawyers it was the *fonte* and archetype, just as for common lawyers English law is the source and the model'.[9]

This will to broaden the study of the civil law tradition was rooted in a more general, and completely new, appreciation of the relationship between its 'center' and its 'periphery', which was indeed so substantial as to justify the argument that the importance of the Italian legal scholarship was far from being limited to the Middle Ages and the Renaissance. A further, crucial, suggestion made by Merryman is indeed that 'Italy is perhaps the only one of the major civil law nations to have received and rationalised the two principal, and quite different, influences on European law in the nineteenth century: the French style of codification and the German style of scholarship'.[10]

Along these premises, it comes as no surprise that Merryman's focus on the Italian legal system is remarkably broad in that it is

[8] Ibid.

[9] J.H. Merryman, 'Note on the Italian Style', in Id, *The Loneliness of the Comparative Lawyer* n 1 above, 175.

[10] J.H. Merryman, M. Cappelletti and J.M. Perillo, n 6 above, 165-166.

concerned with all discourses involved in the activity of creating law, covering a wide historical period. Especially the law-making power of the judiciary turns out to be a central ground for constructing what could be fairly defined as an 'American realism based' overview of the Italian law, for a second likely explanation for Merryman's move towards our legal system is his intention to make patent 'the tension between folklore and practice'[11] in the legal interpretation realm, and to do so by challenging the widespread dogma that under a codified legal system, 'only the legislature can make law'.[12]

We shall not delve into the details here; rather, we wish to underlie the fact that this critical glance ultimately aimed at reconsidering the cleavage between the experiences of civil law and common law.[13]

For this purpose, Merryman's analysis does not limit itself to debunking the idea that what distinguishes civil law jurisdictions from common law jurisdictions is the different degree of reliance on statute law and case law. His belief is that the main root of convergence is rather established by the democratic transitions that occurred in Italy and in the European continent after World War II. In this respect, what specially matters for him is the significance of some major legal changes such as the adoption of a rigid Constitution and the establishment of the judicial review of legislation, as the following passage makes clear: 'The Constitution, with its programmatic provisions, is not addressed solely to the legislature to transform into statutes. It is also addressed directly to the judiciary so that, through the openings provided by general principles and evolutive interpretation, it can bring the new social demands that the Constitution embodies and consecrates into effect in its decisions without waiting for the legislature'.[14]

By making one of the earliest move toward the successful development of a 'Western legal culture' discourse in comparative literature, Merryman was hugely influential in shaping the way the

[11] Ibid 251.

[12] Ibid 246.

[13] Cf on this point M. de S.-O.-l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford: Oxford University Press, 2004), 177-179.

[14] J.H. Merryman, M. Cappelletti and J.M. Perillo, n 6 above, 268.

similarities between the experiences of civil law and common law are described and understood.

This view was further elaborated upon in 1978, in a well-known essay entitled 'On the Convergence (and Divergence) of Civil Law and Common Law'.[15]

Here, like in the Introduction to the Italian Legal System, the approach is rooted in the propitious intersection between the institutional and the cultural perspective. There is however a more distinct flavour of functionalism in the argument upon which Merryman ultimately relies: 'the increasing emphasis on legal protection of human rights and the increasingly sensitive legal recognition of particular regional and social interests within legal systems in both families indicate that the Common Law and the Civil Law are moving along parallel roads, towards the same destination'.[16] In the same direction an even more clear step was taken in the late nineties: 'Of course there are many subtle substantive differences between Common Law and Civil Law, and their separate legal histories have produced distinct conceptual structures, institutions and procedures. Still, as a rule one can expect the two groups of legal systems to produce similar results in like cases'.[17]

Interestingly enough, one potential difficulty with Merryman's work is that it 'flirted' with the principle of functionality in several occasions, in one form or another.[18] Of particular relevance, for

[15] J.H. Merryman, 'On the Convergence (and Divergence) of Civil Law and Common Law', in M. Cappelletti ed, *New Perspectives for a Common Law of Europe* (Leiden-London-Boston: Sythoff; Stuttgart: Klett-Cotta; Brussels: Bruylant; Firenze: Le Monnier, 1978), 195-233.

[16] Ibid 233.

[17] J.H. Merryman, 'The Loneliness of the Comparative Lawyer' n 1 above, 8-9.

[18] In the above-mentioned interview granted in 1997 by Merryman to Pierre Legrand, the former described this way how his co-authored study of law in 'radically different cultures' (J.H. Barton, J.L. Gibbs, V.H. Li and J.H. Merryman, *Law in Radically Different Cultures* (St. Paul, MN: West Publishing Co., 1983)) was set out: 'We developed four typical social problems of the kind that are bound to arise in any society and examined how each of these problems was perceived and resolved in each of the four cultures.' Interestingly enough, he was then asked by Legrand whether he was 'confident… that [he] could formulate the questions in non-ethnocentric terms.' That was, remarkably, his answer: 'Yes, we thought we were able to do that. The idea was that we would see how each problem was treated in each of the four cultures.' Cf P. Legrand, n 4 above, 27.

instance, is the following definition of legal system, which he provided in a 1974 essay entitled 'Comparative law and Scientific Explanation': 'a legal system is a sub-system of society whose principal social function is to respond to a certain range of social demands'.[19] One might even go so far as to say that Merryman's careful agnosticism about the similarity/difference[20] dilemma was not as sharp as he seems to maintain in a short passage from a conversation with Pierre Legrand, where he asks to the latter: 'As to your suggested choice between difference and similarity, why must one choose? Most of us find that we do both while working on a single instance'.[21]

Having said this, Merryman's approach is far too sophisticated to be labelled categorically. He never lets the larger picture – that is, the 'legal culture' – out of sight, as we shall indicate in a moment. He often invites the reader to face many cautionary warnings against making simple generalization and always leaves open the possibility of drawing on different definitions of law for different purposes.

All in all, if there is a common theme in his comparative work, it is the danger – encountered differently in each legal system – presented by the apparatus of substantive rules and their justificatory arguments routinely used by parochial lawyers. Merryman constantly reminds us of the difficulty in casting off such apparatus, and how indispensable that considerable effort is if a meaningful understanding is to be achieved.

Moving back to the Introduction to the Italian Legal System, it is clear that the concern, referred to above, with the lawmaking power of the Italian judiciary accurately reflects such preoccupation.

In this respect, another factor that should be pointed out is Merryman's intellectual affinity with Mauro Cappelletti and Gino Gorla. This was no doubt a particularly fruitful source of inspiration, both for his attempt to put a finger on the legal formalism that has

[19] J.H. Merryman, 'Comparative Law and Scientific Explanation', in Id, *The Loneliness of the Comparative Lawyer* n 1 above, 486. This essay was originally published in J.N. Hazard and W.J. Wagner eds, *Law in the USA in Social and Technological Revolution* (Bruxelles: Bruylant, 1974), 81-104.

[20] And his related bias in favour of comparative law as scientific explanation, untouched by political objectives: cf *inter alia* J.H. Merryman, 'Comparative Law and Scientific Explanation' n 19 above.

[21] P. Legrand, n 4 above, 42.

traditionally dominated the Italian legal style, and for his effort to gain access to other important legal discourses, offering other ways of conceptualizing the daily work of our legal system. Truly one of the attractions of this study is in the way it develops along the longstanding paradigm of civil law/common law comparison established in American legal scholarship, that is the formalism/realism difference, while at same time showing that some form of reflective criticism is also an important part of the Italian tradition of academic law.

In 1990, Cappelletti summarised his affinity with Merryman as follows: 'My youthful fury against [the legal formalism] prevailing in the «legal academe» of Italy – but also, to a large extent, of other countries of Continental Europe and Latin America, that is of the civil law world – met a sympathetic reception from that Stanford professor in his early forties, imbued with American realism. He lent legitimacy to my reaction; also, and most importantly, he gave to it a dialectic expression and a cultural background'.[22]

Not surprisingly, Merryman's unconventional account of the Italian law and, through it, of the civil law system, encountered a strong support and enthusiasm also from Gino Gorla, oriented as the latter was towards an utterly original comparison between the traditions of the civil and the common law. This was the case to such an extent that, in an article published in 1994 and dedicated to the memory of Gorla, taking up the well-know saying that 'a man can be judged by his friend', Merryman states he 'would like to be judged by the warm and enduring affection [he] received from [his] beloved teacher and friend, Gino Gorla'.[23]

Several issues that Merryman raised in the late sixties have gained an unprecedented weight in the current comparative discourse, facing as it is important questions about the adequacy of much of its established frameworks. It is also true that some of his stances sit uneasily with the substantial changes in Italian law and society in the past five decades – one only need to mention the

[22] M. Cappelletti, 'In Honor of John Henry Merryman', in D.S. Clark ed, *Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Berlin: Duncker & Humblot, 1990), 2.

[23] J.H. Merryman, 'Ricordo di Gino Gorla', in VVAA, *Scintillae iuris – Studi in memoria di Gino Gorla*, I (Milano: Giuffrè, 1994), 23.

impact of the europeanization and globalization process. It is therefore timely that a new second edition of 'The Italian Legal System' has just been published.[24]

Certainly Merryman's work on Italian law is not the only lasting contribution to be studied by future generations of comparative lawyers. His book devoted to 'The Civil Law Tradition'[25] is, in absolute terms, probably the most notable in the field of comparative law. First published in 1969 (that is, only two years after the 'Introduction to the Italian legal system'), and now in its third edition, it had a huge impact on the discipline, because of its broader focus, of course, but also because it clearly took a step further away from the rule-based comparison.

While a certain number of statements throughout this work suggest that a change of perspective was needed, especially insightful is the very notion, advanced and developed by Merryman, of 'legal tradition', for it plays a crucial role in bringing a significant additional dimension to comparative analysis: 'a legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective'.[26]

Speaking of this book, David S. Clark, who knows Merryman's work very well for having co-authored fours books with him,[27] said

[24] M.A. Livingston, P.G. Monateri and F. Parisi, *The Italian Legal System – An Introduction* (Stanford: Stanford University Press, 2nd ed, 2015).

[25] J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford: Stanford University Press, 2nd ed, 1985).

[26] Ibid 2.

[27] J.H. Merryman, D.S. Clark and J. Haley, *Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America, and East Asia* (New Providence: LexisNexis, 2010); Id, *The Civil Law Tradition: Europe, Latin America, and East Asia* (New Providence-Charlottesville, VA: LexisNexis and

that it 'has achieved that rare combination for books about law: to be both a commercial and a scholarly success'.[28]

This is not the place for an in-depth examination of the increasing emphasis on legal traditions that over the last years replaced – in the mainstream comparative law – the previous tendency to organise the understanding around the notions of 'legal system' and 'legal families'.[29] It is worth underscoring, in this regard, that the above-quoted definition of legal tradition is by far the most frequently cited in the foreign and comparative law literature. This is to say that as far as the scholarly success of 'The Civil Law Tradition' is concerned, Clark's assessment could be further developed by arguing that this is one of those rare books about law that come to be seen by their successors as establishing a new paradigm.

One should add that despite the controversy raised by Merryman's insistence on the argument that French and German law should be considered as local deviations of the civil law tradition,[30] the book also succeeded in propelling the study of the civil law tradition in new directions. Its focus on regional areas such as Mediterranean Europe and Latin America did not suggest disregard for the contribution by France and Germany to the evolution of the civil law tradition, but it did propose to extend the scope of inquiry well beyond the more conventional path undertaken by other leading comparative textbooks, such as David's '*Les grands systèmes de droit contemporains*' and Zweigert and Kötz's *'Einführung in die Rechtsvergleichung'*.

Apart from the study of the civil law tradition and its

Michie, 1994); J.H. Merryman, D.S. Clark and L.M. Friedman, *Law and Social Change in Mediterranean Europe and Latin America – A Handbook of Legal and Social Indicators for Comparative Study* (Stanford: Stanford University Press, 1979); J.H. Merryman, D.S. Clark and M. Cappelletti, *Comparative Law: Western European and Latin American Legal Systems: Cases and Materials* (Indianapolis, New York and Charlottesville: Bobbs-Merrill, 1978).

[28] D.S. Clark, 'The Idea of the Civil law Tradition', in D.S. Clark ed, *Essays* n 22 above, 11.

[29] See on this point G. Marini, 'Diritto e politica. La costruzione delle tradizioni giuridiche nell'epoca della globalizzazione' *Pòlemos*, 31-76 (2010).

[30] Cf specially R. David, 'Book Review' 44 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 360 (1970).

components, another field in which Merryman gained worldwide recognition is 'law and development'.

It should be pointed out that when his interest in 'law and development' first arose, sometime in the sixties, there was no substantial body of scholarship, since the state of the American legal doctrine was – as Merryman put it himself in a 1977 article – 'strongly action-oriented'.[31] Furthermore, very few scholars were trained in both the law and social sciences, and data were rather limited.

Merryman developed his own approach to law reform, claiming that 'Comparative law and social change' was 'a favorable rubric under which to revive the sort of inquiry and the efforts at *theory-building* that characterized the best aspects of the law and development movement'.[32] It was on this premise that during the seventies, under a grant from the Ford Foundation, he carried out 'Slade (Studies in Law and Development)', an extensive empirical research project aimed at tracing the transformations experienced by the legal systems of the Latin American and Latin European zone. In 1979 this led to a publication with David S. Clark and Lawrence Friedman.[33]

Merryman was thus an early proponent of the critical reformulation of the law and development movement, and this should be kept in mind if the scale of his contribution to the field is to be fairly assessed.[34] Regardless of whether the movement actually benefitted from Merryman's input or not, his emphasis on 'the action-inquiry dichotomy'[35] of the movement, his keen concern with theoretical issues,[36] as well as his bias in favour of a quantitative

[31] J.H. Merryman, 'Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement' 25 *American Journal of Comparative Law*, 457-491, 473 (1977).

[32] Ibid 483.

[33] J.H. Merryman, D.S. Clark and L.M. Friedman, n 27 above.

[34] This is the case to such an extent that the Slade project, which was ultimately a disappointing episode in Merryman's academic life, became eventually the focus of a book in his honor: L. Friedman and R. Perez-Perdomo eds, *Legal Culture in the Age of Globalization: Latin America and Latin Europe* (Stanford: Stanford University Press, 2003).

[35] J.H. Merryman, 'Comparative Law' n 31 above, 473.

[36] Merryman's belief that 'until we have tested, reliable theory (ie tested and reliable vis-a`-vis the target society), we will be more responsible and productive if we limit ourselves to third world law and development inquiry' is key to understanding

approach to the description and discussion of the target reality,[37] resonate still.

Finally, and very significantly, his role of pioneer also hold true for a field to which Merryman devoted his later career: 'art and the law'. Beside being the first Law Professor to teach a course aimed at discussing the most relevant problems that arose or might be expected to arise in the art world,[38] Merryman truly established the framework for the successful development of 'art and the law' as a new field of scholarship. First published in 1979, his groundbreaking book 'Law, Ethics and the Visual Arts', is now in its fifth edition.[39]

It is reported that the origins of Merryman's studies relating to art and cultural property lie in his multiples travels around the world, during which he began collecting art pieces.[40]

Merryman died after a long life, during which he also built and kept a network of friends and academic colleagues. In Italy his death will be felt keenly, particularly by all those who had the chance to experience his old-world charm as well as his dedication to the diffusion of our legal scholarship in the English-speaking world.[41]

his core assertion that 'the law and development movement has declined because it was, for the most part, an attempt to impose U.S. ideas and attitudes on the third world'. Cf J.H. Merryman, 'Comparative Law' n 31 above, 481, 483.

[37] J.H. Merryman, 'Comparative Law' n 31 above, 473.

[38] This happened in the autumn semester of 1972. Cf J.H. Merryman, 'A Course in Art and the Law' 26 *Journal of Legal Education*, 551-555 (1973-74). Merryman taught his last class, 'Stolen Art', only a couple of months before his death.

[39] J.H. Merryman, S.K. Urice and A.E. Elsen, *Law, Ethics and the Visual Arts* (London, The Hague and New York: Kluwer Law International, 2007).

[40] S. Whiting, 'John Henry Merryman, law professor and art collector' *SFGate,* 19 August 2015, available at http://www.sfgate.com/art/article/Obituary-John-Henry-Merryman-law-professor-and-6453580.php (last visited 7 October 2015).

[41] Many of them even benefitted from his tutelage at Stanford. As Mauro Cappelletti points out in 1990, 'a stream of young scholars and students who now hold leading academic, professional, and judicial positions has spent time at Stanford as pupils or collaborators of Professor Merryman; for example, to name only those now holding chairs in distinguished schools: Cassese, Crespi-Reghizzi, Rodotà, Corapi, De Vita, Scaparone, Trocker, Varano, Vigoriti – not to mention that leading figure of Italian comparative law, Gino Gorla. As for myself, I owe primarly to John a major turn in my academic career, starting with my first regular teaching at Stanford Law School in 1968.' Cf M. Cappelletti, 'In Honor of John Henry Merryman' n 22 above, 5.

Essays

Transnational Economic Constitutionalism in the Varieties of Capitalism*

Gunther Teubner**

Abstract

Notwithstanding the ordoliberal theories and the theories critical of a world 'economic constitution', globalization has not produced a unitary economic constitution, but a fragmented constitution of collisions: ie a metaconstitution of constitutional conflicts, whose conflicting units are no longer the national States, but the regimes of transnational production. The alternative (developed for national States by Franz Böhm and Hugo Sinzheimer) between an ordoliberal economic constitution and a social democratic economic democracy has resulted – as regards the current transnational economic constitution – in the opposition between continental Europe's production regimes organized in a neo-corporative way on one hand, and Anglo-American inspired production regimes characterized by financial capitalism on the other. Contrary to all expectations, continental Europe's neo-corporative economic constitutions have revealed a surprising resilience, notwithstanding globalization and the economic crisis. New opportunities for an economic-democratic constitutionalization are emerging in as much as social forces outside the corporation (and so, in addition to state intervention, legal regulations and the counterpowers of 'civil society' coming from other contexts: media, public discussion, spontaneous protest, intellectuals, opposing social movements, non-governmental organizations (NGOs), trade unions, professions) are putting such intense pressure on corporations so as to force them to self-limitations driven by the public wealth, as demonstrated by the '*Corporate Codes*' case.

I. Lessons from the Classics?

Economic constitutionalism – it was Weimar Germany in the 1920s where this concept had been invented and where institutional experiments had been initiated. Social democracy and ordo-

* Translated from the German by Eric Engle. For inspiration and criticism I wish to thank Achim Seifert.

** Emeritus Professor (Goethe-Universität – Frankfurt am Main)

liberalism had dominated the fights for conceptual hegemony. Can the contemporary debate on transnational economic constitutionalism learn from the German classics of the national economic constitution – Hugo Sinzheimer and Franz Böhm? Or can it only attest to the grandiose failure of both of them? Sinzheimer, whose great contributions were to have invented the concept of the collective labor contract and to have introduced elements of economic democracy into the Weimar constitution, in fact failed with his further reaching ambitions for a comprehensive system of economic workers councils. Franz Böhm – during his opposition to the national socialist regime – worked on an ordo-liberal economic constitution for the future, and then later on the anti-trust law that markedly influenced the economy of federal Germany. He would – from his ordo-liberal conceptions of a decentralized, middle-class influenced, competitive market under state supervision – recognize hardly anything in the contemporary globalized world markets dominated by transnational enterprises.[1]

Of course, it is only a superficial critique to evaluate their time-bound concepts of legal policy by contemporary realities. Instead, one should look for Böhm's and Sinzheimer's potential to challenge the contemporary debate. The challenge is whether their ideas, originally developed for the economy of the nation state, can be fruitfully re-conceptualized for the contemporary globalized economy. Then one could replace the superficial question – 'Which of them delivered the better prognosis?' – with a different question – 'If, back then, Böhm suggested an ordo-liberal economic

[1] On Franz Böhm: H. Grossekettler, 'Franz Böhm (1895-1977)', in J. Backhaus ed, *The Elgar Companion to Law and Economics* (Cheltenham: Elgar, 2005), 489-497. On Hugo Sinzheimer: O. Kahn-Freund, 'Hugo Sinzheimer 1875-1945', in R. Lewis and J. Clark eds, *Labour Law and Politics in the Weimar Republic* (Oxford: Basil Blackwell, 1981), 73-103. Böhm's early key work: F. Böhm, *Wettbewerb und Monopolkampf* (Berlin: Heymanns, 1933); his essays on the economic constitution in E.J. Mestmäcker ed, *Reden und Schriften über die Ordnung einer freien Gesellschaft, einer freien Wirtschaft und über die Wiedergutmachung* (Karlsruhe: C.F. Müller, 1960). Sinzheimer's early key work: H. Sinzheimer, *Ein Arbeitstarifgesetz. Die Idee der sozialen Selbstbestimmung im Recht* (Munich: Duncker & Humblot, 1916). Important essays on the economic constitution: H. Sinzheimer, *Arbeitsrecht und Rechtsoziologie. Gesammelte Aufsätze und Reden* (Frankfurt: Europäische Verlagsanstalt, 1976).

constitution and Sinzheimer a social-democratic economic democracy as realistic third ways between Manchester capitalism and state socialism, what would a realistic constitutional alternative look like for the transnational economy today?' Beyond these concrete questions one may seek the results garnered by both scholars at a more abstract level. For both defined the 'economic constitution' in the very first place as a legal concept based on social theory; today's research efforts can build upon them. On a more abstract level, it is worth discussing anew and under todays' conditions their ideas on social theory and the theory of democracy, which went far beyond the simple organization of markets and enterprises. Their future applicability must prove itself on both these levels: of concrete economic law on the one hand and of abstract theories on the other.

In this spirit I would like to develop the following three theses:

1. The legal concept of the transnational economic constitution should be grasped with greater nuance, as contrasted against a definition which sees it as the mere diversity of national economic constitutions, but also in contrast to the simple unity of a global economic constitution. It needs to be redefined as the constitution of collisions between different production regimes in the varieties of capitalism.

2. The economic constitution is not identical with those portions of state-constitutions, which refer to the economy. Likewise, it cannot be limited to the higher-ranking norms in a hierarchy of norms regulating the economy. Instead, it should be understood as a phenomenon of 'double reflexivity', in which the fundamental institutions of an economic production regime enter into an indivisible relation with the rules of constitutional law.

3. Legal norms of economic democracy differ in their chances for realization, according to how trenchant the differences are in which the internal differentiations of the transnational economic constitution are formed out. From the perspective of the varieties of capitalism, in 'coordinated market economies' (CMEs) the potential for economic democracy is considerably higher than in 'liberal market economies' (LMEs).

II. On the Substrate of a Transnational Economic Constitution

The successors to Franz Böhm's attempted to free up his ordo-liberal concept of the economic constitution from the narrow framework of nation-state and national economy in which it was trapped in Böhm's thought and transfer it into an overarching transnational economic constitution. Ernst-Joachim Mestmäcker proposed a concept of a European economic constitution and evoked it into a partially successful institutionalization of ordo-liberal constitutional principles in the European Union. On the global scale, Wolfgang Fikentscher and Peter Behrens suggested the legal concept of a unitary global economic constitution on ordo-liberal foundations.[2] Entirely in Böhm's sense, norms should build a protective wall against the self-destruction of competition.

Parallel thereto, even if with exactly opposed political goals, authors such as Stephen Gill, David Schneiderman and James Tully in the tradition of critical theory diagnosed a 'New Constitutionalism' which institutionalizes a unitary constitution of the global economy proceeding from the institutions of the Washington Consensus.[3]

Both theories can refer to developments in the economic reality. In the last thirty years a push for constitutionalization based on the autonomy of global markets has been massively driven forward politically. The global institutions of the Washington consensus posited genuine constitutional principles with claims to world-wide validity. These sought to create broad discretionary space for enterprises acting globally, to do away with governmental participation in enterprises, to combat protectionism, and to free

[2] E.J. Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union* (Baden-Baden: Nomos, 2006); W. Fikentscher, *Wirtschaftsrecht* (Tübingen: Mohr Siebeck, 1983), 87 et seq; P. Behrens, 'Weltwirtschaftsverfassung' 19 *Jahrbuch für Neue Politische Ökonomie*, 5-27 (2000).

[3] S. Gill and A. Claire Cutler eds, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014); D. Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Basingstoke: Palgrave Macmillan, 2013); Id, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008), 340 et seq; J. Tully, 'The Imperialism of Modern Constitutional Democracy', in N. Walker and M. Loughlin eds, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), 315-338.

economic enterprises from political regulations. Meanwhile, numerous studies have shown that indeed elements of a global economic constitution have emerged, which are based on the constitutionalization of various transnational regimes. Eg the guiding principle of the International Monetary Fund and the World Bank is to open national capital markets. The World Trade Organization (WTO) as well as the EC internal market, the North American Free Trade Agreement (NAFTA), the Mercado Común del Cono Sur (MERCOSUR) or the Asia Pacific Economic Cooperation (APEC) seek respectively a constitutional guarantee for the freedom of world trade and the protection of direct investment.[4] Lex mercatoria has also formed a layer of constitutional norms beyond its contract law rules, concentrated on the constitutive function. 'Private' arbitration courts posit property, contractual freedom, and competition as essential components of transnational public policy.[5] Global corporate charters are likewise marked by their tendency to create a high degree of autonomy for transnational enterprises.[6] The principles of corporate governance of multinational enterprises are: a high degree of enterprise autonomy, capital market orientation of corporate law norms, and the establishment of shareholder values. The resulting multinational corporate governance aims at two goals: to break the tight coupling of transnational enterprises on nation-

[4] On the constitutional character of the transnational trade regime, see E.U. Petersmann, *International Economic Law in the 21st Century* (Oxford: Hart, 2012); D.Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System* (Oxford: Oxford University Press, 2005).

[5] Elements of a transnational economic constitution have been identified in the 'private' arbitration regime by M. Renner, 'Towards a Hierarchy of Norms in Transnational Law' 26 *Journal of International Arbitration*, 533-555 (2009). To the same subject, but using natural law terminology to emphasize the fundamental character of the relevant norms, see J.H. Dalhuisen, 'Legal Orders and their Manifestations: The Operation of the International Commercial and Financial Legal Order and its Lex Mercatoria' 24 *Berkeley Journal of International Law*, 129-191 (2006).

[6] On the new enterprise charters of Global Corporate Governance, see L. Catá Backer, 'Governance Without Government: An Overview and Application of Interactions Between Law-State and Governance-Corporate Systems', in G. Handl et al eds, *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Leiden: Nijhoff, 2012), 87-123.

state politics and rules and to build up rule of law structures in so far as these are necessary for their world-wide functionally specified communication.

However, such analyses of transnational constitutionalization give us a skewed picture. They are one-sidedly obliged to the so-called convergence thesis, according to which as a result of globalization a broad-ranging legal unification is to be expected.[7] According to this thesis, in contemporary Europeanization and globalization, convergence of social economic structures of advanced industrial societies is inevitable. Such supposed social-economic convergence lets legal unification right on up to a unitary world-wide economic constitution appear to be realistic and desirable. A connected corollary is the functional equivalence of legal forms.[8] According to this, the national economic constitutions are based on differing legal doctrinal traditions, however they are all confronted by the same structural problems. Accordingly, they will find differing doctrinal solutions for the relevant problems, which however are functionally equivalent and which from their side finally lead to the convergence of national economic constitutions.

Both propositions are however more than questionable. In the current phase of globalization their opposite appears to be more plausible. The trend to globalization leads, paradoxical though it sounds, not necessarily to a convergence of social orders and a unification of law. Rather, globalization itself produces new sharp differences.[9] This leads not to greater legal unification, but rather to

[7] *Locus classicus*: C. Kerr et al eds, *Industrialism and Industrial Man* (Cambridge, Mass: Harvard University Press, 1960).

[8] In this sense, see K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Oxford: Oxford University Press, 1992), § 3, II; for a critique, G. Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' 26 *Harvard International Law Journal*, 411-455 (1985); for a reconstruction, R. Michaels, 'The Functional Method of Comparative Law', in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 339-382.

[9] Already in the early discussion on globalization it became clear that S.P. Huntington, 'The Clash of Civilizations' 72 *Foreign Affairs*, 22-49 (1993) with his apocalyptic predictions had exaggerated global divisions. A more realistic view sees a simultaneous increase in convergence and divergence as a consequence of globalization: M. Featherstone and S. Lash, 'Globalization, Modernity and the Spatialization of Social Theory', in M. Featherstone et al eds, *Global Modernities* (London: Sage, 1995), 1-24.

a stronger fragmentation of legal orders as a direct consequence of globalization.

Comparative political economy confronts us with surprising empirical results, which fundamentally place the expectations of convergence of economic constitutions into question.[10] These results are confirmed by economic history studies on the autonomous cultures of the global economy, which from a perspective of *longue durée* show the resiliency of collective mentalities and particularities of production cultures.[11] Empirical inquiries and theoretical explanations of the 'varieties of capitalism' support the proposition that, against all expectations, the globalization of markets and the computerization of the economy have not led to an efficient convergence of economic institutions and economic constitutional law norms. Despite all assertions of minimization of transaction costs, market selection, re-litigation, and regulatory competition, which indeed ought as evolutionary selectors to have effectively smoothed out institutional differences, the economic conditions of advanced capitalism have not converged.[12] Just the opposite, the process of globalization, and yes even the unification measures in the European common market, have produced new institutional divergences. Despite the liberalization of the global market and the erection of the common market, one of the most noteworthy results of the last forty years is that in the most varied economic institutions – in the financial regimes of enterprises, in the arrangements of corporate governance, in collective labor relations, the education of managers, in the contractual relations between enterprises, in inter-

[10] The leading representative is P.A. Hall and D. Soskice eds, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2005); for recent analysis, see: A. Hassel, 'Adjustments in the Eurozone: Varieties of Capitalism and the Crisis in Southern Europe' 76 *The London School of Economics 'Europe in Question' Discussion Paper Series,* 1-37 (2014).

[11] W. Abelshauser, *The Dynamics of German Industry: Germany's Path toward the New Economy and the American Challenge* (New York: Berghahn, 2005); W. Abelshauser et al, 'Kulturen der Weltwirtschaft' 24 *Geschichte und Gesellschaft*, Sonderheft, (2012).

[12] W. Carlin and D. Soskice, 'Reforms, Macroeconomic Policy and Fiscal Stabilization Policy', in R. Schettkat and J. Langkau eds, *Economic Policy Proposals for Germany and Europe* (London: Routledge, 2012) 72-119; C. Crouch and W. Streeck, *Modern Capitalism or Modern Capitalisms?* (London: Pinter, 1995).

organizational networks, in standardization processes and in inter-corporate industrial associations – institutional divergences have rather more increased than decreased.[13] This drifting-apart of production regimes means that despite the world-wide victory-march of capitalism since the dual-division of the economic constitution of the cold war, a variety of diverging economic constitutions have established themselves.

Production regimes are institutional framework conditions for economic activity.[14] They structure the production of goods and services by way of markets and market-related institutions. The 'rules of the game' of economic activities, more exactly the incentives and constraints of economic transactions will be formulated through an ensemble of institutions, in which economic activities are embedded. The marked idiosyncracy of each such production regime is explained by theory: the individual institutions within an economic area no longer exist by themselves, but with each other form interdependent elements of a stable system. The single institutions – enterprise financing, managerial education, contractual relationships between enterprises, inter-organizational networks, standardization processes, and inter-enterprise conflict regulation together form an interlocked system which tends toward self-regulation.

Within this stable system, institutions interact via the strategies of collective actors. That the differences in the regimes over the run of time become more accentuated can be derived back from the fact that they conclude in specific stable configurations, which create institutional advantages in the relevant production regime within international competition. Variants of capitalism are thereby explicable from the inter-systemic dynamic of the production regimes.[15]

[13] D. Soskice, 'Divergent Production Regimes: Coordinated and Uncoordinated Market Economies in the 1980s and 1990s', in H. Kitschelt et al eds, *Continuity and Change in Contemporary Capitalism* (Cambridge: Cambridge University Press, 1997), 271-289.

[14] On the different production regimes as stable national or regional configurations of economy, politics, and law which are responsible for the varieties of capitalism, see P.A. Hall and D. Soskice, n 10 above.

[15] P.A. Hall, 'The Political Economy of Europe in an Era of Interdependence', in H. Kitschelt et al eds, *Continuity and Change in Contemporary Capitalism* (Cambridge: Cambridge University Press, 1997), 135-163.

III. On the Concept of a Transnational Economic Constitution

The autonomization of various production regimes sets the scene for reconceptualizing the economic constitution. For this our protagonists, Sinzheimer as much as Böhm, produced relevant preparatory works. For both do not satisfy themselves with a concept of the economic constitution which – as is even today so often presented in constitutional law – equates it with the rather meager number of norms regulating the economy within the state constitution and then ends with the thesis of the neutrality of the German Fundamental Law on matters of economic policy. Both authors made it clear that such a state-centered concept simply fails to account for the actual dynamic of economic constitutions. Moreover, both authors set themselves in clear opposition to the Kelsenian tradition in which one would define an economic constitution simply as a formal hierarchy of economic norms. It is to Sinzheimer's and Böhm's historical merit that they constructed the economic constitution as a legal concept beyond both a state-centered constitutional concept as well as beyond a mere formal legal hierarchy of norms.

Franz Böhm identifies in his famous 'Private Law Society' not 'a gathering of millions of unconnected individuals, but intends an 'ordo': a free-standing social ordering, which established itself after the French revolution, equally ranked alongside the political constitution of the state as the autonomous constitution of the economy.[16] It has at its disposal institutions of its own: in addition to property, contract, and monetary system, the decentralized decision-making mechanism of market price and competition. Thus it creates a social ordering principle of its own, which corresponds to political representation in the state, the economic constitution in the legal sense. This autonomous order of social-steering and coordinating instruments is transformed into a genuine constitution of the economy as soon as it is stabilized by legal rules. Alongside such constitutive rules, this ordo-liberal constitution contains limiting rules, which are supposed to protect the economy against its self-

[16] F. Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' 17 *Ordo*, 75-151, 113 (1966).

destructive tendencies. It is decisive that these legal norms cannot be conceived apart from the social order; rather, one must grasp the economic constitution as an inseparable relation between legal order and social ordering.[17]

Hugo Sinzheimer, in his turn, understands the labor constitution as autonomous on an entirely different social basis, namely as 'a legal order for itself, whose rules are not strewn throughout the various fields of civil and public law, but rather rest on their own basis'.[18] The decisive impulse for this 'own basis' is that social groups, paradigmatically in collective labor contracts, but also in group negotiations in other contexts, are enacting an autonomous law in the strict sense, which exists alongside the law of the state. Coalitions, that is labor unions and employer associations, work together as collective actors on such a democratic labor constitution. The legal system supports the autonomy of the labor constitution in the same ways as it supports the state constitution. Moreover, Sinzheimer, who introduced elements of economic democracy into the Weimar constitution, suggested the concept of an autonomous 'economic community' (*Gemeinwesen der Wirtschaft*), which parallel to the political community presents its 'own economic constitution alongside the state constitution',[19] in which the 'economic citizens' play their own roles alongside the citizens of the state.[20]

It is evident that they base their concept of economic constitution on real existing production regimes, but they do so on different elements, Böhm on market structures and competitive processes,

[17] For thorough analyses of Franz Böhm's life and work, R. Wiethölter, 'Franz Böhm (1895-1977)', in B. Diestelkamp and M. Stolleis eds, *Juristen an der Universität Frankfurt am Main* (Baden-Baden: Nomos, 1989), 208-252.

[18] H. Sinzheimer, 'Das Wesen des Arbeitsrechts', in O. Kahn-Freund and T. Ramm eds, *Arbeitsrecht und Rechtssoziologie* (Frankfurt: Europäische Verlagsanstalt, 1976 (1927)), 108-114, 108.

[19] H. Sinzheimer, *Das Rätesystem: Zwei Vorträge zur Einführung in den Rätegedanken* (Frankfurt: Union Druckerei, 1994 (1919)), 18.

[20] H. Sinzheimer, *Krise des Arbeitsrechts*, 135, 140. For a thorough analysis of Sinzheimer's works, see R. Dukes, 'Hugo Sinzheimer and the Constitutional Function of Labour Law', in G. Davidov and B. Langville eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011), 57-68; A. Seifert, '«Von der Person zum Menschen im Recht»: Zum Begriff des sozialen Rechts bei Hugo Sinzheimer' 2 *Soziales Recht*, 62-73 (2011).

Sinzheimer on formal organization of collective actors and their negotiation systems. Thus, despite all surely serious differences, one can describe both as early representatives of a 'societal constitutionalism', as is later formulated by the historian Reinhart Koselleck and by the sociologists Philipp Selznick and David Sciulli.[21]

We may draw three essential conceptual innovations from the Böhm and Sinzheimer bank account. They use the term economic constitution neither as a simple metaphor nor do they define it as a merely social-economic pre-legal ordering; instead, they place the economic constitution as an independent legal institution alongside the constitution of the state. The state constitution is for them only first among equals. That is their first innovation with regard to constitutional law, which recognizes no constitution beyond that of the State. Their second innovation is a constitutional concept in which the hierarchy of legal rules that regulates the economy is not counter-factually opposed to the actual organization of the economy; rather, legal rules are melded into a unity with the autonomous institutions of the economy. Their third innovation is that not only the state constitution but also the economic constitution contains constitutive rules, ie norms, which, in contrast to regulatory norms and decisional rules, do not merely regulate social realities, but literally create social realities. Market and money are – in order to address Neil MacCormick – 'institutional facts', which are produced in the first place by the rules of the economic constitution, or more exactly are co-produced by them.[22] The special role of constitutive rules places the economic constitution on the same level as the constitution of the state. With these three innovations our protagonists stand not only for a legal pluralism which identifies a corporative legal order alongside the law of the state and equally ranked to it. Moreover, they have founded a new constitutional pluralism, which understands the constitutive and limitative rules of

[21] R. Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford: Stanford University Press, 2002); P. Selznick, *Law, Society and Industrial Justice* (New York: Russell Sage, 1969); D. Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxistic Critical Theory* (Cambridge: Cambridge University Press, 1992). It was Sciulli who coined the term 'societal constitutionalism'.

[22] N. MacCormick and O. Weinberger, *An Institutional Theory of Law* (Dordrecht: Kluwer, 1986).

social institutions as forming genuine legal constitutions alongside the constitution of the state.[23]

Thereby they have laid the foundations for a 'material' economic constitution. Briefly stated, this materiality describes, in contrast to a formal norm hierarchy, the momentum of 'double reflexivity'.[24] What does this mean? A constitution is not simply a legal phenomenon but an inseparable connection between constitutional law and social order, in which reflexive legal norms of the constitutional hierarchy are intertwined with reflexive processes of social practice. At the same time, in parallel to the state constitution there exists in the economic constitution a binary code, superior to the code of legal/illegal with values of 'consistent with the economic constitution'/'contrary to the economic constitution'. This has a remarkable hybrid character, because it tests economic law rules for their constitutionality on the one hand, and on the other hand tests economic transactions and organizations for their social responsibility. The economic constitution then would be understood as not merely a legal text, but rather as the complex interrelation of legal and economic basic institutions within a production regime.[25]

Now, if one looks at the global economy with the optical device by Sinzheimer and Böhm, then it becomes clear that the institutions of the Washington consensus are in no way able to produce a unitary global economic constitution. 1989 did signify the end of state socialism but was in no way the end of history. The result of the most recent globalization wave is instead an enormous diversity of variants of capitalism, a multitude of production regimes which for their part bring forth a variety of economic constitutions. China's state capitalism, better: its single party capitalist production regime, the

[23] The leading contemporary representative of constitutional pluralism is N. Walker, 'Taking Constitutionalism Beyond the State' 56 *Political Studies*, 519-543 (2008).

[24] See in detail, G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012), 102 et seq.

[25] On transnational societal constitutionalism, which lays at the bottom of such a conception of the transnational economic constitution, see the contributions by P. Kjaer, D. Wielsch and M. Renner, in G. Teubner and A. Beckers eds, '*Transnational Societal Constitutionalism*' 20 *Indiana Journal of Global Legal Studies,* 700 et seq, 907 et seq, 941 et seq (2013).

keiretsu dominated economic constitution of Japan, the post-colonial production regimes of South America are today serious rivals to the established economic constitutions in the western hemisphere.[26]

It is however decisive that the variants within capitalism, which counter-indicate a unitary global economic constitution, do not somehow bring with them a mere re-nationalization of economic constitutions. Globalization could not develop a unitary economic constitution but, inexorably, has demolished national boundaries of the economy and established production regimes as the new substrates of the economic constitution, without regard to their territorial boundaries.[27] However, even the new regional units, the EU, NAFTA, or MERCOSUR, do not define the boundaries of the new production regimes. The European Union is cut through in three ways by the boundaries of different production regimes.[28] It is particularly since 2008 that Northern Europe, England, and Southern Europe are drifting apart in their different production regimes, despite their efforts toward European unification. And in the case of Italy, two different production regimes collide, even on the territory of one nation-state.

Of course the production regimes have their historical sources in the old unity of nation-state and national economy. However, with the dominance of transnational enterprises and their subsidiaries, with the globalization of markets and their differentiation into various branches, this unity has been broken. The production regimes have expanded forth beyond their territorial state borders. This ends in an assembly of different economic constitutions, which are difficult at best to sort out, and which overlap in their areas of validity. In principle a single production regime will be shaped by differing local power centers: the autonomous rule production in de-territorialized transnational enterprises, the domination of only one

[26] See n 10 above et seq.

[27] Economic cultures do not correspond to nation-state borders, see eg W. Abelshauser, n 11 above.

[28] Ibid; A. Regan, 'Political Tensions in Euro-Varieties of Capitalism: The Fiscal Crisis of the Democratic State in Europe' *EUI Working Paper MWP 2013/24,* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269668 (last visited 15 October 2015).

economic culture in individual branches of the global economy, and the regulations of the individual nation states. This results in a complex situation, typical for transnational relations. Faced with intersecting boundaries of economic cultures that exist in multinational corporations, in contractual regulations of supply and distribution networks, in different industries in world markets, and in national regulatory regimes – a high functional specification coincides with the simultaneous overlapping of different systems of norms. The individual production regimes maintain their identity against the global economic institutions in their 'persistence, transnational hybridization, and path dependency.'[29] The literature on transnational law established the expression 'inter-legality' which dissolves clearly divided areas of validity of territorial legal orders in favor of their interpenetration.[30] The economic constitutions of different regimes of production claim – one should say: in a relationship of 'inter-constitutionality' – validity in a given time and place, while they at the same time are mutually influencing each other. Backer correctly designates with these four marking characteristics the current global constitutional (dis)order as 'fracture, fluidity, permeability, polycentricity'.[31] Therefore one should not speak of a global, but rather of a transnational economic constitution, insofar as global stands for the unity of a world constitution and transnational for the multipolarity of mutually interwoven economic constitutions. The existing transnational economic constitution must thus – in its multi-polarity of various production regimes on the one hand and the global economic institutions on the other – be grasped with greater complexity than the simple unity of a global economic constitution or the simple adjacent constitutions of national economies. The layering of their unity-in-diversity is in all cases to be grasped as a 'collision

[29] W. Abelshauser, n 11 above, 19.

[30] S. Boaventura de Sousa, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (Evanston: Northwestern University Press, 2003), 437; M. Amstutz and V. Karavas, 'Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum' 8 *Rechtsgeschichte*, 14-32 (2006).

[31] L. Catá Backer, 'The Structure Of Global Law: Fracture, Fluidity, Permeability, And Polycentricity' 7 *Working Papers Consortium for Peace and Ethics*, 106 et seq (2012), available at http://ssrn.com/abstract=2091456 (last visited 15 October 2015).

constitution', that is as a meta-constitution of the conflicts between different regimes of production.

Contrary to the still dominant doctrine, which considers the economic constitution as a sub-region of the state constitution, the economic constitution under transnational conditions is to be understood as a two-level complex:

(1) on the lower level as an independent source of constitutional principles, ie as the summation of the sectoral constitutions of different production regimes,

(2) on the meta-level as a collision constitution, which establishes itself in the collisions between

(a) constitutions of different production regimes,
(b) different sectoral constitutions (constitutions of the state, the economy, the media, science etc) and
(c) global regime constitutions and production regime constitutions.[32]

In view of this complexity, the collisions do not resolve themselves through either federal principles or international private law principles.[33] The responsibility for resolving the conflicting constitutions cannot be found in the global institutions as hierarchically superior meta-instances. The role of a third instance in conflicts within plural constitutions, which Böhm and Sinzheimer still could accord to the nation state, is absent under conditions of globalization. The reason is – as Niklas Luhmann says, 'the structural coupling of the political system and the legal system through constitutions does not have an equivalent at the level of global society.'[34] Instead, the rules to regulate collisions of the economic constitutions – just as paradoxical as it is in international private law

[32] J. Bomhoff, 'The Constitution of the Conflict of Law', in H. Muir Watt and D.P. Fernandez Arroyo eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2015), 262- 276; J. Bomhoff and A.C. Meuwese, 'The Meta-Regulation of Transnational Private Regulation' 38 *Journal of Law and Society*, 138-162 (2011).

[33] Inspired by C. Joerges, 'A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation', in C. Joerges and J. Falke eds, *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford: Hart, 2011), 465-501.

[34] N. Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004), 488.

– will be developed in the conflicting constitutions themselves. At the same time however its demands exceed the capacities of international private law by far. For the production regimes and the global institutions together represent a multilevel governance complex, which produces many more collisions, even between the different levels, which the decentralized collisions calculus needs to take into account in each and any economic constitutional unit.

The simple 'horizontal' view of international private law cannot achieve that, but neither will, however strange it sounds, hierarchical methods do the job. It is a matter of a strict heterarchical relation between economic constitutions, even between global institutions and individual production regimes. The individual production regimes on the one side and the global economic institutions on the other are the power centers of collisions which define the main lines of the constitutional conflicts. The collisions among economic constitutions are thus to be solved in the conflicts of law rules of each production regime and also of each global institution:

- *horizontally*, within the diversity of production regimes, whose borders are no longer territorial but can only be grasped functionally,
- *vertically*, in the relationship between these production regimes and the global institutions of the world economy,
- *diagonally*, as the collision between a specialized globalized regime and the corresponding specialized particular subject-matter of an individual regime of production.

This situation resembles network structures:[35] it is a matter of a heterarchical relationship between the various semi-autonomous levels of multi-level governance, for which network theory provides an appropriate conceptualization. Networks as a specific combination of bilateral individual relationships and multilateral overarching connectivity result from a fragile coexistence of various network nodes – global institutions and individual production regimes – whose normative orders contradict each other. Networks provide an institutional answer to the conflict of rationalities, which result from the differentiation of autonomous systems. Thus arises a 'structure of

[35] On the following particularities of networks with further references, see G. Teubner, '«And if I by Beelzebub Cast out Devils,…»: An Essay on the Diabolics of Network Failure' 10 *German Law Journal*, 115-136 (2009); Id, *Networks as Connected Contracts* (Oxford: Hart, 2011), 122 et seq.

paradox' of institutional interweaving, because these institutions rest on 'contradictory demands' which are at the same time 'functional'.[36] Networks translate external contradictions, which manifest in conflicts of norms, into the internal perspective of the individual nodes, which maps them in the internal connections of different levels and subsystems, of network nodes, node relationships and the whole network.[37] In terms of collision law this means that the network nodes, thus the regimes of production as well as the global institutions, each develop their own internal collision law, from which perspective norm conflicts are decided.

Network theory describes the multi-polarity of the transnational economic constitution as a decentralized network, whose core is – in contrast to a hierarchical organization – only first among equals.[38] In case of collisions between the economic constitutions there is no center on which to refer, but rather – quite analogous to international private law – only the network nodes themselves. Thus, each individual economic constitution, itself decides decentrally about norm collisions. Each network node then stands in responsibility, because it must take up both its internal perspective as well as the norms of the other network nodes and of the entire order. Transnational *order public* can only be decided decentrally in the internal perspective of each individual economic constitution.[39]

IV. The Constitutional Alternatives in the Western Production Regimes

What do the collisions of production regimes in the transatlantic area look like?

[36] So for regional policy networks, see A. Benz, 'Regionalpolitik zwischen Netzwerkbildung und Institutionalisierung: Zur Funktionalität paradoxer Strukturen' 1 *Staatswissenschaften und Staatspraxis*, 23-43, 24 (1996).

[37] K. Semlinger, 'Effizienz und Autonomie in Zulieferungsnetzwerken: Zum strategischen Gehalt von Kooperation', in W.H. Staehle and J. Sydow eds, *Managementforschung* (Berlin: De Gruyter, 1993), III, 309-354, 332.

[38] For details, see A. Windeler, *Unternehmungsnetzwerke: Konstitution und Strukturation* (Wiesbaden: Westdeutscher Verlag, 2001), 105 et seq.

[39] Karl-Heinz Ladeur particularly emphasizes these points in 'Die Netzwerke des Rechts?, in M. Bommes and V. Tacke eds, *Netzwerke in der funktional differenzierten Gesellschaft* (Wiesbaden: Springer VS, 2011), 143-171, 163 et seq.

At first glance, it appears that in the western hemisphere a counter-trend has developed, in which the European and American production regimes are more and more converging. The liberalization of world trade, the end of the trade restrictions of the East-West conflict, and falling transport and information costs unleashed adaptation pressures upon the European welfare states, which were widely understood as having no alternative.[40] In the last forty years the traditional corporate production regimes of continental Europe have been increasingly dismantled and they approached ever more strongly the Anglo-American production regime.

From co-determination, to bank participation in enterprises up to the triangular cooperation of enterprise associations, labor unions, and government, the neo-corporatist institutions ran into pressure. Not only economists critical of neo-corporatism, but even Wolfgang Streeck, the most important theoretician and sympathizer of European post-war corporatism predicted that the democratic elements of the European production regime would not survive the recent wave of globalization.[41] The necessary fine-tuning between social organizations and political institutions would be unable to be repeated on a global scale and the amount of mutual trust and socio-cultural consensus, which here was a precondition, could not be globalized. Already at the European level, where institutions of 'social dialogue' between the European Commission, the Confederation of European Trade Unions, and the European Economic Associations have been experimented with, an expansion of the neo-corporatist model beyond the nation-state proved to be of little success. On a global scale, however, neo-corporatist arrangements would fail completely due to an inherent contradiction. The self-reproduction of social systems on global paths would become derailed since only national institutions are available for their political-legal constitutionalization. Franz Böhm's massive criticism of Sinzheimer's vision of economic democracy and co-determination appears to be historically confirmed.[42]

[40] W. Abelshauser, n 11 above, 10 et seq.

[41] W. Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy* (Oxford: Oxford University Press, 2009), 260 et seq; Id, *Buying Time: The Delayed Crisis of Democratic Capitalism* (London: Verso, 2014).

[42] Very critical: F. Böhm, 'Das wirtschaftliche Mitbestimmungsrecht der Arbeiter

However, the most recent recovery of democratic corporatism in continental Europe comes as a surprise. Already with the transition from standardized mass production to post-Fordist diversified quality production in the eighties, then since the middle of the nineties with the decentralization of collective bargaining on the enterprise level, at latest, with the intensive cooperation between enterprise associations, trade unions, and government during the economic crisis of 2008-09, a transformation of post-war corporatism took place, which proves its resilience despite globalization and economic crisis.[43] The transformation particularly took place in the power relations within the corporate triangles at the macro, meso, and micro levels.[44] The center of power has notably shifted to the 'producer coalitions' on the enterprise level, while they were supported in the background by the cooperation of the industry associations, sectorial trade-unions, and governmental instances, which guarantee higher productivity and prevention of crises. Empirical investigations show that not so much the government's Agenda 2010 gave the impulse for success, but above all the intensive cooperation between enterprises and works-councils, which were supported by labor-unions, industry associations, and government alike. The economic and social success of democratic corporatism in comparison to the production regimes of England and the USA has been so impressive, that the American Nobel prize winner Stiglitz recommended the Scandinavian or German way as a model for the USA.[45]

im Betrieb? *Ordo*, 21-250 (1951). Rather differently, Id, 'Mitbestimmung als Gleichberechtigung von Kapital und Arbeit oder als Vertragsanspruch der Arbeitnehmer aus dem Arbeitsverhältnis?, in F. Böhm and G. Briefs eds, *Mitbestimmung – Ordnungselement oder politischer Kompromiss* (Stuttgart: Seewald, 1971), 206 et seq.

[43] With rich empirical material, see C. Wendy et al, 'The Transformation of the German Social Model', in A. Martin and J.E. Dolvik eds, *European Social Models in the Face of Global Economic Crisis* (Oxford: Oxford University Press, 2014), 49-104; C. Dustmann et al, 'From Sick Man of Europe to Economic Superstar: Germany's Resurgent Economy' 28 *Journal of Economic Perspectives*, 167-188 (2014).

[44] The Swedish model of corporatism has not been done away with in this phase but rather has been transformed and adapted to the conditions of globalization, see in detail G. Flume, 'Das Modell Schweden: Kontinuität und Wandel einer Wirtschaftskultur', in W. Abelshauser et al eds, *Kulturen der Weltwirtschaft* (Göttingen: Vandenhoeck & Ruprecht, 2012), 114-133.

[45] J. Stiglitz, 'Deutschland muss mehr tun', Spiegel-Online 2 April 2009. Similar

Against all previsions of the collapse of social corporatism and economic democracy, varieties of capitalism have established themselves in the transatlantic space as a result of globalization, in which the resistance of European economic cultures against the worldwide successful praxis of standard capitalism is definitely notable. The economic constitutions of Scandinavian and Rhine capitalism are characterized by massive welfare state regulations, the participation of strong labor unions, and the coordination by tightly woven neo-corporatist organizations. It is particularly in their economic democratic elements that they differ markedly from the liberal finance-capital dominated economic constitutions of Anglo American minting, which rely for their coordination above all on markets and hierarchically organized enterprises. After the economic crises 2008, for many observers the neo-corporatist arrangements appear today on the basis of their historical comparative advantage, in view of their higher productivity and their increased social legitimacy, as the more attractive production regime.

Collisions between economic constitutions can be traced back to these significant differences between the two great production regimes – the European production regimes (mainly Germany, Sweden, Norway, Finland, Netherlands, Switzerland, Austria) on the one hand and the Anglo-Saxon regimes of liberal market economies (Britain, USA, Ireland, Canada, Australia, New Zealand) on the other. The Anglo-American economic culture forms a group, styled as Liberal Market Economies (LME) of relatively unregulated liberal market economies. In contrast to the European markets, with stronger economic democratic and social welfare state orientations – so-called Coordinated Market Economies (CME) in which neo-corporatist negotiating arrangements between economic associations, trade unions, and the government coordinate the economy – industry associations and labor unions in the Anglo-American area are rather weak and play only a very limited role of coordination in the institutional framework.[46] Instead, we find there a relatively uncoordinated co-existence of free market processes on the one hand and external regulation by the government on the other

suggestions are even made in Great Britain, 'Labour's Economic plans: Departmental Determinism', The Economist 1 January 2014.

[46] P.A. Hall and D. Soskice, n 10 above.

hand. There, the government, regulatory authorities, and the courts play the most important role in the formation of regulations, whereby the rules typically include little margin of appreciation.

The contrast between the Anglo-American LME and the European CME is the constitutional alternative today, which has replaced the former difference between Böhm's ordo-liberal economic constitution and Sinzheimer's social democratic economic democracy. Böhm's visions have left but few traces in both production regimes, while the European neo-corporatist constitutions definitively implemented some of Sinzheimer's visions of economic democracy.[47] Although Sinzheimer's rather centralistic ideas of an 'economic community', of council workers' democracy and the organized cooperation of coalitions were never realized, today's social corporatism has nevertheless constructed impressive institutions of economic democracy. There is one important difference from Sinzheimer's vision: on the macro and meso levels the current neo-corporatist negotiation system is not formally institutionalized by organizations of public law. Instead, on these levels a rather informal corporatism has arisen by accretion. Meanwhile, on the micro level a strongly formalized corporatism by way of board-codetermination and shop-floor works' councils dominates. Sinzheimer's council workers' organizations were never made real, but a functional equivalent for shifting political conflicts into the economic and social areas can be observed, in which today spontaneous protest movements and non-governmental organizations move to the foreground.

The collisions of economic constitutions fall into the following economic cultural differences of the two production systems:[48]

1. While in the Anglo-American economic culture, financial systems put a relatively short-term horizon on enterprises, which at the same time carry with them high risks, the neo-corporatist culture

[47] Likewise A. Seifert, n 20 above.

[48] For penetrating analyses of the differences, see: R. Deeg, 'The Rise of Internal Capitalist Diversity? Changing Patterns of Finance and Corporate Governance in Europe' 38 *Economy and Society*, 552-579 (2009); A. Johnston and B. Hancké, 'Wage Inflation an Labour Unions in EMU' 16 *Journal of European Public Policy*, 601-622 (2009); P.A. Hall and D. Soskice, n 10 above.

favors financial modes of enterprises toward a rather more long-term financing.

2. In the Anglo-American economies the extreme deregulation of the labor market has driven out collective labor law, which denies worker interests an effective representation in enterprises. There exist only weak trade unions, which can hardly oppose the hierarchical leadership of top management. In contrast, in the neo-corporatist culture, institutions of economic democracy have been developed which articulate worker interests quite successfully. In the collective labor relations of enterprises and of industry, strong cooperative relationships have arisen, in which trade unions and today ever more often the shop-floor works' councils play an important role and are responsible for the formation of successful production coalitions on the global market.

3. While in the LMEs the system of inter-enterprise relations places highly competitive demands and at the same time sets sharp boundaries on potential cooperation between enterprises, the relationships between enterprises tend in CMEs to develop cooperative networks with relational long-term contracts, and these both horizontally within the market as well as vertically between producers, transporters, and sales.

4. The coordination between the economic sector, the political and other sectors of society will in LMEs be left either to market forces or exclusively to state regulation. In contrast, CMEs have developed neo-corporatist negotiation arrangements in which enterprises cooperate with welfare state regulatory institutions and various social organizations. Economic associations and large enterprises coordinate markets by the development of technical standards, standard contracts, and procedures of dispute settlement. Economic associations negotiate technical and social standards with the government. The courts produce social obligations for economic enterprises. Thus, a negotiated *ordre public economique* is constructed.

IV. An Example: Corporate Codes in the Collisions of Transnational Economic Constitutions

How the collisions between diverging production regimes lead global economic institutions to develop in entirely different

directions shall be sketched in this conclusion with an example of global corporate constitutionalism – the corporate codes of multinational enterprises.[49] Multinational corporations were involved in recent years in a series of scandals which shocked global public opinion. Ecological catastrophes, inhumane working conditions, child labor, 'complicity' of multinational enterprises in cases of corruption and human rights violations by political regimes have raised public awareness of the negative consequences of the transnationalization of economic enterprises. Binding regulations under international law could not be implemented. Instead, a massive amount of another species of transnational norms has splayed itself across the global legal landscape – corporate codes of conduct. These are 'voluntary' codes of behavior for multinational corporations.

Two different basic variations of the codes have been formed. On the one side, the global economic institutions of the state world – the UN, OECD, ILO, EU – have formulated unitary 'public' codes of behavior for enterprises. On the other, the massive public criticism, which is diffused by the media globally as well as by the offensive actions of protest movements and non-governmental compels countless corporations to 'voluntarily' take up a number of 'private' corporate codes which posit norms in which they make effective self-binding declarations to the public and promise their implementation.

In the relationship of codes, an inversion has occurred of the traditional hierarchy of superior state-law and subordinate private law norms.[50] A particularly evident reversal is found in the hard-law / soft-law quality of 'public' and 'private' codes. It is now the rules based on state law providing only non-binding recommendations

[49] On the transnationalization of multinational corporate group charters, see L. Catá Backer, 'The Concept of Constitutionalization and the Multi-Corporate Enterprise in the 21st Century' 6 *Working Papers Coalition for Peace & Ethics*, 1-27 (2014); Id, 'Governance Without Government' n 6 above; G. Teubner, 'Self-constitutionalization of Transnational Corporations? On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct' 19 *Indiana Journal of Global Legal Studies*, 617-638 (2012).

[50] On the relationship between both types of codes, see L. Catá Backer, 'Governance Without Government' n 6 above.

that display the quality of 'soft law', while the private ordering of multinational corporations effectively implements precise, binding norms, and thereby develops into a new form of 'hard law'.

As a consequence of this inversion, the constitutionalization of the transnational economy essentially occurs in the corporate sector, via the formation and implementation of private ordering. Not the institutions of the state, but rather corporate collective actors decide whether corporate codes will be at all produced, and if so which content they will have and how they are to be legally enforced. As a result of drastic power transfers in the global economy from the public to the corporate sector, transnational enterprises have become the real constitutional authority, because it is they who create corporate codes through their unilateral public declarations of self-obligation.

Due to the collisions between diverse production regimes, the character of corporate codes itself is incisively changed. In the vertical dimension, it is the varieties of capitalism that successfully hinder the global institutions of the world of states – UNO, ILO, OECD, EU – from providing legally binding corporate codes. If the economic constitutions of the major production regimes in this way diverge, then the 'public' corporate codes can only be soft law, while the hard law can emerge only at the level of enterprises in the 'private' codes. The 'public' codes can no longer regulate the collisions for a global *ordre public économique,* but only give guidelines for concrete collision rules, which are implemented in the enterprises according to the specifics of the situation.

In the horizontal dimension, the 'private' codes take on a different character, depending upon the production regime they are implemented in. This is due not primarily to their adaptation to local particularities of the individual enterprise, but rather to their institutional embedding in different regimes of production. They will differ from each other according to whether they operate in LMEs with their compromise between Keynesianism and the Chicago School, with their priority to private ordering, adapted to the New Sovereignty of enterprises, or in CMEs with greater welfare state and economic democracy components in the neo-corporatist triangle of associations, trade unions, and the state.

That shows itself in the current virulent question whether the state courts qualify corporate codes as legally binding and enforce

them effectively.[51] Multinational corporations seek by any means to hinder the interpretation and application of corporate codes by state courts. Thus they insist categorically that their codes are 'voluntary' and therefore legally non-binding. American courts hesitate when public interest litigation pushes them to enforce the codes as legally binding rules. They are open only to juridify market-based social norms. They declare other social norms as legally binding only insofar as they implement consumer preferences where these are sabotaged by false or misleading information. However, with an appeal to judicial restraint, they deny the binding character to the core material of the corporate codes, ie social norms, which proscribe corporate behavior in the name of the public interest.[52]

The chances for juridifying corporate codes appear quite different in the European production regime. If they are imported into the thoroughly regulated neo-corporatist arrangements, then the codes must be adapted to fundamental principles of the welfare state and economic democracy. They will be exposed to the stronger legislative activities in the EU and at the same time to a more extensive juridification by the courts. For example, the EU-legislator provides sanctions in § 5 I No 6 of the Law Against Unfair Competition against enterprises that give false data about the observation of a code of conduct, to which the enterprise has obligated itself in a binding fashion, if said false data refers to that binding code.[53]

Juridification by the courts, with which the legal qualification of the corporate codes enters into new found land, runs in two opposing directions. On the one side, the courts exert strict control of the contents of the codes, in so far as the codes burden employees or

[51] For detailed analyses, see A. Beckers, *Taking Corporate Codes Seriously: Towards Private Law Enforcement of Voluntary Corporate Social Responsibility Codes* (Oxford: Hart, 2015); D. Klösel, *Compliance-Richtlinien: Zum Funktionswandel des Zivilrechts im Gewährleistungsstaat* (Baden-Baden: Nomos, 2012).

[52] On these three types of norms in US law, see A. Peukert, 'Die Rechtsrelevanz der Sittlichkeit der Wirtschaft – am Beispiel der Corporate Social Responsibility im US-Recht', in R.M. Hilty and F. Henning-Bodewig eds, *Corporate Social Responsibility* (Berlin: Springer, 2014), 233-256.

[53] The particularities under which the specific codes of conduct fall within the norm are controversial and courts have not finally clarified their scope, A. Beckers, n 51 above, 176 et seq.

consumers; on the other side, the courts transform the codes into binding state law, in so far as they contain obligations in the public interest.

The courts intervene effectively in two constellations, where the enterprises insist on the legally non-binding character of their voluntary codes. In the first constellation they intervene when enterprises wish to remove private compliance rules from judicial control since they want to more strictly implement their internal rules – like in the cases of rules on whistle-blowers, social political activities, internal monitoring, evaluations of performance, and internal supervision of rules. The case of Walmart is the most famous. Walmart was very strict in its corporate codes, governing even the private lives of the employees, and sought to enforce a clause prohibiting love and flirtation, which is standard in the USA. The courts, however, refused to permit Walmart to appeal to the non-binding nature of the voluntary code which would allow them to escape from judicial review. The courts let the questionable clauses fail, in part based on the participation rights of the works council, in part on the basis of fundamental rights standards.[54]

In the second constellation the case of Lidl, which has become just as famous, shows how difficult it is for the enterprises to appeal to the 'voluntary' and non-binding character of their codes, whenever they declare self-obligations with respect to the public good but then in practice do not hold to them.[55] Lidl was sued, with success, for anti-competitive conduct when it made false advertisements and declared that it had fulfilled its code obligations.

Not only competition law but also tort law with its highly developed organizational duties, as well as contract law, with its broad contractual and quasi-contractual obligations, and the third party effect of fundamental rights are relevant here. With these doctrines the welfare-state-inspired private law of continental Europe has a full toolkit for the legal qualification of corporate codes

[54] Arbeitsgericht Wuppertal NZA-RR 2005, 476; Landesarbeitsgericht Düsseldorf NZA-RR 2006, 81. D. Klösel, n 51 above, 59 et seq.

[55] An extensive analysis of the Lidl case: Verbraucherzentrale (Statement of Claim filed 6 April 2010, Case settled on 14 April 2010), *Hamburg* v *Lidl*, available at http://business-humanrights.org/en/lidl-lawsuit-re-working-conditions-in-bangladesh (last visited 15 October 2015).

at its disposal.[56] Thereby the courts can assure the legally binding character of the codes and enable their enforcement and judicial review. Courts can in the final analysis always accuse enterprises of *venire contra factum proprium* – a legally relevant performative self-contradiction, when enterprises have first enacted corporate codes as serious declarations of self-binding, but then seek to qualify them before the court as non-binding declaratory intentions: estoppel.

As for aspirations to economic democracy, the US courts prove themselves to be rather resistant. Democracy there is understood as having no place in market processes, but primarily in the political system. Corporate codes are accordingly strictly interpreted for conformity to the market.[57] They are only juridified by courts insofar as they implement the changing preferences of market participants in the market. Primarily, it remains a matter for the private TNCs to react *ad hoc* in their struggles with civil society groups regarding the changing preferences of consumers and investors by public interest oriented codes, so far as this corresponds to their cost-benefit analysis. A further politicization of the marketplace is not held to be legitimate there.

In contrast, the economic cultures of continental Europe with their neo-corporatist institutions have historically been long directed toward an internal politicization of economic decisions. Alongside wide ranging social welfare state interventions, the institutions of economic democracy are particularly held to be legitimate for they, through the participation of labor in corporate decisions, are supposed to compensate for market failures.[58] In their adaptation to democratic corporatism of continental Europe, the corporate codes are being redefined: no longer seen as unilateral enactment by sovereign enterprises, they are instead understood as the result of political conflicts between enterprises and civil society actors. In addition to other institutions of economic democracy, corporate codes serve here to pursue goals of public interest, the re-embedding of the economy into society. That occurs however not through

[56] The current state of play and suggestions for further legal reforms can be seen in A. Beckers, n 51 above, 39 et seq, 344 et seq.

[57] Thereto see A. Peukert, n 52 above.

[58] In a historic perspective, see W. Abelshauser, n 11 above.

external state intervention but rather in the form of a re-entry: the internalization of social demands in the decisions of the enterprise.[59]

If the internal politicization of the European economic culture has thus markedly influenced the corporate codes, the codes in their turn produce new impulses for economic democracy.[60] Their first impulse comes from a change in direction of the protest movements, in which according to some observers a new political quality in society has been realized.[61] Civil society protests direct themselves increasingly not (only) against institutions of the state, but selectively, directly, and intentionally, against corporate actors in the market, which are accused of violating their social responsibilities. Social movements react thereby to drastic power shifts in the global economic constitution. The actual economic *pouvoir constituent* has been taken over by transnational enterprises, because it is they who, through unilateral public self-obligation, enact and implement the corporate codes. However, first and above it is social movements who by their protest initiate these corporate codes, co-determine their contents, and monitor their implementation. For it is mostly the NGOs and other actors in civil society who have compelled multinational corporations to conclude agreements with them regarding corporate codes through their protest actions. Civil society's actors realize a particular potential of corporate codes for economic democracy through their activities, which go well beyond the traditional neo-corporatist arrangements, which in continental Europe were only developed between enterprises and labor unions.

Their second impulse for economic democracy drastically extends the substantive themes within the politicization of the economy. Corporate codes no longer only mediate the distributive interests of capital and labor within the enterprise. The civil society protests go

[59] For details see G. Teubner, 'Self-constitutionalization of Transnational Corporations?' n 49 above.

[60] The consequences which result from such new institutions in international law are researched by I. Feichtner, 'Verteilung in Völkerrecht und Völkerrechtswissenschaft', in S. Boysen, A.B. Kaiser and F. Meinel eds, *Verfassung und Verteilung* (Tübingen: Mohr Siebeck, 2015).

[61] C. Crouch, *The Strange Non-Death of Neoliberalism* (Cambridge: Polity Press, 2011); R. O'Brien et al, *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (Cambridge: Cambridge University Press, 2002), 2.

much further than these important but limited themes, and compel corporations to establish encompassing public interests with binding force: environmental protection, anti-discrimination, human rights, product quality, consumer protection, data protection, freedom of the internet, and fair trade.[62] While such themes had been earlier almost exclusively decided within the political system, a strange paradox of economic democracy arises as a result of direct confrontation of civil society groups with corporations: the public interest will be implemented through private ordering.[63] Of course the corporate codes cannot, like political legislation, claim universal validity. However, for the individual enterprise they have binding obligatory force; for the civil society groups insist that the power of corporate law arrangements extends to dependent corporations, and that contractual agreements bind large networks of supply and distribution.

Their third impulse for economic democracy proceeds from the self-obligation of enterprises to protect fundamental rights. Here, the codes go much further than the current doctrines of third-party effect of fundamental rights. For they break through their state-fixation and recognize explicitly a direct effect of fundamental rights on private collective actors. They also make up for certain weaknesses of the state-law protective duties. If the fundamental rights standards of the codes result directly from the democratic potential of social conflicts, then a higher contextual adequacy is to be expected because organizations and procedures are more exactly calibrated to the particularities of the fundamental rights conflicts in economic relations.[64]

[62] Luhmann argues that the so-styled 'new social movements' no longer fit the form of socialist protest. They do not refer to the consequences of industrialization and no longer have the sole goal of a better division of wealth and well being. Their propositions and themes have become much more heterogenous, above all the ecological them has crept into the foreground, N. Luhmann, *Theory of Society* (Stanford: Stanford University Press, 2012), chapter 4, XV.

[63] For a thorough analysis, A. Beckers, n 51 above, 262 et seq.

[64] On such an extension of the third party effect of fundamental rights, see I. Hensel and G. Teubner, 'Horizontal Fundamental Rights as Collision Rules: How Transnational Pharma Groups Manipulate Scientific Publications', in B. Kerstin et al eds, *Contested Collisions: Interdisciplinary Inquiries into Norm Fragmentation in World Society* (Cambridge: Cambridge University Press, 2015).

V. Conclusion

Globalization has indeed produced a transnational economic constitution. However, it needs to be understood as a meta-constitution, which regulates constitutional collisions. The colliding units are not nation-states, but transnational production regimes, which extend well beyond the boundaries of nation-states.

The traditional alternative – ordo-liberal economic constitution and social democratic economic democracy – formulated by Böhm and Sinzheimer has been replaced by the opposition between the institutionally strong, tightly woven production regimes of continental Europe, organized by neo-corporatism, and the liberal finance-capital marked Anglo-American production regimes.

Against all predictions, the neo-corporatist constitutions of European economies today are undergoing a renaissance, which shows that despite globalization and economic crisis they are resilient. Moreover, the corporate codes which have emerged in the recent wave of globalization, have opened in Europe – beyond the protection of workers' rights – a new opportunity for economic democracy. Alongside the legal norms created by state intervention, the opposing power of civil society – the media, public debate, spontaneous protest, intellectuals, protest movements, NGOs, labor unions, and the professions – are exercising such a massive pressure on enterprises, that they are compelled to enact self-binding restrictions oriented on the public interest.

Essays

Structured Error. Case Study on a Discourse Logic of Comparative Law

Bertram Lomfeld*

Abstract

Taking legal reactions on errors in contract formation (the 'law of errors') as a paradigm, this case study outlines the method of a 'discursive comparative law'. Following a critical view on the prevailing methods of comparative law (I), the essay explores the idea of 'deliberative comparisons' between legal cultures (II). A 'discourse logic' compares structures of legal argumentation in different jurisdictions and reveals its competing ethical and political reasons. From that perspective, contract law turns into a political battlefield of normative legal principles (III). A comparative discursive analysis of the 'law of errors' in Germany, France, Italy and England, however, shows amazingly similar argumentative structures (IV). A second stunning result is the discursive picture of European private law. The unifying European Common Frame of Reference pluralizes the field of normative reasons (V). Here, to structurally demonize legal harmonization per se would be in itself a 'structured error'.

I. Critical Comparative Law – '*error in methodo*'?

To err is human. A Belgian furrier makes an error while signing on to an orally pre-negotiated price with London merchants.[1] A computer system confirms the order of a notebook automatically, listed in a German merchant's online shop at a price of two hundred euros instead of two thousand euros.[2] The French *Musée du Louvre* purchases an old painting from a couple for two thousand Francs and puts it on exhibition shortly thereafter as 'Apollon et Marsyas' by the famous painter Nicolas Poussin valued at several million francs.[3] An

* Professor of Private Law and Legal Philosophy at Free University Berlin.

[1] *Hartog* v *Colin & Shields* [1939] 3 All ER 566.

[2] German Bundesgerichtshof 26 January 2005, 58 *Neue Juristische Wochenschrift*, 976 (2005).

[3] French Cour d'appel Versailles 7 January 1987 (Poussin), *Revue Trimesterielle de droit civil,* 741 (1987).

Italian investor makes a terrible financial investment after receiving bad information from the Bank handling his assets.[4] An employer hires a woman as a nighttime security guard who announces two months later that she can no longer work at night because she is pregnant.[5] *Errare humanum est*. The problem of human error has existed for millennia. However, although the first part of the phrase has come down to us through the centuries, the Latin original saying was actually longer: To err is human, but to insist on errors is diabolical.[6] Even the general idea of 'an' error law with which the mistaken party may be considered exempt from an erroneous contract also serves to highlight this problem. All around the world, people make mistakes – there is no way around the fact. Is there then a corresponding universal idea of error in law? Or is even this idea in and of itself a mistake?

The question of universality is part and parcel of comparative law. But can a comparison really get to the root of something like this? In asking this, we inevitably find ourselves ensnared in a fundamental questioning of the comparative method itself. For decades, the answer on this matter seemed quite clear: 'The basic methodological principle of all comparative law is that of functionality'.[7] A functional comparative law is based on a single, technical function of law. 'The legal systems in every society face essentially the same problems, and solve these problems by quite different means, though very often with similar results'.[8] Errors create problems the world over, problems that law must endeavor to solve. The social problem of error thus comprises a unified approach for the comparison of the legal treatment of the validity of contracts.

[4] Italian Corte di Cassazione 19 October 2012 no 18039, 'Intermediazione e consulenza finanziaria' *Repertorio del Foro italiano*, I, 2928 (2013).

[5] Case 421/92 *Habermann* v *Beltermann*, [1994] ECR I-1657.

[6] '*Errare humanum est, (sed) perseverare diabolicum*': attributed to Seneca yet never attested, but cf M. Cicero, *Orationes Philippicae* (Cambridge: Cambridge University Press, 2003), 12.5: '*Cuiusvis hominis est errare, nullius nisi insipientis in errore perseverare*'.

[7] K. Zweigert and H. Kötz, *An Introduction to Comparative Law,* translated by T. Weir (Oxford: Oxford University Press, 1998), 34. For an overview cf also R. Michaels, 'The Functional Method of Comparative Law' in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 339.

[8] K. Zweigert and H. Kötz, n 7 above.

After decades of largely theoretical abstinence, in recent years the 'method question' has increasingly inched more and more into the center of a reinvented comparative law debate.[9] For some time it was quite clear that comparative law, as the law itself, is always bound to the concepts of space and time.[10] Those who in the past delved into the issue of historical comparative law describe the emergence of different 'legal traditions',[11] while others classify jurisdictions into 'legal families'.[12] But the skepticism with respect to the emergence of the new methods goes deeper. The functionalist method seems to underestimate the pluralism of 'legal cultures'.[13] The most extreme opposing methodological position sees comparative law merely as an attempt to rehash descriptions of untranslatable legal cultures. The fact that English Common Law never formed a single 'law of errors' is then, following this argument, an indelible part of a cultural way of life. However, here too one can see a structural added value: 'Comparative legal studies is deconstruction'.[14] De-construction concerns itself with breaking down the constructions of a particular legal system, its paradoxes and ideological backgrounds.

Yet comparative law is not exhausted in comparative 'aesthetics of rationality', but rather, at least implicitly, always inherently

[9] P.G. Monateri, *Methods of Comparative Law* (Cheltenham: Elgar, 2014); J. Husa, *A New Introduction to Comparative Law* (Oxford: Hart, 2015); G. Samuel, *An Introduction to Comparative Law and Method* (Oxford: Hart, 2014); M. Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2014).

[10] R. Pound, 'Comparative Law in Space and Time' 4 *American Journal of Comparative Law,* 70 (1955).

[11] Cf for example R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996).

[12] R. David and J. Brierley, *Major Legal Systems in the World Today* (New York: Free Press, 1978); K. Zweigert and H. Kötz, n 7 above, Part B.

[13] For the cultural method in comparative law cf M. Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' 47 *International Comparative Law Quarterly*, 495 (1998); E. Örücü and D. Nelken eds, *Comparative Law. A Handbook* (Oxford: Hart, 2007); P. Legrand and R. Munday eds, *Comparative Legal Studies. Traditions and Transitions* (Cambridge: Cambridge University Press, 2003); C. Varga ed, *Comparative Legal Cultures* (Aldershot: Dartmouth, 1992).

[14] P. Legrand, 'Paradoxically Derrida' 27 *Cardozo Law Review*, 631, 717 (2005); on the deconstruction of the idea of law in general see J. Derrida, 'Force of Law' 11 *Cardozo Law Review*, 920 (1990).

involves a much more far-reaching social project.[15] The dispute over methods then takes a political turn, as the debate on a European Civil Code illustrates wonderfully.[16] Functional comparative law implicitly incorporates a tendency towards legal harmonization of the identified problem. Cultural comparative law calls for a pluralism of legal systems and therefore fights against a standardization of legal cultures. A key methodological issue in the controversial debate about a European harmonization and unification of law revolves around 'legal transplants'.[17] Does it make sense and is it at all possible to adopt individual legal characteristics from one jurisdiction to another?[18]

The passionate debate about functional unity or cultural differences often overlooks how many pluralistic contexts and diverging ideological backgrounds already exist within a particular legal system itself. With respect to a 'critical comparative law'[19] therefore, matters generally not only concern the overcoming of 'ethnocentrism' and 'legocentrism', but also the political dimension of law in a society generally. Traditionally, 'comparatists see their task as being essentially unpolitical, or neutral [... and avoid] radical questions about the role of law in society'.[20] All basic concepts of

[15] A. Riles, 'Introduction' in A. Riles ed, *Rethinking the Masters of Comparative Law* (Oxford: Hart, 2001), 11-15.

[16] Cf M. Bussani and U. Mattei eds, *The common core of European private law* (The Hague: Kluwer, 2003) and A. Hartkamp et al eds, *Towards A European Civil Code* (Nijmegen: Kluwer, 2004); versus P. Legrand, 'Against a European Civil Code' 60 *Modern Law Review*, 44 (1997).

[17] A. Watson, *Legal Transplants* (Athens, GA: University of Georgia Press, 1974); R. Michaels, 'One Size Can Fit All. On the Mass Production of Legal Transplants', in G. Frankenberg ed, *Order From Transfer. Studies in Comparative (Constitutional) Law* (Cheltenham: Elgar 2013), 56-80.

[18] Prominent sceptical voices are: P. Legrand, 'The Impossibility of Legal Transplants' 4 *Maastricht Journal of European & Comparative Law*, 111 (1997); G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' 61 *Modern Law Review*, 11 (1998).

[19] G. Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' 26 *Harvard International Law Journal*, 411 (1985); for the remaining actuality of Frankenberg's account see P. Zumbansen, 'Comparative Law's Coming of Age? Twenty Years After Critical Comparisons' 6 *German Law Journal*, 1073 (2005).

[20] J. Hill, 'Comparative Law, Law Reform and Legal Theory' 9 *Oxford Journal of Legal Studies*, 101 (1989), 107.

private law arise and stand in pluralistic normative contexts and are diversely ethical and political. 'Critical comparison extracts from beneath the claims to legal rationality competing political visions and contradictory normative ideals'.[21] In this sense, the following draft of a 'discursive comparative law' seeks to explore, through examples occurring in the legal provisions on error, a critical path between a technical-functional and cultural method.

II. Deliberative Comparisons

Discursive comparative law compares structures of argumentation and reasoning in different jurisdictions from the perspective of a discourse theory of social norms. For a discourse theory, generally speaking, the exchange of rational reasons constitutes the essence of a social order. The validity of a social order depends on its democratic legitimacy, and along with it, that the subjects agree to standards or that they can criticize them, with reason.[22] Law institutionalizes special formal structures of this argumentative debate about reasons.[23] Laws, customary law, precedents, dogmatic theories and methods structure the legal discourse on social conflict. A differentiated reconstruction of argumentative structures allows the legal-theoretical distinction between 'rules' and 'principles'.[24]

'Legal rules' are binary standard sets that assign an event a legal consequence and are mutually exclusive. 'Legal Principles', however, are more general normative reasons that apply simultaneously and must be weighed against each other in case of conflict. A clear

[21] G. Frankenberg, 'Critical Comparisons' n 19 above, 452.

[22] J. Habermas, *Between Facts and Norms*, translated by William Rehg (Cambridge, MA: MIT Press, 1998); T. Scanlon, *What We Owe To Each Other* (Cambridge, MA: Harvard University Press, 2000); R. Forst, *The Right to Justification*, translated by Jeffrey Flynn (New York: Columbia University Press, 2011).

[23] R. Alexy, *A Theory of Legal Argumentation*, translated by R. Adler and N. McCormack (Oxford: Oxford University Press, 2009).

[24] J. Esser, *Grundsatz und Norm* (Tübingen: Mohr, 1956); R. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), chapters 2-4; R. Alexy, 'On the Structure of Legal Principles' 13 *Ratio Juris*, 294 (2000).

structure of argument arises when one understands the interplay of both standard categories on two levels.[25] With each social conflict, normative reasons collide that are weighed as legal principles, expressed or implied, by a legal decision. Legal rules define abstract primacy relations between conflicting principles.[26] In each individual case, the actual weighting affects those administering the law. Thus, in the light of legal precedence, the judge weighs reasoning, and makes decisions (decides). Legal rules structure this weighing by setting 'burdens of justification'. The rules of a legal system thus shape the argumentative structure of the balancing of each individual case.

The structuring of this assessment can be formalized and compared as 'discourse logic'. The philosophical logic represents linguistic statements in a conceptual scheme.[27] A 'discourse logic' structures and formalizes normative assessments between principles.[28] The logical starting point of any assessment is the collision of at least one principle with another principle (P1 >< P2). In the event of a mistake when concluding a contract, the interest of the declarant and his true will stand in direct opposition to the recipient, and his reliance in terms of actual expression (*Will* >< *Reliance*). In a legal process, the judge weighs the conflicting principles on the basis of the facts of each case, one against the other, and takes a concrete decision of priority (*Will* > *Reliance*). Legal rules establish conditional primacy relations between principles. The rule of challenging a declaration of intent essentially regulates that, under the condition of a particular error, the *Will* of the declarant takes precedence over the *reliance* of the recipient.

[25] B. Lomfeld, *Die Gründe des Vertrages* (Tübingen: Mohr, 2015), 36-55; A. Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (Baden-Baden: Nomos, 1990).

[26] R. Alexy, *A Theory of Constitutional Rights*, translated by J. Rivers (Oxford: Oxford University Press, 2009), chapter 3; R. Alexy, 'On Balancing and Subsumtion' 16 *Ratio Juris*, 433 (2003).

[27] W.V. Quine, *Methods of Logic* (New York: Holt, Rinehard & Winston, 1956), Introduction.

[28] For an introduction into 'discourse logic' see B. Lomfeld, n 25 above, 44-55 and 306-309.

Avoidance = Relevant Error → *Will* > *Reliance*[29]

In so doing, the legal principles establish these as the fundamental, normative value standards to the pluralistic, ethical foundations of any society. Collisions between principles can document real ethical conflicts, or at least a dissent on normative grounds. Any settlement or application of law is seen as argumentative balancing ('deliberation') of conflicting reasons.[30]Any legal decision is thus 'political', as it opts for and against certain normative (ethical) reasons. In so doing, a deliberative legal theory seeks to stay neutral, in as far as is possible, with respect to pluralistic ethics. It only tries to reconstruct legal decisions as a 'political' balancing between pluralistic values in a society.

At any rate, in any legal democratic system, legal decisions require justification. The respective rules justify concrete legal consequences. The decision as to whether the rule is applicable can always only be justified by resorting to other (conflicting) reasons. Each legal system can thus be reconstructed in 'discourse logic' as specific structures of burdens of justification between conflicting principles. Discursive or deliberative comparative law seeks to compare balancing structures. Thus, initially, it is necessary to determine the 'ethical' background justification of legal doctrine and 'political' considerations in any legal culture. In this respect, discursive comparative law can be understood as critical legal theory.

[29] The formal symbols of 'discourse logic' are the following:
>< collides with (collision of principles)
> outweighs (primacy-relation)
→ if... than (conditional primacy relation = rule)
+ and (cumulative weights of principles)
= implies, equals, corresponds (relation, principles)
≠ no (normative negation of a reason).

[30] The concept related to the tradition of 'deliberative democracy', cf J. Habermas, 'Three Normative Models of Democracy' 1 *Constellations,* 1 (1994); S. Benhabib, 'Deliberative Rationality and Models of Democratic Legitimacy' 1 *Constellations,* 26 (1994); J. Rawls, 'The Idea of Public Reason Revisited' 64 *University of Chicago Law Review*, 765 (1997); cf also the representative essay collections of J. Bohman and W. Rehg eds, *Deliberative Democracy* (Cambridge, MA: MIT Press, 1997) and J. Elster ed, *Deliberative Democracy* (Cambridge University Press, 1998). Even French poststructuralist J.F. Lyotard, *Le différend* (Paris: Gallimard, 1983) uses the concept of a ›deliberative politics‹ (§210) to mark the pluralistic competition between different discourses (§234).

By attempting an integrated discourse logic, however, a functional comparability is also constructed simultaneously that takes a forefront position in the following analysis of legally relevant mistakes. Here, the cultural differences of each national law are less appreciated because comparable political conflicts are highlighted. The deliberative comparison designs a critical-functional method of comparative law.

III. The 'Erroneous' Neutrality of the Law and the Battle of Legal Principles

What is an error? From a deliberative perspective, *Will* and *Reliance* collide with respect to errors in legal principles. The party in error does not freely form or express her will, but does so, rather, under the influence of a mistake. Her partner in the contract relies on the actual statement, as in the case of a slip of the pen, for example, or an error in signing. The recipient trusts the written reply, while the party in error does not even take note of what he has said. Contract law establishes a structure of argumentation for balancing the principles of *will* and *reliance*. What is allowed as a relevant mistake? To what extent, exactly, can the erring individual be permitted to allow her impaired will to prevail over the reliance of the contracted partner? What obligations for disclosure exist? The conflict of *will* versus *reliance* lurks in the background of each contract formation. National regulations for disputes take on quite different forms. While the legal structures of balancing vary, the collision of justifications remains the same.

In this dogmatic, abstract description, the principles of conflict sound purely technical. Behind every technical regulation, however, is also concealed a social conflict and along with it, a political balancing, or assessment.[31] The normative background becomes clearer when one considers contractual theories for each of which principles stand, or have stood. According to the (at least) historically strong theory of *Will*, in Germany and France, a contract either

[31] For an illustration of that claim see prominently D. Kennedy, 'The Political Stakes in ›Merely Technical‹ Issues of Contract Law' 10 *European Review of Private Law*, 7 (2010).

stands or is void per the sole intentions of the parties.[32] An error must consequently lead to the nullification of the contract. On the other hand, the contrarian 'declaration theory' establishes the contractual promise solely according to its objective appearance.[33] The declarant must be able to maintain the objective effectiveness of his statement. An undetectable error remains irrelevant. Historically, these two approaches were already considered at odds as '*verba vel voluntas*' in Roman law.[34]

Will and *reliance* can be read as two opposing 'ethical' reasons underpinning the contract.[35] The will theory is normatively derived from a liberal ethics of freedom. Whoever promises something commits himself with this promise through his intentional autonomy itself. The normative legal principle of *will* accordingly requires that the law should respect and support this individual, intentional self-determination. An objective ('declaration') theory, on the other hand, takes the social context of the conclusion of the contract as a starting point. The contractual obligation arises from the social expectations of the individual making the promise, whose reliance must not be disappointed. Law should therefore accordingly protect *reliance* as social security. An extreme version of this, for example, is the 'factual contract' that exists for an individual entering a subway, the

[32] The most prominent development of a purist will theory was in Germany with C.F. von Savigny, *System des heutigen römischen Rechts* (Berlin: Veit & Comp, 1840), §140 and B. Windscheid, 'Wille und Willenserklärung' 63 *Archiv für civilistische Praxis,* 72 (1880). In France the strong focus on ›volonté‹ appeared already as natural law construction with R. Pothier, *Traité des obligations* (Paris: Debure l'aîné, 1764), 6. A vivid reception of mostly the German will tradition in England is analyzed by F. Pollock, *Principles of Contract* (London: Stevens & Sons, 1876), Introduction.

[33] For the German 'Erklärungstheorie' see O. Bähr, 'Über Irrungen im Kontrahieren' 14 *Jherings Jahrbücher der Dogmatik des bürgerlichen Rechts,* 393 (1875); in France: R. Saleilles, *De la déclaration de volonté* (Paris: Pichon, 1901); E. Gounod, *Le principe de l'autonomie de la volonté en droit privé francais* (Paris: Rousseau, 1912). In the whole Common Law Tradition the ›objective theory‹ became the normal starting point of interpretation; cf O.W. Holmes, *The Common Law (*Reprint New York: Dover Publications, 1991), 309.

[34] Cf R. Zimmermann, n 11 above, 587.

[35] For an in depth analysis of the enlisted legal principles of contract law (the 'reasons of contract') with an encompassing comparative discussion of philosophical, historical and recent contract theories see B. Lomfeld, n 25 above, 73-228.

realization of which no longer depends upon the will of the individual acting. In this case, the protection of the actual reliance surpasses a general protection for transport safety in the interest of the *stability* of the social (economic) system. The collision of *will* versus *reliance* reflects the political debate about an individualistic liberal order as opposed to a social (or even collective) social order.

However, *will* and *reliance* are not the only legal principles that are cavorting about in contract law. What about when a contract is retroactively annulled? Is the erring party liable or must he or she provide compensation for any losses or damages? In this instance, a problem of material justice arises. From an egalitarian perspective, a principle of '*equivalence'* requires that the law support the substantive equality between the parties and should thus compensate the one who has demonstrated reliance. A libertarian position can interfere with the universality of this compensation claim. Compensation would then only be justified if the erring party has to answer for her error. The legal principle of individual '*responsibility'* is thereby the other side of free, voluntary self-determination.

Disclosure liabilities and consumer protection mark a new paradigmatic conflict in error discourse: *risk* versus *fairness*. What information each party must disclose during the initiation of a contract? What information is part of economic competition? According to an economically understood *'risk'* principle, information flows into the competitive market in the form of strategic advantage. The parties set up informational advantages to maximize their individual benefits and also to thereby socially allocate resources in an optimal way as well. From the perspective of welfare economics theory, however, the law should also ensure allocative *'efficiency'*. On the other hand, behind disclosure obligations is mainly positioned an egalitarian principle of *fairness*. The law should thus ensure a procedural equality of opportunity.

In sum, eight principles of 'law of errors'[36] can be classified into

[36] The Common Core of European Private Law (cf n 16 above) working group also stated eight aims of respective legal provisions; cf R. Sefton-Green ed, *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge: Cambridge University Press, 2005), 14: 'i. Protecting the consent of the parties'; 'ii. Upholding the security of transactions'; 'iii. Controlling contractual fairness', divided into 'procedural fairness' and 'substantive fairness'; 'iv. Upholding the moral duty to tell

four basic ethical poles or political philosophies:[37] *Will* and (self) *responsibility* represent a liberal or libertarian philosophy of freedom. *Reliance* and *stability* demonstrate or comprise values of a communitarian or sociological theory. *Efficiency* and strategic *risk* reflect the utilitarian philosophy of economic theory. *Equivalence* and *fairness* are associated with egalitarian theories of justice.

IV. Political Structures of 'Laws of Error' (Germany, France, Italy, England)

Viewed from a historical perspective, one might expect a significant divergence between national laws. Contractual rights inspired by natural law such as the French 'Code Civil' and the Italian 'Codice Civile' base their laws around the principle of will. Likewise, the German 'Bürgerliches Gesetzbuch' (BGB) squarely places *will* at the center of the error question in good, idealistic, rational legal tradition. Quite different, however, is the much more pragmatic Common Law of the economically coalesced Commonwealth. Emerging from commercial conventions, the objective effectiveness of a declaration emerging in the course of trade and lending the impression of 'a reasonable business man' comprise fundamental maxims. In fact, something like universal 'law of error' in England is, conceptually, not such a clear matter to define. Legal concepts such as 'mistake' and 'misrepresentation' do not necessarily follow a uniform pattern. This part of contract law seems to confirm the historical-functional classification in 'legal families':[38] 'Common Law' versus Roman and Germanic 'Civil Law'.

Firstly, a discursive comparative law analyzes foundational 'discursive structures' and upsets this classificatory certainty: For

the truth' and 'v. Protecting or compensating the innocent reliance of a mistaken party'; 'vi. Imposing or regulating standards of behaviour'; 'vii. Setting objective standards in relation to the content of the contract'; 'viii. Allocating risks under the contract'.

[37] B. Lomfeld, n 25 above, 73-228; cf also M. Hesselink, 'Five Political Ideas of European Contract Law' 7 *European Review of Contract Law*, 295 (2011) differentiates 'utilitarian', 'liberal-egalitarian', 'libertarian', 'communitarian' and 'civic' ideas of contract law.

[38] Cf n 12 above.

both 'Common Law' as well as continental 'Civil Law', *reliance* represents the starting point of argumentation. In continental law, error is a reason for contesting a contract. The argumentative structure of a challenge, however, logically presupposes a prima facie primacy of *reliance*. Only a priority presumption of validity of the declaration can underpin the legal construction of an avoidance of the contract and make sense. Since a challenge requires special justification, the party defending the *will* principle thus has the burden of justification. On the other hand, the discursive structure of Common Law does not follow a pure objective theory. In the context of 'mistake' and 'misrepresentation', different reasons can serve to eliminate the validity of a contract. In this respect, Common and Civil Law do share the same basic point of view. The reliance of the contract prevails as long as no reasons against its validity are put forward. This 'avoidance structure' can be described as a common discourse logic of error.

[Discourse Logic of Error][39]
(1) [Default] *Reliance* > *Will*
(2) AVOIDANCE = Legally relevant error → *Will* > *Reliance*
(3) Confirmation = *Reliance* > *Will*
(4) Time limit = *Reliance* > *Will*
(5) Compensation = *Equivalence* > *Reliance*

As a basic point of view, the *reliance* of the recipient prima facie prevails over the *will* of the declarant (1). The declarant must especially justify the precedence of his undisturbed *will* (2). With legally recognized reasons for avoidance, *will* then supersedes that *reliance*. The contract is void. This basic structure of a legal challenge is readjusted by the influence of other rules. Here, again, the argumentation follows a common discourse logic of balancing between *will* and *reliance* under different legal jurisdictions and legal institutions. If the party in error confirms the contract even after becoming aware of her mistake, he renews the *reliance* and may no longer cancel the contract (3). Reasons for a challenge must be submitted immediately after subjective acknowledgement of the error, otherwise *reliance* serves to prevent, per tacit approval, the

[39] For the meaning of the symbolic operators compare n 29 above.

contract being set aside (4). After being successfully set aside, services are already provided must be refunded or replaced (5). In so doing, the parties should be in as similar a position as possible as they would have been previously without conclusion of the contract (*restitutio in integrum*).

This interplay of the balance between *will* and *reliance* reveals a new discursive, but again uniform functionality of various jurisdictions. In the second step, discursive comparative law considers the 'political grammar' of the applicable argumentation and exposes the unity of the structure culturally and politically. In almost all jurisdictions, a legal concept of 'relevance' of error emerges which opens up balancing, or considerations, to the widest range of valuations. The actual weighting of individual reasons and the result of the balancing is then no longer uniform and often much debated in the jurisdictions themselves.

1. Germany[40]

The BGB very largely follows Savigny's will-based error doctrine.[41] According to it, an error is a 'state of consciousness in which the true representation of the object is concealed or repressed

[40] Relevant provisions of the German 'BGB' (translation provided by the German Federal Ministry of Justice, 2013, available at www.juris.de) are:

§119 '(1) A person who, when making a declaration of intent, was mistaken about its contents or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case. (2) A mistake about such characteristics of a person or a thing as are customarily regarded as essential is also regarded as a mistake about the content of the declaration'.

§121 '(1) Avoidance must be effected [...] without undue delay after the person entitled to avoid obtains knowledge of the ground for avoidance [...] (2) Avoidance is excluded if ten years have passed since the declaration of intent was made'.

§122 '(1) If a declaration of intent is [...] avoided [...] the person declaring must, if the declaration was to be made to another person, pay damages to this person [...]'.

§142 '(1) If a voidable legal transaction is avoided, it is to be regarded as having been void from the outset'.

§144 '(1) Avoidance is excluded, if the voidable legal transaction is confirmed by the person entitled to avoid'.

[41] M.J. Schermaier, '§§116-124', in M. Schmoeckel, J. Rückert and R. Zimmermann eds, *Historisch-kritischer Kommentar zum BGB* (Tübingen: Mohr, 2003), 58.

by an untrue one'.[42] Accordingly, §119 BGB allows disputes without regarding the receiver of the statement. His responsibility or knowledge of the error is irrelevant; it is all about the trouble-free self-determination of the declarant. Paradoxically, the German Supreme Court used a parallel will argument in considering the case of a system error leading to the wrongly published online prices of computer 'notebooks'.[43] Neither did the *responsibility* of the online system controller play any role, nor its strategically inherited *risk* or its *more efficient* risk-control. German legal practice is characterized by an extremely libertarian basic understanding of its 'law of errors'.

Different criteria of weighting could, however, be tacked onto the open-ended terms of 'sensible understanding' and 'essential characteristics' in §119 BGB. An economical reading as such elevates the allocative *efficiency* to a decisive reason underpinning a relevant error and assumes that 'the parties entering into a contract always have an interest in an unwasteful (efficient) contract.'[44] The error with respect to the 'characteristics' of the worker, not being pregnant, would be relevant from an economic perspective. In contrast, the European Court of Justice in context of the European Directives on equal treatment denied the employer's possibility to appeal.[45] *Fairness* outweighs *efficiency*.

[Discourse Logic of the German Law of Errors]
(1) *Reliance* > *Will* [142(1) BGB]
(2) AVOIDANCE = Relevant error [119 BGB] → *Will* > *Reliance*
(2a) 'he would not have made' [119(1) BGB] = *Will*
(2b) 'sensible understanding' [119(1) BGB] = *Efficiency/ Fairness*
(2b) 'essential characteristics' [119(2) BGB] = *Efficiency/ Fairness*
(3) Confirmation [144 BGB] → *Reliance* > *Will*
(4a) 'without undue delay' [121(1) BGB] → *Reliance* > *Will*
(4b) Within 'ten years' [121(2) BGB] → *Stability* > *Will*
(5a) Unjust enrichment [812 BGB] → *Equivalence* > *Reliance*
(5c) Reliance interest [122 BGB] → *Reliance* > *Will*

[42] F.C. von Savigny, n 32 above, §145.
[43] German Bundesgerichtshof 26 January 2005 n 2 above.
[44] M. Adams, 'Irrtümer und Offenbarungspflichten im Vertragsrecht' 186 *Archiv für civilistische Praxis*, 453 (1986), 489.
[45] Case 421/92 *Habermann* v *Beltermann* n 5 above.

The time requirement for an immediate challenge is supplemented in German law by an objective contestation period of ten years (§ 121 BGB). Services that have already been provided in a contested contract can be reclaimed through the law of unjust enrichment. A special peculiarity is represented by the claim of the recipient on reliance damages in §122 BGB. The balancing of the negative interest corrects the consequences that arise from will-centered error terminology. If *responsibility* rests with the erring individual himself, he needs to compensate for enforcing his *will* upon the *reliance* of others.

2. France[46]

French contract law is much in line with a liberal interpretation of *will*. Whether or not both parties share the error or the declarant is mistaken is ultimately irrelevant.[47] Even if the error arose spontaneously or was provoked, it makes no difference; the aspect of *responsibility* does not matter. The error is, however, only considered notable if it relates to the 'very substance of the thing' (Art 1110 *Code Civil*). To these required substantial qualities can be included, for example, the authorship of an image, as in the 'Poussin' case.[48] In this case, it is *fairness* that ultimately supports the open valuation as to what constitutes a 'substantial quality'. In essence, the State Museum's structural power of information is thereby compensated. If, on the other hand, a party knowingly enters into taking a strategic *risk* such as acquiring an image 'attributed to Fragonard' and purchases it, the assessment of error aligns with this fact accordingly.[49] *Risk* displaces (or chases away) error ('*L'aléa*

[46] Relevant provisions of the French ›Code Civil‹ (translated by G. Rouhette and A. Rouhette-Berton, 2006, available at www.legifrance.gouv.fr) are:

Art 1109. 'There is no valid consent, where the consent was given only by error […]'.

Art 1110. 'Error is a ground for annulment of an agreement only where it rests on the very substance of the thing which is the object thereof […]'.

Art 1117. 'An agreement entered into by error […] is not void by operation of law; it only gives rise to an action for annulment or rescission […]'.

[47] M. Fabre-Magnan, *Les obligations* (Paris: PUF, 2004), 272.

[48] Cour d'appel Versailles 7 January 1987 n 3 above.

[49] French Cour de Cassation 24 March 1987 (Verrou de Fragonard), *Bulletin civil*, I, 105.

chasse l'erreur'). A general obligation to clarify authorship does not exist[50] and economic competition for better information displaces material justice.

[Discourse Logic of French Law of Errors]
(1) *Reliance* > *Will* [1117 CC]
(2) AVOIDANCE = Error [1109 CC] → *Will* > *Reliance*
(2b) 'on the very substance' [1110 CC] = *Fairness*
(3a) Confirmation [1338 CC] → *Reliance* > Will
(3b) Risk chases error ['Fragonard'] → *Risk* > *Will*
(3b) Inexcusable error → *Risk* > *Will*
(4b) Within 'five years' [1304 CC] → *Stability* > *Will*
(5a) Restitution → *Equivalence* > *Reliance*

An assessment or weighting of strategic *risk* also undertakes jurisprudence with the argument that the error made must be 'excusable'.[51] Finally, a confirmation by the statement recipient prevents nullification (Art 1338 *Code Civil*) and after five years the challenge is objectively excluded (Art 1304 *Code Civil*). The entitlement to a restitution arises with the retroactive nullification of the rescission.[52]

3. Italy[53]

In the literature, the constitutive reason underlying contract is

[50] French Cour de Cassation 3 May 2000 (Baldus), *Bulletin civil*, I, 131.
[51] French Cour de Cassation 3 July 1990, *Revue Dalloz*, 507 (1991).
[52] J. Carbonnier, *Droit Civil* (Paris: PUF, 2004), 1022.
[53] Relevant provisions of the Italian *codice civile* are:
Art 1338. Knowledge of reasons for invalidity. 'A party who knows or should know the existence of a reason for invalidity of the contract and does not give notice to the other party is bound to compensate for the damage suffered by the latter in relying without fault, on the validity of the contract'.
Art 1427. Mistake, duress and fraud. 'A contracting party whose consent was given by mistake, [...] can demand annulment of the contract [...]'.
Art 1428. Relevance of mistake. 'Mistake is cause for annulment of a contract when it is essential and recognizable by the other contracting party'.
Art 1431. Recognizable mistake. 'A mistake is considered recognizable when, with respect to the content, the circumstances of the contract, or the quality of the contracting parties, it would have been detected by a person of normal diligence'.
Art 1432. Preservation of corrected contract. 'The mistaken party cannot

predominantly a subjective principle of freedom rooted in natural law.[54] However, the practice of Italian 'law of error' is significantly and distinctly more social in most aspects. The declarant must of course also challenge under Italian law, otherwise, *reliance* precedes *will* (Art 1427 Civil Code). The error must also be 'essential' in substance and 'recognizable' for the other party (Art 1428 Civil Code). Though the injury of a duty to inform does not by itself lead to classifying the error as 'essential' (Art 1429 Civil Code), *fairness* is an important factor.[55] With recognition, Italian law places social due diligence squarely upon the declarant recipient (Art 1431 Civil Code). He bears the *risk* of a negligently unrecognized error and is even obligated to pay compensation to the erring party in matters of doubt (Art 1338 Civil Code). Thus, Italian law provides clear limits to the libertarian rule of *will*. Without negligence of the recipient the contract persists. In the event of mutual error, jurisprudence dispenses with this requirement accordingly.[56]

[Discourse Logic of Italian Law of Errors]
(1) *Reliance* > *Will* [1427 cc]
(2) AVOIDANCE = Relevant Error [1428 cc] → *Will* > *Reliance*
    (2b) 'essential' [1429 cc] = *Fairness*
    (2d) 'recognizable' [1428, 1431 cc] = *Risk*
(3a) Confirmation [1444 cc] → *Reliance* > *Will*
(3c) Adaption of contract [1432 cc] → *Equivalence* ≥ *Will*
(4b) Within 'five years' [1442 cc] → *Stability* > *Will*
(5a) Restitution [1149 cc] → *Equivalence* > *Reliance*
    (5b) Damages [1338 cc] → *Responsibility* > *Reliance*

One of the most interesting regulations is the ability to adapt the contract ('*mantenimento*'). If the other party offers to fulfill the contract as intended by the erring party, then the power to contest

demand annulment of the contract if, before it can derive injury from it, the other party offers to perform it in a manner which conforms to the substance and characteristics of the contract that the mistaken party intended to conclude'. (translation by J.H. Merryman, *The Italian Civil Code and Complementary Legislation* (New York: Oceana, 2010), 26, 39).

[54] G. Alpa, *I Principi Generali* (Milano: Giuffrè, 1993), 295.

[55] Corte di Cassazione n 4 above.

[56] C.M. Bianca, *Diritto Civile. Il Contratto* (Milano: Giuffrè, 2000), 348.

no longer applies (Art 1432 Civil Code). The erring party shall be positioned no better by her error than she should or would have been without the error and can withdraw from the contract.[57] The recipient then has the option to make a decision as to whether he considers the originally intended contract to be materially *just* or not. Again, a social inclusion here restricts the libertarian freedom to unilaterally terminate the contract. The upholding of the contract, however, not only serves *equivalence*, but also helps in upholding the original *will*.

4. English Common Law

The basic principle, at least in English Common Law, is an objective theory of contract formation.[58] Only objective appearance counts.[59] Social *reliance* basically precedes the *will*. An error must significantly disrupt the agreement between the parties.[60] A unilateral 'mistake' is only legally relevant if the recipient was also aware of the mistake[61] or ought to have known it.[62] In the case of a written agreement of the pre-negotiated offer, the merchant should have detected the error immediately and clarified the matter. It is his or her strategic *risk* to act, or not to act.

In addition to 'mistake', Common Law recognizes a further challenge for 'misrepresentation', which requires an additional *responsibility* on the part of the receiver. A 'fraudulent misrepresentation' can also include a statement about which the declarant is in doubt.[63] The transitions to

[57] Cf Corte di Cassazione 23 February 1981 no 1081, *Giustizia Civile Massimario*, II, 415 (1981).

[58] *Smith* v *Hughes* [1871] LR 6 QB 597: 'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms' (Judge Blackburn).

[59] O.W. Holmes, n 33 above, 309: 'The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct'.

[60] G. Treitel, *The Law of Contract* (London: Sweet & Maxwell, 2003), 304.

[61] *Hardman* v *Booth* [1863] 1 H&C 803.

[62] *Hartog* v *Colin & Shields* n 1 above.

[63] *Derry* v *Peek* [1889] 5 TLR 625.

'negligent misrepresentation'[64] are fluid. In essence, it always ultimately comes down to the allocation of strategic *risk* for information. According to US-American Common Law, the relevance of error should explicitly decide who has borne the 'risk of mistake'.[65] With a focus placed squarely upon *risk*, the economically utilitarian orientation of Common Law becomes quite apparent.

[Discourse Logic of English Common Law of Errors]
(1) Objective appearance [*Smith* v *Hughes*] = *Reliance* > *Will*
(2) AVOIDANCE = Mistake → *Will* > *Reliance*
(2b) knew [*Hardman* v *Booth*] ≠ *Reliance*
(2c) ought to have known [*Hartog* v *Colin*] = *Risk*
(*2) AVOIDANCE = Misrepresentation → *Risk* > *Reliance*
(*2d) negligent [*Howard Marine* v *Dredging*] = *Risk*
(*2e) fraudulent [*Derry* v *Peek*] = *Responsibility*
(3) Affirmation [*Long* v *Lloyd*] → *Reliance* > *Will*
(4) Lapse of time [*Leaf* v *International Galleries*] → *Stability* > *Will*
(5) Restitution [*Kleinwort Benson* v *Lincoln*] → *Equivalence* > *Reliance*

Additional discourse structures of Common Law resemble those of continental laws. A contract can no longer be contested if the erring party to the contract confirmed it, through his behavior, after having learned about the faulty information.[66] The challenge must take place immediately after learning of the new situation and within a time frame that a prudent investigator would typically require in order to gain a clear picture of things. A period of five years was deemed too long to acquire knowledge of the false authorship of a painting.[67] Restitution of services and reliance damages are possible, even when ascribed to legal errors.[68] However, what is meant or intended is less damaging to the recipient party, but more so to the erring party, who errs because of his *reliance* on the false presentation by the recipient.

[64] *Howard Marine and Dredging Co Ltd* v *Ogden & Sons (Excavations) Ltd* [1978] 2 WLR 515.
[65] Cf *Restatement (Second) of Contracts* (American Law Institute, 1981), §154.
[66] *Long* v *Lloyd* [1958] 1 WLR 753.
[67] *Leaf* v *International Galleries* [1950] 2 KB 86.
[68] *Kleinwort Benson* v *Lincoln* [1998] 3 WLR 1095; cf also G. Treitel, n 60 above, 940.

V. Pluralizing Unity (European Common Frame of Reference)

Despite a uniform discursive basic structure, the balancing practices of individual jurisdictions vary. In particular, open legal terms on the relevance of error offer a gateway for pluralistic reasons from a communitarian, an economic or an egalitarian perspective. The range of variation and inconsistencies would be even much greater if we considered not only the prevailing opinions of the respective legal practice. Already, the identified differences make it clear that the reconstruction of a unified discursive basic structure is by no means an obstacle to a plurality of reasons in balancing.

A common culturalist argument against unification of law is always that it will lead to an impoverishment of the pluralism of law.[69] Looking at the design of a European private law in the Draft Common Frame of Reference (DCFR)[70] from the perspective of a discursive comparative law, this objection goes nowhere. A European private law pluralizes the reasons, even in the act of balancing. The DCFR cumulatively compiles almost all normative elements in the individually researched national laws into a pluralistic system, together. Thus, in the regulation covering the avoidance of contract (Art II.7: 201)[71] one finds at the side of the German argument of

[69] Cf the discussion at n 13-16 above.

[70] The DCFR was prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) based on several requests of the European Parliament, cf *Official Journal of the European Communities*, C 158/400 (1989). Its Interim Outline Edition was published as C. Bar, E. Clive and H. Schulte-Nölke eds, *Principles, Definitions and Model Rules of European Private Law* (Munich: Sellier, 2009).

[71] Art II.7: 201 DCFR: '(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if: (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and (b) the other party; (i) caused the mistake; (ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake; (iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or (iv) made the same mistake. (2) However a party may not avoid the contract for mistake if: (a) the mistake was inexcusable in the circumstances; or (b) the risk of the mistake was assumed, or in the circumstances should be borne, by that party'.

causality of *will* the English-inspired *responsibility* of the receiver and the central balancing in of risk as applied in France and Italy. In employing a special reasoning for injury of 'information duties' the DCFR injects the egalitarian basis of *fairness* prominently into the balancing.

[Discourse Logic of the European DCFR]
(1) DEFAULT [7:212(1)] = *Reliance* > *Will*
(2) AVOIDANCE [7:201(1)] = *Will* + ... > *Risk*
(2a) Missing causality [7:201(1)(a)] ≠ *Will*
(2b) Substantial error [7:201(1n)(a)] = *Efficiency/Fairness*
(2c) Knowledge (of recipient) [7:201(1)(a)] ≠ *Reliance*
(2d) Negligent ignorance [7:201(1)(a)] = *Risk*
(2e) Causation of error [7:201(1)(b)(i)] = *Responsibility*
(2f) Information Duty [7:201(1)(b)(ii), (iii)] = *Fairness*
(3) EXCEPTIONS = ... > *Will*
(3a) Confirmation [7:211] → *Reliance* > *Will*
(3b) Risk allocation [7:201(2)] → *Risk* > *Will*
(3c) Adaption [7:203] → *Equivalence* ≥ *Will*
(4) TIME LIMITS [7:210] = *Stability* > *Will*
(5) COMPENSATION = ... > *Reliance*
(5a) Restitution [7:212(2)] → *Equivalence* > *Reliance*
(5b) Damages [7:214] → *Responsibility* > *Reliance*
(5c) Reliance interest [7:204] → *Reliance* > *Will*

Pluralism prevails in the whole discursive structure of the European 'law of errors'. The DCFR considers not only a 'confirmation' (Art II.7: 211), but also the risk allocation between the parties (Art II.7: 201(2)) as well as the French 'inexcusable error' and the Italian legal concept of an 'adaption' (Art II.7: 203).[72] The very

[72] Art II.7: 203 DCFR. '(1) If a party is entitled to avoid the contract for mistake but the other party performs, or indicates a willingness to perform, the obligations under the contract as it was understood by the party entitled to avoid it, the contract is treated as having been concluded as that party understood it. This applies only if the other party performs, or indicates a willingness to perform, without undue delay after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance. (2) After such performance or indication the right to avoid is lost and any earlier notice of avoidance is ineffective. (3) Where both parties have made the same mistake, the

open period of 'within a reasonable time' (Art II.7: 210) allows for both subjective and objective limits of contestation. In addition to 'restitution' by the 'rules on unjustified enrichment' (Art II.7: 212 (2)), the DCFR also allows for 'damages for loss' by the erring party (Art II.7: 214), independent of an actual contestation and acknowledges a general 'liability for loss caused by reliance on incorrect information' (Art II.7: 204).[73] In the last regulation particularly, it is clear that European contract law considers the error as disturbance of a more comprehensive social information-relationship during the pre-negotiations to the contract.

From the perspective of such a pre-contractual social information relationship, it proves to be particularly relevant who originally bears the *risk* for information and to whom the reasons of *fairness*, or a duty to inform, apply. The preliminary negotiations of the London merchant bind him in a social obligation.[74] In the case of the online merchant, the economic thought of more *efficient* risk-control is part of due of diligence, according to which the *risk* of his error is no longer as simple to pass on, as is the case in the libertarian German *will* regime.[75] The French *Musée du Louvre* has an obligation to inform the other party about the true authorship of the work of Poussin, due to its structurally superior knowledge.[76] Under European contract law, for reasons of *fairness*, the Italian investors were able to establish an argument on the basis of the Bank's breach of information obligations.[77] In the case of pregnant night security

court may at the request of either party bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred'.

[73] Art II.7: 204 DCFR. '(1) A party who has concluded a contract in reasonable reliance on incorrect information given by the other party in the course of negotiations has a right to damages for loss suffered as a result if the provider of the information: (a) believed the information to be incorrect or had no reasonable grounds for believing it to be correct; and (b) knew or could reasonably be expected to have known that the recipient would rely on the information in deciding whether or not to conclude the contract on the agreed terms. (2) This Article applies even if there is no right to avoid the contract'.

[74] *Hartog* v *Colin & Shields* n 1 above.

[75] German Bundesgerichtshof 26 January 2005 n 2 above.

[76] French Cour d'appel Versailles 7 January 1987 (Poussin) n 3 above.

[77] Italian Corte di Cassazione 19 October 2012 n 4 above.

guard, the economic *risk* of the employer must be balanced against the *fair* and equal treatment of women.[78]

Overall, the DCFR expands or broadens the classic collision in the 'law of errors' between liberal *will* and social *reliance*, and around the explicit balancing between economic *risk* and egalitarian *fairness*. In so doing, European contract law is assigning distributive justice a new and more prominent role in the balancing of the validity of a contract.[79] The example of 'law of errors' thus demonstrates how standardization of laws can pluralize legal discourse. However, this pluralistic design of European contract law was preceded by a long political struggle between different groups of comparative law experts.[80]

A blind functionalist belief in always finding a 'better solution' through application of purely technical comparative law 'is based on an uncritical acceptance of the ideological foundations of Western legal systems' and misses 'the most important question [...]: is the train on the right track?'[81] A development of this broader normative question requires an open political debate. While discursive comparative law reconstructs the discursive logic of the functional structures of a legal system, it also allows for a reflexive level of normative criticism. In this respect, the discourse theory of contractual rights should be understood as a critical legal theory, which tries to 'uncover the political underpinnings of legal doctrines and decisions, thus working towards a political theory of law'.[82]

Comparative analysis is indeed 'a powerful political act', but it does not have to result in a 'constitutive aporia'.[83] It may just as easily inspire the democratic utopia of a 'pluralist internationalization'.[84] At

[78] Case 421/92 *Habermann* v *Beltermann* n 5 above.

[79] H. Eidenmüller, 'Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR' 5 *European Review of Contract Law*, 109 (2009).

[80] Cf M.W. Hesselink et al, 'Social Justice in European Contract Law: a Manifesto' 10 *European Law Journal*, 653-674 (2004); cf also n 16 above.

[81] J. Hill, n 20 above, 107.

[82] G. Frankenberg, n 19 above, 452.

[83] P. Legrand, 'Comparative Law, in D. Clark ed, *Encyclopedia of Law and Society* (Los Angeles: Sage 2007), 221 and 223.

[84] M. Delmas-Marty, *Comparative Legal Studies and Internationalization of Law* (Paris: Collège de France, 2015).

any rate, the neutrality of a technical and functional comparative law is a fiction. In this case, one can certainly say, to err is human, too, after all. *Sed in errare perseverare diabolicum*. To insist on errors, however, would be diabolical.

Essays

Discussing a Reform of the Senate. A Comparison between Italy and Canada

Erika Arban*

Abstract

In March 2015, the Italian Chamber of Deputies voted on a far-reaching constitutional reform; assuming a successful outcome of the long and complex amendment *iter,* this reform will have the effect to radically alter (among other things) the role, nature and composition of the Senate and of the perfect bicameral system currently in place. Interestingly enough, Italy is not the only country currently engaged in a political and institutional debate on a cardinal reform of the Senate: also in Canada, the role and composition of the Upper Chamber has often been contested, as this institution, in its existing arrangement, does not seem to fulfill the tasks intended for it by the framers of the Canadian federation. While over the years a number of unsuccessful attempts to reform have followed one another, the debate on the very nature of the Canadian Senate has culminated, for the time being, with the opinion rendered in 2014 by the Supreme Court of Canada which helps delineating some essential traits of the Upper Chamber. After a brief overview of the constitutional reform of the Senate under discussion in Italy, this paper will illustrate the main points raised in the opinion rendered by the Canadian Supreme Court, with the ultimate objective to show potential points of convergence and divergence between the Italian and Canadian experiences. While the nature of the Canadian federal arrangement is profoundly different from Italian regionalism, this contribution suggests the idea that surprising analogies can be found between these two countries.

I. An Overview of the Italian Constitutional Reform

1. 'Perfect Bicameralism' and the Proposed Constitutional Reform

As it is well known, the framers of the 1948 Constitution opted for a 'perfect' bicameral system for Italy.[1] The expression 'perfect

* LL.M., Ph.D. – University of Ottawa, Faculty of Law.

[1] Giacinto Della Cananea suggests using the expression 'symmetric' instead of

bicameralism' implies the existence of a Parliament composed of two 'branches' or 'houses' (the Chamber of Deputies and the Senate) enjoying the same roles and functions.[2] From a practical standpoint, this means that the legislative function is collectively exercised by both branches[3] so that each bill must be approved in the same identical text by both Houses;[4] the Cabinet must have the confidence of both Houses in order to function;[5] and both deputies and senators are elected by universal and direct suffrage[6] for five years.[7]

The scheme just sketched, however, is undergoing a drastic revision: in fact, in March 2015 the Italian Chamber of Deputies voted on a seminal constitutional reform affecting, among other things, the role, nature and composition of the Senate and of Title V of the Constitution (on the relationship between central and peripheral governments).[8] This vote followed the preference formerly

'perfect' bicameralism. See G. Della Cananea, 'The End of (Symmetric) Bicameralism or a Novus Ordo?' *Italian Journal of Public Law*, 4 (2014).

[2] See Art 55 para 1 Constitution. For a historical account of representation and second chambers in a comparative perspective see, *ex multis,* S. Mannoni, 'Reforming the Constitution: A Debate. The «Second Chamber»: A Historical and Comparative Sketch' *Italian Journal of Public Law*, 8-22 (2014).

[3] See Art 70 Constitution.

[4] V. Cerulli Irelli, 'On the Constitutional Reform in the Process of Being Approved in Italy' *Italian Journal of Public Law*, 24 (2014).

[5] See Art 94 para 1 Constitution.

[6] See Arts 56 para 1 and 58 para 1 Constitution. The only differences existing between the two Houses concern the distinct age limits required to elect Senate members and being elected as senators (pursuant to Art 58 Constitution, senators are elected by voters who are at least twenty-five years old, and only electors who have attained the age of forty are eligible for election to the Senate), and the number of deputies and senators sitting in each Chamber (six hundred thirty for the Chamber of Deputies and three hundred fifteen for the Senate, pursuant to Arts 56 para 2 and 57 para 2 Constitution, respectively). Historically, the age difference is explained by the fact that the Senate is presented as 'elemen[t] of reflection and wisdom' within the Parliament. See H. Brun, G. Tremblay and E. Brouillet, *Droit Constitutionnel* (Cowansville, QC: Éditions Yvon Blais, 5th ed, 2008), 337.

[7] See Art 60 para 1 Constitution.

[8] See, *ex multis*, G. Della Cananea, n 1 above, 3. While acknowledging the important implications of the reform of Title V of the Constitution, this paper will exclusively focus on the consequences of the reform of the Senate. Incidentally, however, among the changes to Title V, it is important to mention the suppression of shared legislative competences between the regions and the state (currently enshrined in Art 117 para 3 Constitution) and the consequent transfer to exclusive

expressed by the Senate in the summer of 2014.[9] If the complex constitutional amendment procedure will be successfully completed, the Italian Senate will soon assume a brand new connotation.[10]

To begin with, the reform under discussion proposes to bring significant changes to Arts 57 and 58 Constitution on the number of senators and their election. In fact, while the number of deputies (six

state powers of most of these subject matters; also, the reform will re-introduce a so-called 'supremacy clause' whereby the national legislator will be able to make laws also in areas of regional competence if there is a national interest to protect. For an overview of the discussed reform on aspects other than the Senate, see, *ex multis,* A. Lucarelli, 'Le Macroregioni «per funzioni» nell'intreccio multilivello del nuovo tipo di Stato', 2-3, available at http://www.federalismi.it/nv14/articolo-documento.cfm?artid=29074 (last visited 5 October 2015). Similarly, this contribution does not take into account the exquisitely political ramifications of the reform, preferring to concentrate on its purely constitutional and institutional aspects. Readers who are interested in the political facets of the discussion can refer to the following links for additional details: *Corriere della Sera* online, available at http://goo.gl/vQ8MrX (last visited 8 October 2015).

[9] It is perhaps worth emphasizing how this is not the first time that an institutional reform is discussed and proposed throughout the last sixty-seven years of republican history, although previous attempts have been unsuccessful. Giulio Enea Vigevani offers a detailed account of the various reforms that followed one another over the last few decades. See G.E. Vigevani, 'The Reform of Italian Bicameralism: the First Step' *Italian Journal of Public Law*, 56 et seq (2014).

[10] In fact, pursuant to Art 138 Constitution, '[l]aws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils […] A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members'. As noted, the Senate voted for the first time in August 2014 and the Chamber of Deputies voted for the first time in March 2015. The text voted by the Chamber of Deputies will now revert to the Senate for approval, at simple majority; however, this vote will concern only the sections of the bill amended by the Chamber of Deputies. This will complete the first step of the constitutional amendment procedure. Next, both Houses will have to approve (or reject) the same text, without being able to amend it. While for the first reading a vote by simple majority is sufficient in both Houses, the second reading requires a vote by a majority of two-thirds of the members in each Chamber. If the bill is approved by simple majority in the second reading, a popular referendum may be called. See *Il Sole 24 Ore* online, available at http://240.it/zv9525 (last visited 8 October 2015).

hundred thirty) and their election by universal suffrage will not be changed,[11] senators will be reduced from three hundred fifteen to hundred and they will no longer be democratically elected by universal and direct suffrage; rather, ninety-five senators will be appointed by regional councils among its members with proportional method, and five senators will be appointed by the President of the Republic among individuals with outstanding merits.[12] The ninety-five senators-councillors will be 'distributed' among regions based on demographic criteria (ie the most populous regions will have more senators), but each region will have at least two senators. The duration of the senatorial mandate will also change: the five senators chosen by the President of the Republic will be appointed for seven years, while the appointment of the ninety-five regional senators will equal the duration of their regional mandate.[13]

Furthermore, although the bicameral nature of the Parliament will not be altered, pursuant to the changes proposed in the reform only the Chamber of Deputies will represent 'the Italian people' and only its members will 'represent the Nation',[14] while the Senate will exclusively represent 'territorial institutions'.[15]

Most importantly, however, the proposed constitutional reform will deeply transfigure the legislative function as currently framed. In fact, the Chamber of Deputies will remain the only 'pure' legislative assembly, thus entrusted with full legislative powers,[16] while the Senate will enjoy full legislative functions on constitutional reforms

[11] See *Il Sole 24 Ore* online, available at http://goo.gl/DU3cGt (last visited 8 October 2015).

[12] See *Il Sole 24 Ore* online, available at http://goo.gl/DU3cGt (last visited 8 October 2015); *Corriere della Sera* online, available at http://goo.gl/zBEjvq (last visited 8 October 2015); *Repubblica* online, available at http://goo.gl/4jvPHs (last visited 8 October 2015). Incidentally, the councils of the autonomous provinces of Trento and Bolzano will also appoint their members.

[13] See *Il Sole 24 Ore* online, available at http://goo.gl/DU3cGt (last visited 8 October 2015); *Corriere della Sera* online, available at http://goo.gl/h6VGi5 (last visited 8 October 2015); *Repubblica* online, available at http://goo.gl/xXEnRX (last visited 8 October 2015).

[14] See V. Cerulli Irelli, n 4 above, 26.

[15] Ibid 26.

[16] See *Corriere della Sera* online, available at http://goo.gl/NglMuX (last visited 8 October 2015); see also *Repubblica* online, available at http://goo.gl/Xha9cG (last visited 8 October 2015).

and constitutional laws only, and for a number of other specific situations, including laws on the fundamental functions of municipalities and metropolitan cities and laws establishing general rules, forms and terms of the Italian participation in creating and implementing EU norms.[17] As for all other bills, they will be sent to the Senate after the approval of the Chamber of Deputies, but while the Senate may suggest amendments, the Chamber of Deputies will have a final say on them. On a number of laws pertaining to the relationship between the central government and local autonomies (Regions), however, the Chamber of Deputies could disregard the Senate's requests only by absolute majority.[18] If the Senate does not require the examination of a given bill, the Chamber of Deputies will promulgate it.

Another key change contained in the reform is that the Senate will no longer vote the confidence to the Cabinet, thus leaving the Chamber of Deputies as the only House entrusted with granting the confidence vote: this implies that the Chamber will be the only branch exercising 'the function of political direction and control'.[19]

Finally, senators could not be arrested or subjected to tapping without previous authorization of the Senate: in this sense, 'privileges and immunities from prosecution remain the same, despite the diversity, respectively, of the functions and procedures for the election of members of both Houses'.[20] Also, senators will not be entitled to parliamentary compensations (a prerogative of Deputies only) but they will continue to enjoy the compensations due for their role as mayors or regional councillors.[21]

In addition to reduce the costs of political institutions, the

[17] See A. Lucarelli, n 8 above, 3, fn 2, for the complete list as contained in the 'new' Art 70 Constitution.

[18] See *Il Sole 24 Ore* online, available at http://240.it/ASjtkg (last visited 8 October 2015); *Corriere della Sera* online, available at http://goo.gl/QdUqnE (last visited 8 October 2015); *Repubblica* online, available at http://goo.gl/Pu2hrI (last visited 8 October 2015). See also V. Cerulli Irelli, n 4 above, 28-29.

[19] V. Cerulli Irelli, n 4 above, 26; G.E. Vigevani, n 9 above, 67. See also *Corriere della Sera* online, available at http://goo.gl/navVXU (last visited 8 October 2015); *Repubblica* online, available at http://goo.gl/hSEYD5 (last visited 8 October 2015).

[20] V. Cerulli Irelli, n 4 above, 26, 28. See also *Il Sole 24 Ore* online, available at http://goo.gl/d6ZZqw (last visited 8 October 2015); *Corriere della Sera* online, available at http://goo.gl/GSkxeu (last visited 8 October 2015).

[21] See *Il Sole 24 Ore* online, available at http://goo.gl/kYv9CJ (last visited 8 October 2015).

suggested changes to the Senate are intended to serve two key objectives: on one side, depart from the aforementioned 'perfect bicameralism' by diversifying the tasks and structure of two branches;[22] on the other side, create a *forum* where regional (and local) interests can be expressed.[23] As expected, the proposed reform has not been exempt from criticism, and some of its most contested aspects will be outlined in part III of this paper. Now it is time to move to Canadian federalism and to the main points raised by the Supreme Court of Canada in its *Senate reference*.[24]

II. Canadian Federalism and the *Senate Reference*

1. The Canadian Federation

Canada is a federal state. In fact, as the preamble to the *Constitution Act, 1867* clearly indicates, it was the express desire of the provinces of Canada, Nova Scotia, and New Brunswick 'to be federally united into one dominion under the Crown of the United Kingdom of Great Britain and Ireland'.[25] However, as Hugo Cyr notes, in Canadian constitutionalism it is very common to use the term *confederation* to 'refer to the coming together of the three British colonies to form the Dominion of Canada in 1867', although Canada is not a confederation.[26] Similarly, Hugo Cyr notes that

[22] For a brief explanation of the rationale justifying the choice of a perfect bicameralism, see G. Della Cananea, n 1 above, 5; V. Cerulli Irelli, n 4 above, 25.

[23] Lorenza Violini well explains the rationale behind keeping bicameralism or switching to a unicameral system (thus eliminating the Senate). See L. Violini, 'The Reform of Italian Bicameralism: Current Issues' *Italian Journal of Public Law*, 33-35 (2014). I will revert to the discussion on the abolition of the Senate in part III of this paper.

[24] Reference re Senate Reform, 2014 SCC 32 (*Senate reference*). All the Supreme Court judgments cited in this paper can be freely consulted and retrieved, in English or French, from the Canadian Supreme Court website available at http://www.scc-csc.gc.ca/case-dossier/judgment-jugement-eng.aspx (last visited 15 October 2015).

[25] Preamble to the *Constitution Act, 1867* (emphasis added). The entire constitutional text (including the preamble) is available online in English and French at http://laws-lois.justice.gc.ca/eng/Const/page-1.html (last visited 15 October 2015).

[26] H. Cyr, 'Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism' 23 *Constitutional Forum Constitutionnel*, 4, 20 (2014). A confederation

Canada is not a unitary state either although the *Constitution Act, 1867* is referred to as an 'Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof'.[27]

The fact that Canada is a federation is confirmed by the Supreme Court of Canada (SCC) in one of its seminal opinions, where federalism is identified as one of the 'four fundamental and organizing principles of the Constitution'.[28] The SCC also observes that federalism 'was the political mechanism by which diversity could be reconciled with unity'[29] and that it represented the 'political and legal response to underlying social and political realities'.[30] In this sense, it received 'primary textual expression' in the 'basic division of powers in ss. 91 and 92 of the *Constitution Act, 1867*'.[31] In fact, in a federal system such as the Canadian one, 'political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the *Constitution Act, 1867*'.[32] Finally, federalism 'recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction'.[33]

is commonly referred to as a form of *supra* national arrangement composed of independent and sovereign states; in other words, it is some sort of international organization where sovereign states join together, on the basis of an international treaty, but without a transfer of sovereignty. See R. Bin and G. Falcon, *Diritto Regionale* (Bologna: Il Mulino, 2012), 47. Based on this definition, Canada certainly does not display the typical traits of a confederation, as its constituent units (ten provinces and three territories) are not independent states bound together by an international treaty.

[27] H. Cyr, n 26 above, 20.

[28] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at paras 32 and 55 (*Secession reference*). The other 'fundamental and organizing principles of the Constitution' are: democracy; constitutionalism and the rule of law; and respect for minorities (ibid).

[29] Ibid para 43.

[30] Ibid para 57.

[31] Ibid para 47.

[32] Ibid para 56. Sections 91 and 92 of the *Constitution Act, 1867* list in great detail the legislative powers of federal and provincial governments, respectively.

[33] Ibid para 58.

2. The Supreme Court of Canada and its Reference Jurisdiction

Once ascertained that Canada is a federal state, it may be helpful to briefly sketch the genesis, composition and role of the SCC and, specifically, of its reference jurisdiction.

As Peter W. Hogg contends, the SCC was not established at confederation, in 1867: in fact, at that time, the Judicial Committee of the Privy Council (JCPC), located in London (UK), 'served as the final court of appeal from all British colonies'.[34] Nonetheless, section 101 of the *Constitution Act, 1867* concedes that '[t]he Parliament of Canada may [...] provide for the Constitution, maintenance, and organization of a general court of appeal for Canada'. Pursuant to this provision, in 1875 the federal parliament enacted a statute (the *Supreme Court Act*)[35] establishing the SCC.[36] The detachment from the jurisdiction of the JCPC occurred at different stages, but reached full completion only in the 1950s.[37]

Presently, the SCC comprises nine judges (one chief justice and eight puisne judges): three of them come from Quebec, thee from Ontario, two from the Western provinces, and one from the Atlantic provinces.[38] The Chief Justiceship usually alternates between a French-speaking and an English-speaking justice, although exceptions exist.[39] Furthermore, pursuant to section 4(2) of the *Supreme Court Act,* SCC judges 'shall be appointed by the Governor in Council' meaning the federal cabinet: in other words, they receive executive appointment.[40]

[34] P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, Student ed, 2013), 8-1.

[35] R.S.C., 1985, available in English and French at http://laws-lois.justice.gc.ca/PDF/S-26.pdf (last visited 15 October 2015).

[36] P.W. Hogg, n 34 above, 8-2. While for all cases commenced after 1949 the court of last resort became the SCC, the last Canadian appeal was rendered by the JCPC in 1959.

[37] Ibid 8-4.2.

[38] Ibid 8-5. See also sections 4(1) and 6 of the *Supreme Court Act*. The Western provinces are Manitoba, Saskatchewan, Alberta and British Columbia; the Atlantic provinces include Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland & Labrador.

[39] Ibid 8-5.

[40] Ibid 8-7.

One important feature of the SCC, that is particularly relevant for our purposes, is the so-called 'reference jurisdiction'. In fact, pursuant to section 53(1) of the *Supreme Court Act* '[t]he Governor in Council may refer to the Court for hearing and consideration important questions of law or fact'.[41] Section 53(4) further explains that '[w]here a reference is made [...], it is the duty of the Court to hear and consider it and to answer each question so referred'.[42] The SCC can thus give 'advisory opinions'[43] and in this sense it differentiates from other courts of last resort such as the Supreme Court of the United States, which has persistently refused to render advisory opinions as they lack the required elements of 'case' or 'controversy' defining the judicial power in the United States.[44] The advisory opinions rendered by the SCC to the government are not technically considered an expression of the judicial function: in fact, on one side, they lack 'the adversarial and concrete character of a genuine controversy' and, on the other, this action is usually taken by the Attorney General acting for the Executive.[45] Furthermore, because of their 'advisory character', the answers provided by the SCC are not 'binding' on the parties, and do not have the same weight as a precedent; however, they are usually treated as pure judicial opinions.[46] While the reference jurisdiction procedure is available to answer also non-constitutional issues, it has mainly been used for constitutional questions.[47] Usually, the questions referred to the SCC concern the constitutionality of a *federal* law (or of a law proposal), but nothing excludes the possibility to refer a question on the constitutionality of a *provincial* law.[48] Finally, pursuant to section

[41] R.S.C., 1985, c. S-26, available online in English and French at http://laws-lois.justice.gc.ca/PDF/S-26.pdf (last visited 15 October 2015).

[42] However, despite this duty, the SCC has at times 'exercised a discretion not to answer a question posed on a reference' particularly in situations when the question had become moot, was not ripe, was too vague, was not a legal question, or was not 'accompanied by enough information to provide a complete answer'. See P.W. Hogg, n 34 above, 8-18, 8-19.

[43] Ibid 8-15.

[44] Ibid 8-17; see also L.H. Tribe, *American Constitutional Law* (New York, NY: Foundation Press, 3rd ed, 2000), I, 328-330.

[45] P.W. Hogg, n 34 above, 8-17.

[46] Ibid 8-18.

[47] Ibid 8-15, 8-16.

[48] Ibid 8-16.

53(1) of the *Supreme Court Act*, it is the 'Governor in Council' that may direct a reference to the SCC: by convention,[49] this expression means the federal government (cabinet), which is thus the only body enjoying the privilege of referring questions to the Court.[50]

3. The Canadian Senate

As noted above, Canada is a federal state. According to federal theory, one of the distinctive traits of a *pure* or *classic* federation is the presence of a chamber (usually styled Senate, or Upper Chamber) representing the interests of the constituent units of the federation at central level.[51] In this way, these constituent units have a forum where they can advance their claims at national level and participate in federal legislation.[52] Yet, as it will be further explained, this is not entirely true for Canada.

Section 17 of the *Constitution Act, 1867* mandates that the Parliament of Canada consists of 'the Queen, an Upper House styled the Senate, and the House of Commons' and sections 21 to 36 of the

[49] In Canadian law, conventions are 'rules of the Constitution' which 'are not enforced by the law courts' and whose function is to 'prescribe the way in which legal powers shall be exercised'. As Peter W. Hogg explains, an example of constitutional convention in Canadian law is this: while the *Constitution Act 1867* and other statutes confer extensive powers to the Governor General, by convention the latter 'will exercise those powers only in accordance with the advice of the cabinet or in some cases of the Prime Minister'. However, although not enforceable in courts, the latter have from time to time recognized them. See P.W. Hogg, n 34 above, 1-22, 1-22.1 and 1-22.2.

[50] Ibid 8-16. This implies that neither a provincial government nor a private person can direct such a reference, although other mechanisms are available for them. For instance, a provincial government can direct a reference to the provincial court of appeals and a private individual can access a superior court of the province by way of declaratory action challenging the validity of a federal or provincial law (ibid).

[51] *Ex multis,* see H. Brun, G. Tremblay and E. Brouillet, n 6 above, 336; N. Duplé, *Droit Constitutionnel: principes fondamentaux* (Montréal, QC: Wilson & Lafleur, 5th ed, 2011), 203; S. Mangiameli, *Il Senato Federale nella Prospettiva Italiana* (2010), available at www.issirfa.cnr.it (last visited 15 October 2015). The way these constituent units are called vary from federation to federation. In Canada, they are called *provinces;* in the United States, they are called *states;* in Germany, they are called *länder;* in Switzerland, they are called *cantons,* etc.

[52] *Ex multis*, see H. Brun, G. Tremblay and E. Brouillet, n 6 above, 407 et seq; N. Duplé, n 51 above, 203.

same *Act* sketch the main features of the Senate. A first distinctive and rather contested characteristic of the Canadian Senate is that its members are not democratically elected (as it happens for the members of the House of Commons) but are appointed by the executive: in fact, it is the Governor General (which, by convention, means the Cabinet) who appoints senators.[53]

The number of senators is one hundred and five and, once appointed, they hold office until the age of seventy-five.[54] The number and distribution of senators reflect provincial subdivisions; in fact, for this specific purpose Canada is divided into four 'divisions' (Ontario, Quebec, the Maritime provinces, and the Western provinces).[55] Ontario, Quebec, the Maritime Provinces and the Western provinces enjoy twenty-four senators each;[56] Newfoundland is represented by six members; and Yukon, the Northwest Territories and Nunavut each have one member in the Senate.[57]

Section 23 of the *Constitution Act, 1867* lists some of the requirements that an individual must meet in order to be appointed senator. In addition to an age requirement (thirty years old, as specified by section 23(1)) and a residency requirement (he or she shall be a resident of the province for which appointment is sought: section 23(5)), the appointee shall also enjoy some 'real property' and 'personal property' requirements.[58]

[53] Section 24 of the *Constitution Act, 1867*. See also H. Brun, G. Tremblay and E. Brouillet, n 6 above, 343; N. Duplé, n 51 above, 204, who clarifies that, under Canadian constitutional law, all the powers held by the governor general are ruled by constitutional convention, so it is in fact the Prime Minister who appoints the senators and then the governor general validates the appointments (ibid). See also *Senate reference* n 24 above, para 50.

[54] See sections 21 and 29(2) of the *Constitution Act, 1867*.

[55] See section 22 of the *Constitution Act, 1867*.

[56] For the Maritime provinces, ten senators represent Nova Scotia, ten represent New Brunswick, and four represent Prince Edward Island; for the Western provinces, Manitoba, British Columbia, Saskatchewan and Alberta are each represented by six senators: section 22 of the *Constitution Act, 1867*.

[57] H. Brun, G. Tremblay and E. Brouillet, n 6 above, 341; N. Duplé, n 51 above, 204. Incidentally, Newfoundland joined confederation in 1949.

[58] As for the 'real property requirement', section 23(3) of the *Constitution Act, 1867* provides that each senator 'shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in Franc-

Finally, as far as powers are concerned, the House of Commons and the Senate enjoy the same powers, with one exception: money bills (ie bills 'for appropriating any part of the public revenue, or for imposing any tax or impost' to use the constitutional wording) shall originate in the House of Commons only (section 53 of the *Constitution Act, 1867*). Another important distinction between the two branches is that the Cabinet is accountable only before the House of Commons and not before the Senate.[59]

Because of the features just outlined, the very nature, composition and powers of the Canadian Senate have regularly been questioned and made the object of proposed reforms. In particular, the executive appointment of senators has often raised the question whether the Senate is an undemocratic institution because of the non-election of its members.[60]

Another criticism often moved to the Senate has been of not actually fulfilling the traditional role of the second chamber in a federal state, as the provincial-based number and distribution of senators does not imply that they sit in representation of the interests of their provinces, as it should be in a typical federation. [61] In fact, the

alleu or in roture, within the province for which he is appointed, of the value of four thousand dollars, over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same'. As for the 'personal property' requirement, section 23(4) of the *Constitution Act, 1867* provides that the senators' real and/or personal property 'shall be together worth four thousand dollars over and above his debts and liabilities'.

With regards to Quebec, further specifications are included in sections 22 and 23 of the *Constitution Act, 1867*. In fact, section 22 provides that 'each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions' of Quebec. Furthermore, as per section 23, each senator from Quebec 'shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division'. See H. Brun, G. Tremblay and E. Brouillet, n 6 above, 342; N. Duplé, n 51 above, 205.

[59] H. Brun, G. Tremblay and E. Brouillet, n 6 above, 339; N. Duplé, n 51 above, 205.

[60] H. Brun, G. Tremblay and E. Brouillet, n 6 above, 346-347.

[61] Ibid 336, who argue that the Canadian Senate 'does not effectively ensure provincial participation at federal level in the exercise of the legislative function'. See also N. Duplé, n 51 above, 203-204, who observes that, because of the executive appointment of senators and of the composition of the Senate, the latter cannot be considered a true federal chamber. Similarly, she notes that Canadian provinces do not participate in the process to appoint senators.

federal Prime Minister does not choose senators in a way that 'they can convey the aspirations of the province for which they are appointed'.[62] For this reason, some theorists contend that the only link between senators and provinces is having their domicile on the territory of the province and have some property there. Consequently, more than a true federal Upper Chamber, the Canadian Senate seems to express Canadian pluralism, as efforts are made to appoint to the Senate 'individuals representing the different religious, ethnic, economic, professional, etc groups' living in Canada.[63]

Among the various proposals made in the past to reform the Senate, it is worth mentioning those contained in the Meech Lake and Charlottetown Accords. The Meech Lake Accord of 1987 was a package of constitutional amendments intended to allow Quebec to endorse the *Constitution Act, 1982* imposed on the province despite its opposition. Among other things, this Accord contained a number of provisions to change the way senators were appointed: based on the suggestions made, the federal government would choose senators from a list of names drafted by the province to be represented. However, the Western provinces were not entirely satisfied with the proposal, and were looking more at a 'Triple E' senate (one which would be *e*lected, *e*qual and *e*ffective). The subsequent Charlottetown Agreement of 1992, which would somehow better reflect these demands, was rejected by referendum.[64]

More recently, other proposals were made to change certain features of the Senate. For example, Bill S-4, tabled in 2006, proposed to replace the current senatorial term of office with a term of eight years, renewable.[65] Tabled in 2007, Bill C-20 proposed consultative elections of nominees whereby 'the names of the winners of national consultative elections would be submitted to the Prime Minister of Canada, for consideration [...] when recommending nominees to the Governor General'.[66] Similarly, Bill C-7 (which was given first reading in 2011) provided that 'Senators would sit for a

[62] H. Brun, G. Tremblay and E. Brouillet, n 6 above, 338.
[63] Ibid 338.
[64] *Ex multis,* see N. Duplé, n 51 above, 204, 634-635.
[65] *Senate reference* n 24 above, para 7.
[66] Ibid para 8.

non-renewable nine-year term' and set out 'a model statute for provincial and territorial legislation creating consultative elections' so that the 'Prime Minister «must» consider names from the list of successful candidates'.[67] These proposed reforms thus aimed at fixing the democratic deficit and almost life tenure of senators. All three bills, however, did not survive the approval project, but some of their suggestions were resurrected before the SCC in the *Senate reference,* as I am going to explain now.

4. The *Senate Reference*

Following the reference jurisdiction procedure detailed above, in February 2013 the Canadian Government addressed to the SCC a number of questions on how to accomplish a reform of the Senate 'under the Constitution'.[68] While the SCC clearly stated that its role was not 'to speculate on the full range of possible changes to the Senate'[69] but simply 'to determine the legal framework for implementing the specific changes contemplated in the questions',[70] the opinion rendered by the SCC in 2014 offers the ideal opportunity to reflect on the role and purposes of the Senate within the Canadian constitutional system. In the next paragraphs I will thus illustrate some of the key points made by the SCC in the *Senate reference* which, in my opinion, are most helpful for our comparative purposes with the Senate reform discussed in Italy.

The four questions addressed to the SCC by the Governor in Council are: (1) Can the Canadian Parliament unilaterally implement a framework for consultative elections for appointments to the Senate? (2) Can the Canadian Parliament unilaterally set fixed terms for Senators? (3) Can the Canadian Parliament unilaterally remove from the *Constitution Act, 1867* the requirement that Senators must

[67] Ibid para 9.

[68] Ibid para 20. This was an opinion rendered by judges McLachlin CJ and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

[69] *Senate reference* n 24 above, para 4. In fact, the SCC further specifies that the 'desirability of these changes is not a question for the Court; it is an issue for Canadians and their legislatures' (ibid) and that '[t]he question before us now is not whether the Senate should be reformed or what reforms would be preferable, but rather how the specific changes set out in the Reference can be accomplished under the Constitution' (ibid 20).

[70] *Senate reference* n 24 above, para 4.

own land worth four thousand in the province for which they are appointed and have a net worth of at least four thousand (4). The degree of consent required to abolish the Senate.[71] As it can be noted, three of the four questions pertain to the possibility to change or amend certain features of the Senate by the federal Parliament acting alone (ie without provincial participation).[72]

Before addressing each question, the SCC reiterates the fact that the Senate 'is one of Canada's foundational political institutions' laying 'at the heart of the agreements that gave birth to the Canadian federation'.[73] The importance of the Senate as a political institution is buttressed by the wording of the preamble of the *Constitution Act, 1867* mandating that '[w]hereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one dominion under the crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom'. For the SCC, this means that the framers of the Canadian confederation 'wanted to preserve the British structure of a lower legislative chamber composed of elective representatives, an upper legislative chamber made up of elites appointed by the Crown, and the Crown as head of state'.[74] The SCC further observes that, being modelled on the British House of Lords (but 'adapted to Canadian realities'), one of the purposes of the Senate was to provide 'sober second thought' on the legislation adopted in the House of Commons.[75] The other purpose of the Senate was to provide 'a distinct form of representation for the regions that had joined Confederation'.[76] In fact, the SCC continues, '[w]hile representation in the House of Commons was proportional to the population of the new Canadian provinces, each region was provided equal representation in the Senate irrespective of population'.[77] With time, however, the Senate has become the ideal forum 'to represent

[71] These four questions are listed in the *Senate reference* n 24 above, para 2.

[72] Ibid para 49.

[73] Ibid para 1.

[74] Ibid para 14.

[75] Ibid para 15, quoting the expression used in the 1865 parliamentary debates by John A. Macdonald, the future first Prime Minister of Canada.

[76] Ibid para 15.

[77] Ibid para 15.

various groups that were under-represented in the House of Commons' such as 'ethnic, gender, religious, linguistic, and Aboriginal groups' thus losing, as noted above, the trait typical of most *federal* Senates to represents the interests of the constituent units.[78]

Yet, in spite of these noble purposes, the SCC acknowledges the difficulties that have always accompanied the life and work of this 'foundational political institution' since 'from its first sittings, voices have called for reform [...] and even, on occasion, for its outright abolition'.[79] Reform proposals were particularly urged especially in the years before 1982,[80] and mainly revolved around three issues: modification of seats distribution; limitation of Senate powers; and appointment of senators.[81] In any event, the SCC recalls how, despite 'ongoing criticism and failed attempts at reform, the Senate has remained largely unchanged since its creation'[82] thus confirming a certain resistance towards a reform of this institution.

Next, the SCC emphasizes the complex architecture of the Canadian Constitution. By recalling its *Secession reference*, the SCC reaffirms the idea that the Canadian Constitution shall be viewed as 'having an «internal architecture»'[83] meaning that '[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole'.[84] Consequently, constitutional amendments shall not be seen

[78] Ibid para 16.

[79] *Senate reference* n 24 above, para 1. This antipathy towards the Senate, and the suggestion to abolish it, is particularly strong at provincial level: in fact, none of the ten provincial governments enjoy a second chamber (or the equivalent of a Senate), so many feel that there is no need to have a Senate at federal level.

[80] Ibid paras 17-18. In Canadian constitutionalism, 1982 is a momentous year in that it coincided with the *Patriation* of the Constitution, meaning the entry into force of the *Constitution Act, 1982* which contained an entirely domestic constitutional amendment procedure, as will be further explained in the paper. Incidentally, the *Constitution Act, 1982* also introduced the Canadian Charter of Rights and Freedoms.

[81] Ibid para 18.

[82] Ibid para 20.

[83] Ibid para 26 (citing para 50 of the *Secession reference*).

[84] Ibid para 26 (citing para 50 of the *Secession reference*). This image of a 'constitutional architecture' is one of the key messages contained in the *Senate reference,* and it becomes particularly illuminating if we consider the complex

as a mere 'textual changes' as they include 'changes to the Constitution's architecture'.[85]

The SCC then reveals the main steps that led to the enactment of the constitutional amendment formula contained in Part V of the *Constitution Act, 1982* and the political discussions surrounding *patriation*,[86] including a detailed illustration of the various amending procedures.[87] Prior to *patriation*, 'constitutional amendment in

structure of the Canadian constitution. In fact, the expression 'Canadian constitution' refers to a number of documents entered into force at different times. As indicated by section 52(2) of the *Constitution Act, 1982* the Canadian constitution comprises: (a) the *Canada Act, 1982* (which includes the *Constitution Act, 1982*); (b) all Acts and orders referred to in the schedule; and (c) all amendments to the Acts and orders mentioned in paras (a) and (b). The *Constitution Act, 1867* (which contains all the articles on the Senate discussed above) is part of the documents listed in the schedule *sub* section 52(2)(b). See *Senate reference* n 24 above, para 24. Consequently, because of this complex structure, the SCC encourages to see all these different documents as a whole, even if drafted at different times, with the individual provisions 'intended to interact with one another' and not as a 'mere collection of discrete textual provisions'. See *Senate reference* n 24 above, paras 26 and 27.

[85] Ibid para 27.

[86] These can be found at paras 30-31 of the *Senate reference*.

[87] Ibid para 32. The amendment procedure detailed in part V of the *Constitution Act, 1982* is very complex, but it can be summarized following the description of the four categories offered by the SCC. The first category is the general amending formula detailed in section 38 of the *Constitution Act, 1982,* whereby constitutional amendments shall be 'authorized by resolutions of the Senate, the House of Commons, and legislative assemblies of at least seven provinces whose population represents, in the aggregate, at least half of the current population of all the provinces'. This is why this general rule is often referred to as '7/50' formula. The rationale behind this procedure is that 'substantial provincial consent must be obtained for constitutional change that engages provincial interests'. This provision also grants to the provinces a right to 'opt out' of constitutional amendments that 'derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province'. See *Senate reference* n 24 above, para 34. While the '7/50' amendment formula is the general rule (to the point that all other procedures shall be seen as 'exceptions' to it), section 42 of the *Constitution Act, 1982* complements the provision of section 38 by listing a number of categories where the '7/50' formula shall be applied, such as 'the powers of the Senate and the method of selecting Senators' as well as 'the number of members by which a province is entitled to be represented in the Senate and the residence qualification of Senators'. *Senate reference* n 24 above, paras 36 and 37. The second category is the so-called 'unanimous consent' procedure outlined in section 41 of the *Constitution Act, 1982,* requiring 'the unanimous consent of the Senate, the House

Canada required the adoption of a law by the British Parliament following a joint resolution addressed to it by the Senate and the House of Commons, since the *Constitution Act, 1867* was an Act of the British Parliament'.[88] And while there was no 'formal requirement' to consult provincial governments to that effect, in practice a constitutional convention had developed requiring provincial consent for those changes 'directly affecting federal-provincial relations'.[89] After these general remarks, the SCC reverts to the four questions of the *Reference,* which I am going to detail in the next paragraphs.

a. The first Question: Consultative Elections for Appointment of Senators

As noted, the first question the SCC is called to answer pertains to the election of senators and, more specifically, whether the Canadian Parliament can 'unilaterally implement a framework for consultative elections for appointments to the Senate'.[90] As already explained, in Canada members of the Senate are appointed (or 'summoned') by the Governor General acting on the advice of the Prime Minister.[91] For

of Commons, and all the provincial legislative assemblies for the categories of amendments enumerated in the provision' and is 'designed to apply to certain fundamental changes to the Constitution of Canada'. Ibid para 41. The third category is also referred to as 'special arrangements' procedure and is detailed in section 43 of the *Constitution Act, 1982*. It applies 'to amendments in relation to provisions of the Constitution [...] that apply to some, but not all, of the provinces'. Ibid para 43. The purpose of this procedure is to make sure that those provisions that apply only to one or more, but not all, of the provinces 'cannot be amended without the consent of the provinces for which the arrangement was devised'. See ibid para 44. Finally, the 'unilateral federal and provincial procedure' detailed in sections 44 and 45 of the *Constitution Act, 1982* 'give[s] the federal and provincial legislatures the ability to unilaterally amend certain aspects of the Constitution that relate to their own level of government, but which do not engage the interests of the other level of government'. See ibid para 48. As the SCC further explains, this procedure is a reflection of Canadian federalism, whereby the 'Parliament and the provinces are equal stakeholders in the Canadian constitutional design' so that '[n]either level of government acting alone can alter the fundamental nature and role of the institutions provided for in the Constitution'. Ibid para 48.

[88] Ibid para 29.

[89] Ibid para 29.

[90] Ibid para 2.

[91] See sections 17, 24, 32 and 37 of the *Constitution Act, 1867;* see also *Senate reference* n 24 above, paras 51 and 55.

the SCC, the appointment of Senate members, rather than their democratic election, 'shapes the architecture of the *Constitution Act, 1867*'.[92] From a historical perspective, the founding fathers 'deliberately chose executive appointment of Senators in order to allow the Senate to play the specific role of a complementary legislative body of «sober second thought»'.[93] Consequently, '[t]he framers sought to endow the Senate with independence from the electoral process to which members of the House of Commons were subject, in order to remove Senators from a partisan political arena that required unremitting consideration of short-term political objectives'.[94] In other words, the executive appointment of senators served the purpose to 'serenely revise legislation, away from all popular pressures'.[95] The other reason that explains executive appointment is linked to the idea that the Canadian upper chamber 'would be a *complementary* legislative body, rather than a perennial rival of the House of Commons in the legislative process'.[96] Not enjoying the same legitimacy stemming from popular elections, senators 'would confine themselves to their role as a body mainly conducting legislative review, rather than as a coequal of the House of Commons'.[97]

In spite of the historical rationale summarized by the SCC, the executive appointment of senators in Canada has often been considered undemocratic and, consequently, contested. For this reason, the first question in the *Senate reference* asks whether the federal Parliament can unilaterally change this by creating

[92] *Senate reference* n 24 above, para 59.

[93] Ibid para 56.

[94] Ibid para 57. However, for some scholars, senatorial appointments are 'essentially partisan' and, in order to be appointed senator, 'it is usually necessary to be a member of the party in power'. See H. Brun, G. Tremblay and E. Brouillet, n 6 above, 342. Also, constitutional scholars such as Henri Brun, Guy Tremblay and Eugénie Brouillet argue that this type of senatorial structure is a legacy of the 'aristocratic type' of second chamber which, originally, was intended to express the views of a 'given social class'. As a result, the very fact that senators are not democratically elected implies that they are not subject to electoral pressures and, thus, they can participate to the legislative process in a more 'objective and serene' way. See H. Brun, G. Tremblay and E. Brouillet, n 6 above, 337.

[95] H. Brun, G. Tremblay and E. Brouillet, n 6 above, 338.

[96] *Senate reference* n 24 above, para 58.

[97] Ibid para 58.

'consultative elections to select senatorial nominees endorsed by the populations of the various provinces and territories'.[98] In other words, the proposed consultative elections discussed in the *Reference* would produce lists of candidates compiled through national or provincial and territorial elections so that the Prime Minister would consider them prior to making recommendations to the Governor General.[99]

However, based on the historical rationale detailed above, the SCC argues that senatorial consultative elections would alter the architecture of the Constitution by modifying the role of the Senate as a 'complementary legislative body of sober second thought'.[100] In fact, by modifying the 'constitutional architecture', the role of 'sober second thought' of the upper chamber would be weakened; also, this would 'give it the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design'.[101] Furthermore, consultative elections of Senate members would imply the subjection of Senators 'to the political pressures of the electoral process' and their endowment to popular mandate, thus transforming senators into 'popular representatives'.[102] Consequently, although prime ministers could ignore election results, the proposed consultative elections 'would amend the Constitution of Canada by changing the Senate's role [...] from a complementary legislative body of sober second thought to a legislative body endowed with a popular mandate and democratic legitimacy'.[103]

In any event, as recalled above, the role of the SCC in the *Senate reference* is not to 'speculate on the full range of possible changes to the Senate' but simply to 'determine the legal framework for the specific changes'.[104] Consequently, the conclusion of the SCC on the first question is that consultative elections to nominate senators would bring a change to the architecture of the Canadian Constitution,

[98] Ibid para 49.
[99] Ibid para 65.
[100] Ibid para 54.
[101] Ibid para 60.
[102] Ibid para 61.
[103] Ibid paras 62 and 63.
[104] Ibid para 4.

and such an amendment would thus attract the general amending procedure of section 42(1)(*b*) of the *Constitution Act, 1982*.[105]

b. The Second Question: Senatorial Tenure

The second question in the *Senate reference* concerns senatorial tenure: in particular, the SCC is asked if the federal Parliament can unilaterally (eg without provincial participation) 'set fixed terms for Senators'.[106] In fact, under the present wording of section 29(2) of the *Constitution Act, 1867,* once appointed senators hold their place until the age of seventy-five.[107] As indicated by the SCC, the fact that senators are currently appointed 'roughly for the duration of their active professional life'[108] serves the very purpose of allowing them 'to function with independence in conducting legislative review'.[109]

Yet, as for the senatorial executive appointment discussed above, this characteristic of the Canadian Senate has not been exempt from criticism. For this reason, the federal Parliament proposed to replace senatorial life tenure with 'fixed term' tenure (see and Bill S-4 and Bill C-7). However, the SCC argues that transforming the current tenure with a fixed term would bring a 'significant change' to the nature of the Senate as 'complementary legislative body of sober second thought'[110] as it would 'offer a lesser degree of protection from the potential consequences of freely speaking one's mind on the legislative proposals of the House of Commons'.[111] A change in the tenure would thus alter the role and nature of the Senate, and thus amend the Constitution.[112]

[105] Ibid para 70. For a detailed description of this amending formula, see n 87 above. The conclusion of the SCC on the first question contrasts with the argument made by the Attorney General of Canada, who submits that the implementation of consultative elections for senators does not amend the Canadian constitution or, if it does, the amendment can be achieved by the (federal) Parliament alone. See *Senate reference* n 24 above, paras 51-53.

[106] Ibid paras 2 and 49.

[107] Incidentally, this provision was enacted by the *Constitution Act, 1965,* S.C. 1965, c. 4, which came into force on 2 June 1965. The original section provided for life-tenure of senators.

[108] *Senate reference* n 24 above, para 79.

[109] Ibid para 79.

[110] Ibid paras 79 and 80.

[111] Ibid para 80.

[112] Ibid para 71.

The next step for the constitutional judges is to determine which amending formula should be appropriate to the change of senatorial tenure. The argument of the SCC is that, since the Senate 'is a core component of the Canadian federal structure of government' any change that affects 'its fundamental nature and role engage the interests of the stakeholders in our constitutional design – ie the federal government and the provinces – and cannot be achieved by Parliament acting alone'.[113] The imposition of fixed terms is considered a change to the 'fundamental nature and role' of the Senate, thus requiring the general amending procedure.[114]

c. The Third Question: Senatorial Real and Personal Property Requirements

The third question addressed to the SCC pertains to the removal of the personal wealth and real property requirements for senators: in other words, the issue is whether the federal Parliament can unilaterally (eg without provincial participation) remove the constitutional requirements that senators must own land worth four thousand in the province for which they are appointed (the 'real property' requirement) and have a net worth of at least four thousand (the 'personal property' requirement).[115]

The reasoning of the SCC on this issue, however, is limited to the amendment procedure to follow in order to change the aforementioned requirements; this is unfortunate, as it would have been instructive to learn more about the historical genesis and rationale of the 'real property' and 'personal property' prerequisites. In any event, the conclusions of the SCC is that a change in the 'net worth' or 'personal property' requirement is not seen as a modification of the Senate's fundamental role as a 'complementary

[113] Ibid para 77.

[114] Ibid paras 79 and 82. Once again, the conclusion of the SCC clashes with the positions of the Attorney General, who argues that changes in senatorial tenure would fall within the unilateral federal amending power contemplated in section 44 of the *Constitution Act, 1867*. See *Senate reference* n 24 above, para 72. See n 87 above for a description of these two amendment formulas.

[115] *Senate reference* n 24 above, paras 2 and 49. As noted above, the 'real property qualification' is spelled out in section 23(3) of the *Constitution Act, 1867,* whereas the 'personal property qualification' is enunciated in section 23(4) of the same *Act*.

legislative chamber of sober second thought'[116] and it does not 'engage the interests of the provinces'.[117] As a result, a federal unilateral amendment under section 44 of the *Constitution Act, 1982* is permitted.[118] As for the 'real property' requirement, the SCC argues that, while its removal 'would not alter the fundamental nature and role of the Senate',[119] it would does so with regards to Quebec senators only, thus attracting the 'special arrangements procedure' of section 43, *Constitution Act, 1982,* and requiring the consent of the sole Quebec's National Assembly.[120]

d. The Fourth Question: Procedure to Abolish the Senate

The fourth and final question addressed to the SCC concerns the procedure to follow in order to abolish the Senate and, in particular, the degree of provincial consent required.[121] As happened with the previous question, the reasoning of the constitutional judges is limited to their role of determining 'the legal framework for implementing the specific changes contemplated in the questions'[122] without discussing the historical foundations of a bicameral system and the advantages and disadvantages of abolishing one of the parliamentary branches. Once again, the SCC maintains that the abolition of the Senate 'would fundamentally alter' the Canadian 'constitutional architecture' as it would remove the 'bicameral form

[116] *Senate reference* n 24 above, para 88.

[117] Ibid para 89.

[118] Ibid para 90. See n 87 above for a description of this amendment formula.

[119] Ibid para 91.

[120] Ibid para 91. In fact, as recalled above, pursuant to section 22 of the *Constitution Act, 1867,* 'each Senator from Quebec is appointed to represent one of the province's 24 electoral divisions' and this was justified by the fact that it was necessary to ensure that 'Quebec's Anglophone minorities would be represented in the Senate, by making it mandatory to appoint Senators specifically for divisions in which the majority of the population was Anglophone'. See *Senate reference* n 24 above, para 92. Furthermore, section 23(6) of the *Constitution Act, 1867* provides some flexibility to Quebec's senators as it allows them 'to either reside in the electoral division for which they are appointed *or* to simply fulfilling their real property qualification in that division' (ibid). This is why the SCC deems it necessary to have the consent of Quebec's National Assembly to modify this requirement (ibid para 93). See n 87 above for a description of the amendment formula.

[121] Ibid para 2.

[122] Ibid para 4.

of government' instituted in 1867.[123] Also, the SCC clearly distinguishes between the abolition of the Senate and mere changes to it (eg its powers, the number of senators, etc): while changes to the Upper Chamber require a 'substantial degree of federal-provincial consensus',[124] the abolition of the Senate 'would alter the structure and functioning of Part V' of the *Constitution Act, 1982* which was 'drafted on the assumption that the federal Parliament would remain bicameral in nature' and is thus 'replete with references to the Senate'.[125] In fact, the Canadian Senate plays a key role in most of the amendment procedures contemplated in Part V of the *Constitution Act, 1982* and, as a result, a 'process of constitutional amendment in a unicameral system would be qualitatively different from the current process'.[126] Consequently, only the 'unanimous consent of Parliament and of all the provinces' could abolish the Senate.[127]

e. The *Upper House Reference* and Concluding Remarks

At the end of this review of the main points discussed by the SCC in the *Senate reference,* it may be worth noting that the questions addressed to the constitutional judges in 2013 were not entirely new. In fact, in 1980 the SCC was consulted to address similar queries, to which the constitutional judges answered in the *Upper House reference*.[128] More specifically, the questions asked were whether the Parliament of Canada (the federal parliament) had legislative authority to (unilaterally) abolish the Senate and/or to enact legislation 'altering, or providing a replacement for, the Upper House of Parliament'.[129]

Similarly to the approach displayed by the SCC in the *Senate reference,* in the *Upper House reference* the constitutional judges

[123] Ibid para 97.

[124] Ibid para 101. The reader would recall that, in order to bring changes to the Senate (ie powers, number of senators, etc) the procedure set forth in section 42 of the *Constitution Act, 1982* shall be followed (the '7/50' procedure).

[125] *Senate reference* n 24 above, para 106.

[126] Ibid para 110.

[127] Ibid paras 106 and 111. See n 87 above for a description of this amendment formula.

[128] Reference re Authority of Parliament in Relation to the Upper House, 1980 1 R.C.A. 54 (*Upper House reference*).

[129] Ibid 58, 59.

did not assess whether the Canadian Senate effectively played the role originally intended for it.[130] The SCC argued that the Senate played a 'vital role as an institution forming part of the federal system'[131] to the point that its abolition 'would alter the structure of the federal Parliament to which the federal power to legislate is entrusted' although it would not 'directly affect federal-provincial relationships in the sense of changing federal and provincial legislative powers'.[132] Furthermore, the SCC also emphasized how one of the purposes for the creation of the Senate was 'to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation'.[133] Consequently, '[t]he power to enact federal legislation was given to the Queen by and with the advice and consent of the Senate and the House of Commons' so that 'the body which had been created as a means of protecting sectional and provincial interests was made a participant in this legislative process'.[134]

The *Upper House reference* was issued in 1980 before *patriation*: consequently, the various amending procedures contained in Part V of the *Constitution Act, 1982* were not available. Yet, the conclusions reached by the SCC were not dissonant from those of the *Senate reference,* in the sense that, even in 1980, the SCC considered that 'the federal parliament alone could not alter the intentions of the Founding Fathers of Confederation at this regard'.[135]

III. A Comparison between Canada and Italy. Conclusion

This paper took as its point of departure the seminal constitutional reform recently approved by both Houses of the Italian Parliament in their first reading to show the topicality, in comarative perspective, of the debate ongoing in Italy. In fact, I illustrated how, in Canada, the Senate (or Upper Chamber) has historically been a

[130] H. Brun, G. Tremblay and E. Brouillet, n 6 above, 338.
[131] *Upper House Reference* n 128 above, 66.
[132] Ibid 65 and 66.
[133] Ibid 67.
[134] Ibid 68.
[135] H. Brun, G. Tremblay and E. Brouillet, n 6 above, 338.

rather contested institution, attracting criticism and unsuccessful attempts of reform. The *Senate reference* issued by the SCC in 2014, and detailed in this contribution, thus offers an ideal foundation to identify analogies and differences between the Italian and the Canadian experiences and conclude on potential shortcomings of the Italian reform.

1. Italy and Canada in Comparative Perspective

Italian jurists seldom look at Canadian federalism for comparison or inspiration: after all, a comparison between Italy and Canada could appear rather improbable at first sight, since Canada is a typical example of a (quite decentralized) *pure* or *classic* federation, while Italy could be regarded as a model of regional state at the most. Yet, despite the profound differences in the genesis and trajectory followed by Canadian federalism (as opposed to Italian regionalism), the institutional and political debate on the Senate reform presents surprising analogies and points of convergence that are worth, in my opinion, a closer scrutiny.

The perfect bicameral system that has singled out Italy throughout its republican history (and currently subject to revision) shares an interesting similitude with Canada. In fact, in both countries, the original intention of the constitutional framers was to establish a bicameral model where both branches would have almost identical powers, but where one of them (the Senate or Upper Chamber) would serve as chamber of 'sober second thought' (in Canada) or 'careful consideration or wisdom'[136] (in Italy), as evidenced by the executive appointment of Canadian senators and by the more stringent age requirements to vote for, and be elected at, the Italian Senate.[137]

The constitutional text currently in force in Italy allows us to make another parallel between the Italian Senate and the Canadian counterpart, as senatorial election or appointment follows a geographical element. In fact, Italian senators are now elected on a regional basis, and seat distribution among regions is proportional to local population, whilst Canada is subdivided into four divisions with

[136] Ibid 337.
[137] See n 6 above.

equal representation of senators.[138] Yet, neither in Italy nor in Canada senators represent local interests, as the geographic allocation merely serves electoral purposes. This aspect is particularly controversial in Canada, as it is a federal state: in fact, *federal* Upper Chambers are usually intended to offer a venue for constituent units to participate and be represented at central level, but in Canada the Senate has with time transformed into a venue expressing Canadian pluralism only. As for Italy, regional representation at the centre has become an issue only after the strengthening of Italian regionalism with the constitutional amendments of 2001: the reform under discussion, proposing to transform the Senate into a chamber representing local autonomies, shall be seen as an evolution of, and adaptation to, the new regional model.

Moving now to the specific changes contained in the constitutional reform discussed in Italy, we have already noted how it will drastically reshape the nature, functions and composition of the Senate in a number of ways. First, the universal and direct suffrage presently sanctified by Art 58 para 1 Constitution will be replaced by regional appointments of senators, so that the Senate could better fulfil its new role of territorial chamber. At this regard, however, constitutional scholars have raised various concerns: some theorists argue that a repeal of the universal and direct suffrage is unconstitutional, as the vote is a fundamental principle enshrined in the Italian Constitution.[139] Similarly, regional appointment of senators implies that the legislative function will be exercised by individuals who are not democratically elected and, consequently, who are not directly accountable towards the peoples.[140] Furthermore, scholars have also questioned the aptness of future senators to effectively carry out their senatorial tasks, especially with regards to their suitability to 'be adequately equipped to discuss the implications of constitutional reforms or of the new policies of the European Union'[141] and how Senate members will be able to divide

[138] See Arts 57 para 1 and 57 para 4 Constitution (for Italy) and section 22(1), *Constitution Act, 1867* (for Canada).

[139] A. Pace, 'I rischi del nuovo Senato' (2015) available at http://www.osservatorioaic.it/01-2015.html (last visited 8 October 2015).

[140] Ibid.

[141] G. Della Cananea, n 1 above, 7.

their tasks between regional and national engagements.[142] In this sense, the new regional appointment will resemble the executive appointment of senators in Canada, where the 'democratic deficit' of the Senate represents a rather thorny issue. As pointed out by the SCC in the *Senate reference,* the executive appointment of senators allows the Upper Chamber 'to play the specific role of a complementary legislative body of 'sober second thought'"[143] and to 'endow the Senate with independence from the electoral process to which members of the House of Commons were subject'[144] so that senators 'would not have the expectations and legitimacy that stem from popular election'.[145] In other words, the gist of the SCC message is that senatorial executive appointment is deeply rooted in the original constitutional design. Conversely, in Italy the framers of the 1948 Constitution opted for the universal and democratic suffrage to elect the members of both the Chamber of Deputies and of the Senate. Borrowing the same words used by the SCC, we can perhaps say that the direct election of senators 'shapes the architecture' of the 1948 Italian Constitution. The experience with indirect senatorial appointment in Canada may suggest that it would have been preferable to maintain a democratically elected senate. Thus the objective of having a chamber representative of the interests of regions and other local autonomies could have as well been attained by preserving the direct election of its members.

Along with proposals to reform the Senate, it is interesting to note that both in Italy and Canada suggestions were made to abolish this institution. In Italy, for example, Lorenza Violini recalls how '[t]he issue of keeping bicameralism or translating to unicameralism has deep roots dating back to the very dawn of our republican history'[146] and, more recently, the Commission for constitutional reforms appointed by Giorgio Napolitano in 2013 to assist the cabinet in the institutional reform proposed a unicameral model for Italy, later rejected.[147] Giacinto Della Cananea further indicates that, at

[142] Ibid 7; A. Pace, n 139 above.
[143] *Senate reference* n 24 above, para 56.
[144] Ibid para 57.
[145] Ibid para 58.
[146] L. Violini, n 23 above, 33-34.
[147] Ibid 34. For additional views on the pros and cons of a 'monocameral' option,

European Union level, only thirteen out of twenty-eight countries have an upper chamber and only five of them are directly elected by citizens.[148] As for Canada, we noted how there is a certain aversion, especially at provincial level, towards a bicameral system, as many feel that an Upper Chamber styled the Senate is unnecessary. It is unquestionable that persuasive and convincing arguments can be made both in favour and against bicameralism, but if the main purpose of a Senate is to offer a venue to local autonomies to be represented at central level, then bicameralism becomes inevitable (although other forms of coordination between the centre and the periphery could be perfected).

2. Conclusion

When finally approved, the overarching constitutional reform discussed in Italy will potentially transfigure (among other things) the role, nature and composition of the Senate, mainly by relinquishing its historical role of second House mirroring the functions of the Chamber of Deputies elected by universal and direct suffrage and becoming the parliamentary branch, regionally appointed, that represents the interests of local autonomies at the centre. This amendment will allow the Senate to adapt to the changed dynamics in the centre-periphery relationships introduced with the 2001 constitutional reform. Certainly, the timing chosen to introduce a *regional* Senate (for a long time invoked as the missing ring in the chain of reforms preceding and following the 2001 constitutional amendment) is quite puzzling, as it happens at a time when Italian regionalism has entered into a strong centripetal trend.[149]

In conclusion, the purpose of the parallel between Canada and

see also M. Luciani, 'La Riforma del Bicameralismo Oggi' *Rivista dell'Associazione Italiana dei Costituzionalisti*, 5-6 (2014).

[148] G. Della Cananea, n 1 above, 6.

[149] Similar concerns are shared, among others, by F. Gabriele, 'Il regionalismo tra crisi e riforme costituzionali' *Rivista dell'Associazione Italiana dei Costituzionalisti*, 9 et seq (2014). While this contribution decided to focus specifically on the aspects of the reform pertaining to the Senate, the reform itself will have the potential to redefine Italian regionalism by eliminating the shared legislative competences between the centre and the periphery (Art 117 Constitution), among other things.

Italy on the Senate reform sketched in this contribution was to show the similarity of many issues revolving around the nature, role and especially composition of the Senate, notwithstanding the obvious differences between the two legal systems. Among other things, we can speculate that issues analogous to those emerged in Canada will be advanced in Italy once the reform will be finally approved.

Malebolge

Right to the City or Urban Commoning? Thoughts on the Generative Transformation of Property Law

Ugo Mattei and Alessandra Quarta*

Abstract

The economic and political transformations determined by the rise of neoliberalism are usually studied at a state dimension, while the urban one is quite ignored. Nevertheless, the government of the city has been influenced by global and national recent changes and all the municipal sectors have been touched by the austerity's recipe. The decrease of urban public spaces, their privatizations as well as gentrification transform city planning that is often unable to elaborate alternative solutions against the overexploitation of the urban territory and the increase of inequalities caused by economic crisis. In a city, after all, it is impossible to hide inequalities and injustices.

In the last years, cities have often been the theater of political struggles against the privatization of public spaces, evictions and the dissolution of the urban welfare. In many cases, the demonstrators have occupied parks or abandoned buildings (theatre, condominiums...), and used them to find a temporary solution to their different needs (housing, social space, new forms of work, urban gardens...).

They denounce the great number of public or private empty spaces (for instance, the abandoned infrastructures left by the process of de-industrialization) and their neglect. According to the right to the city they claim, the inhabitants have to produce urban spaces starting from their own needs: empty spaces become an opportunity, the urban care is a collective task. This approach shares the logic of the commons, which reclaims a new paradigm based on inclusion, participation and social and ecological use of resources: according to many scholars, also urban spaces are commons.

After a description of this wide context, the article explores the connection between commons and the right to the city.

* Ugo Mattei is Professor of Civil Law at the University of Turin, Department of Law and Professor of Comparative Law at the Hastings College of Law, California. Alessandra Quarta is Research Fellow at the University of Turin, Department of Law and Director of Research at the International University College of Turin (IUC). The research for this article has been conducted jointly. Alessandra Quarta has drafted sections 1, 3, 4; Ugo Mattei has drafted section 2. Thanks to Giovanni Ferrero for his comments and to Peppe Mastruzzo and Keaton Allen-Gessesse for their editorial assistance.

Introduction

If they study the topic at all, property law scholars usually only study the economic and political transformations created by the rise of neoliberalism at a State level (that of the Civil Code and of legislation), often ignoring both the global and the local dimensions. In particular, they ignore transformations at the urban level, leaving it to scholars of administrative law whose approach very often tends to be quite narrow and positivistic. Nevertheless, global changes have affected the government of the city and the very nature of property and the European austerity policy has stricken the autonomy of national and local rulers. The contraction of urban public spaces and their privatization as well as gentrification transform city planning and weaken the power of municipal authorities. Most often, such authorities are unable to resist overexploitation of the urban territory enabled by extractive property law and cannot tackle the growing inequality caused by global capitalistic transformations. This phenomenon reflects the current ratio of power between the public sector (very weak) and the private sector (very strong) with the former at the mercy of the latter. In a city, the consequences of this dramatic imbalance of power which defeats all the assumptions of Western liberal constitutionalism are extremely easy to detect. After all, in the urban context where, for the first time in history, most humans live, it is impossible to hide inequality and injustice.

In the recent past, cities have often been the theater of political struggles against the privatization of public spaces, evictions, and the dissolution of the urban welfare. In many cases, the demonstrators have occupied parks or abandoned buildings (including theatres and condominiums, among others), and used them to find a temporary solution to their different needs (housing, social space, new forms of work, urban gardens, etc). Social movements denounce the great number of public or private empty spaces — for instance, the derelict infrastructures left by the process of de-industrialization — and their neglect. According to 'the right to the city', they claim, the law should enable inhabitants to 'generate' urban spaces starting from their own needs: empty spaces become an opportunity, and urban care a collective 'generative' task. This approach, now shared by a broad international network of scholars and activists, assumes the logic of the commons, which reclaims a new paradigm based on inclusion,

participation, and social and ecological use of resources. According to many scholars, urban spaces are also commons.

This short essay intends to explore the connection between commons and the right to the city in the Italian experience, developing a broader idea of civic participation than that realized in different contexts by the existent process of participated city planning. In the last two years, the 'right to the city' that the commons movement has unveiled has induced many Italian municipalities to adopt some original models of urban regulation. According to these 'commons sharing regulations' now approved in dozens of cities throughout Italy, citizens can take care of urban spaces such as flowerbeds, urban gardens, or empty buildings, entering into a sharing agreement (*patto di condivisione*) with the municipality. The enactment of such regulations recognizes a much more horizontal relationship between the administrative authority and ordinary citizens. It is the enacted result of years of cultural and political struggles for the commons, and while often quite moderate in its political inspiration, has the potential to change the very notion of governance of the urban territory. If applied on both private and public land of significant residential value, it can contribute to a reduction of the land rent, giving a more immediate solution to collective needs and facilitating civic engagement from which political alternatives can grow.

I. The Neoliberal Crisis of the Cities

In recent years, many legal scholars and many social movements have discussed the relevance and the real meaning of the right to the city, theorized in the sixties by Henri Lefebvre,[1] reactivated a decade later by Manuel Castells,[2] and examined today by David Harvey and his radical geography.[3] Social movements claim the right to the city to protest against the unfair distribution

[1] H. Lefebvre, *Le droit à la ville* (Paris: Anthropos, 1968).

[2] M. Castells, *The Urban Question: A Marxist Approach* (Cambridge, MA: The MIT Press, 1977).

[3] D. Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* (London-New York: Verso, 2012).

of wealth and power:[4] particularly after 2008, when the economic and financial crisis exploded, they have claimed the public use of urban spaces and demanded more participation in the decision-making processes that concern city planning.

Until the nineteen eighties, Italian legal scholars studied urban development and in particular the contents of the Fundamental Planning Act;[5] they discussed the measure of compensation for expropriation, the nature of the limits to property, and the significance of the social function of private property (Art 42 Italian Constitution).[6] In this context, legal scholars verified the possibility of applying the classic idea of property (based on individualism and absolutism) in the urban framework, where the limits to the powers of the owner are very clear and undeniable.[7] In fact, the development of the city involves the structure and the effects of private property, since planning activities limit the powers of the owner. In particular, an important issue addressed by that wave of scholarship was the nature of development rights (ie the power to build) as a way to control the growth of the city and to assure equality between owners and non-owners. Property law scholars then did not simply consider city planning as a part of administrative law and they discussed how to control land rent-seeking, while today such a radical critique of the structure of private ownership is all but taboo.[8] For more than two decades, coinciding with the hegemony of neoliberal thought, Italian property law scholars simply revamped the paradigm of ownership as exclusion from a zone of individual sovereignty to be reconciled with other similar zones to which other owners were entitled.

[4] The examples come from New York, with its Occupy Wall Street Movement, Barcelona with Indignados, Istanbul with the struggles in Gezi Park, Hong Kong.

[5] The legge no 1150 was passed in 1942 and modified many times, but a general reform has never been made and every attempt at doing it has failed.

[6] The last complete Italian studies about property and urban development are A. Gambaro, *Jus aedificandi e nozione civilistica della proprietà* (Milano: Giuffrè, 1975) and Id, *Proprietà privata e disciplina urbanistica* (Bologna: Zanichelli, 1977).

[7] Urban property is said 'conformed', because the owner has to respect many limits, as for instance a defined distance between buildings, aesthetic standards, height limits, etc.

[8] A. Quarta, 'La polvere sotto il tappeto. Rendita fondiaria e accesso ai beni comuni dopo trent'anni di silenzio' *Rivista critica del diritto privato*, 253-272 (2013).

At the end of the seventies through the following two decades, the return to dominance of the individualistic and absolute idea of private property coincided with the political choice to liberalize the market and to privatize many public services and public assets. The Thatcher government in the UK began this neoliberal turn, which quickly became the dominant paradigm in economics and politics throughout continental Europe. In particular, in the early nineties, the Italian government decided to privatize many public companies and to sell many public assets.[9] Property law scholars were called upon to provide a robust theory of property rights to cope with the new broad area that privatization opened to private law and to ordinary jurisdiction as opposed to that of administrative law. The most 'natural' move given the intellectual climate of the time was to look to robust theory in the US legal system where the role and scope of property rights were very significant and where administrative law could not count on a different circuit of courts such as the one typical of the civil law tradition.

These political and economic decisions have revealed or perhaps even determined the weakness of the State and the public sector against private corporations and, in general, against market forces.[10] The neoliberal rhetoric in general and its translation into the Italian system in particular would introduce the idea that the State is just like any other market actor, which as such must compete on the market which is the natural playing field. Nevertheless, bureaucracy and corruption make the State a poor market competitor, so that it would be desirable if it could abandon the market in favor of other more efficient private competitors. Such prestigious and influential public law scholars and policy-makers as Cassese, Amato and Bassanini have thus theorized the so-called 'regulatory state' as the only solution capable of reforming the Italian system.[11] Under this

[9] E. Barucci and F. Pierobon, *Le privatizzazioni in Italia* (Roma: Carocci, 2007).

[10] U. Mattei, E. Reviglio and S. Rodotà eds, *Invertire la rotta: idee per una riforma della proprietà pubblica* (Bologna: Il Mulino, 2007).

[11] S. Cassese, 'Stato e mercato dopo privatizzazioni e deregulation' *Rivista trimestrale di diritto pubblico*, 378-387 (1991); Id, *La nuova costituzione economica* (Roma-Bari: Laterza, 5th ed, 2012); G. Amato, 'Il mercato nella Costituzione' *Quaderni Costituzionali*, 7-19 (1992); for a general perspective about the regulatory state, see D. Oliver, R. Rawlings and T. Prosser eds, *The Regulatory State: Constitutional Implications* (Oxford: Oxford University Press, 2010); G. Majone and A. La Spina,

theory, the State should only draft the rules of the game and check, through independent authorities, that the private market actors respect them. These ideas have been the Trojan horse for the final dissolution of the public sector in favor of corporate interests, done with the full consent of the most acclaimed in academia. Dissolving the public sector through privatization thus became the desirable policy and lawyers, busy in their preaching for the regulatory State, simply ceased to do their job, which was to make sure that sufficient guarantees of due process were in place to avoid arbitrary exercise of power. Unfortunately, governments usually ignore the interests of citizens when they decide to privatize services and to sell public assets since the transfer of property from the public into private hands is not accompanied by the same due process guarantees as the expropriation of private property in the public interest.

For historical reasons shared by all countries in the liberal constitutional tradition, the rules we find in the Italian Civil Code (borrowed from the French Napoleonic Code) to protect public property have not been useful to limit privatization, even if they consider some goods as inalienable.[12] In the Italian intellectual climate of the early ninetieth, with 'technical governments' struggling to enter into the Euro zone (1999), the issues of the distribution of resources and justice gave way to efficiency and privatization, which also marked the return of a strong idea of private property. The theory of property rights of Demsetz[13] and of many scholars within the economic analysis of law contributed to spreading the neoliberal model in the civil law tradition and Italy was not immune from this trend.[14] In this new (old) logic, property is an institution that reduces transaction costs and internalizes negative externalities. It has not, nor should it have, any redistributive function.

Throughout the neoliberal era, significant events have marked Italian urban development: in three different times – the first in 1985

Lo Stato regolatore (Bologna: Il Mulino, 2000). For a critique U. Mattei, *Contro riforme* (Torino: Einaudi, 2013).

[12] U. Mattei, E. Reviglio and S. Rodotà eds, *I beni pubblici. Dal governo democratico dell'economia alla riforma del codice civile* (Roma: Scienze e Lettere editore commerciale, 2010).

[13] H. Demsetz, 'Toward a Theory of Property Rights' 57(2) *The American Economic Review*, 347-359 (1967).

– the legislature has legalized buildings previously in violation for the main purpose of obtaining liquidity while pleasing powerful developers. Compensation for expropriation of private property returned to the fair market value criterion, mostly under pressure from the equally 'neoliberal' European Court of Human Rights.[15] New legislation invented a 'negotiated procedure' between public and private actors to work out legal deals on the location of buildings, their scope, the amount of necessary infrastructure and similar crucial issues. It is easy to see how in the aforementioned new balance of power between the private and the public, city planning has completely lost its public soul.

Neoliberal scholars considered this a desirable evolution of the new 'regulatory state', setting the rules of a market in which private actors could actually compete. In this vein, they celebrated negotiated city planning as the decline of the authoritarian role of the public administration, but, blinded by their ideology, they did not consider that private corporations had seized our cities, taking advantage of the public economic weakness during the negotiation. In many situations, the most important economic opportunity for municipalities comes from modifying the city plan with zoning variations and changes of allowed uses that favor private subjects to build. In fact, private developers pay some infrastructure costs to build and cash-strapped municipalities can use this liquidity for their ordinary spending.

In this way, municipalities use the money paid for infrastructure costs or as legalization fees for previous abuses as instruments of fiscal policy, forgetting their role of policy planning which requires a long-term vision, some degree of independence, and some capacity to actually enforce the law against strong vested interests.[16] This is not

[14] U. Mattei and R. Pardolesi, 'Law and Economics in Civil Law Countries: a Comparative Approach' 11 *International Review of Law and Economics*, 265-275 (1991).

[15] U. Mattei, *La proprietà* (Torino: Utet, 2015), Chapter X; A. Gambaro and U. Morello, 'Proprietà e possesso', in Id eds, *Trattato dei diritti reali* (Milano: Giuffrè, 2011), I; G. Ramaccioni, *La tutela multilivello del diritto di proprietà: profili strutturali e funzionali nella vicenda della occupazione acquisitiva* (Torino: Giappichelli, 2013).

[16] F. Adobati and V. Ferri, 'Oneri di urbanizzazione, crescita urbana e debito pubblico di domani', in VVAA, *Abitare l'Italia. Territori, economie, diseguaglianze.*

just a technical problem of classifying the nature of legal tools available to the municipality or the legally correct uses of the resources they can generate. This evolution has a concrete impact on city development, as the conditions of suburbs demonstrate: large residential buildings and shopping malls develop instead of public services (such as libraries or youth centers) or green spaces, despite the importance of the latter to integrate the inhabitants who live distant from the city center.

Thus from a legal perspective, city planning is suffering a double decline: on the one hand, it is losing connection with the idea of a landscape to be approached with an ecological sensibility;[17] on the other hand, for the reasons previously summarized, city planning is often sacrificed in the interests of the building industry or of the large distribution.

The economic and financial crisis has exacerbated the situation, as local authorities are suffering extensive cuts of national resources transferred from the central government. The effects of neoliberal policies over cities include privatization of local public services such as water distribution, garbage collection, and transportation, now standard practice of municipalities.[18] By so doing they have reduced many services previously available at subsidized prices, which has especially afflicted the most vulnerable populations, such as the elderly. In this way, the municipal welfare system, which since the early part of the twentieth century in Italy has guaranteed some social cohesion and solidarity, is progressively disappearing. The ensuing trend is to address the needs of weaker citizens by transferring public resources to private actors (often for-profit corporations) or to deploy a variety of partnerships with banks and charitable foundations that most often are very poor substitutes for

Atti della XIV Conferenza SIU (2011), available at http://siu.bedita.net/atelier-5 (last visited 12 October 2015).

[17] U. Mattei, *La proprietà* n 15 above; P. Maddalena, *Il territorio bene comune degli italiani: proprietà collettiva, proprietà privata e interesse pubblico* (Roma: Donzelli, 2014); S. Settis, *Il paesaggio come bene comune* (Napoli: La scuola di Pitagora, 2013); Id, *Paesaggio, Costituzione, cemento: la battaglia per l'ambiente contro il degrado civile* (Torino: Einaudi, 2012).

[18] VVAA, *Servizi pubblici locali: innovazione e beni comuni* (Milano: Franco Angeli, 2015).

direct municipality engagement.[19] Often public services provided through private actors not only are more expensive for the users and of poorer quality but they end up being more costly for the public treasury given the high costs of procurement procedures and monitoring and the complete lack of a long-term strategy with consequent declines in investments.

To this grim scenario one must add the growth of evictions and of closures of small business activities, created by the untenable growth of proprietary rent extraction in the absence of public housing projects due to lack of available public funds (which are mostly used to service sovereign debt). The rise of protests and occupations to solve this social catastrophe seems inevitable, as does the degree of police brutality to cope with it. Many municipalities go bankrupt (an unthinkable idea before neoliberalism, which is when public authorities started to be considered as any other market actor); most are highly indebted.[20] This vicious circle is exacerbated by cities' constant search for private investors through the organization of major events (for example, the Olympic Games) or the building of major infrastructures (for example, the high-speed train from Turin to Lyon).

Cities are looking for new identities to survive to the death of Fordism and the closure of factories, which are radically changing the local economy as well as the urban landscape. Many abandoned and neglected industrial plants exist and cry for some generative use. Many derelict public buildings are equally necessitating care and deserve a destiny different from transformation into more shopping malls. All of the public and private goods draw a map carved out by empty spaces, now simply wasted, while they could provide much-needed social services such as shelter for refugees or homeless people or places of social aggregation. These empty spaces could moreover host alternative economies of a variety of kinds as has already happened in many instances before.[21]

[19] S. Busso, E. Gargiulo and M. Manocchi, 'Multiwelfare. Le trasformazioni dei welfare territoriali nella società dell'immigrazione' *FIERI – Rapporti di Ricerca*, 1-110 (2013).

[20] P. Berdini, *Le città fallite: i grandi comuni italiani e la crisi del welfare urbano* (Roma: Donzelli, 2014).

[21] P. Pedrocco, F. Pupillo and I. Cristea, 'I vuoti urbani e le infrastrutture

II. The Right to the City and Its Institutional Denial

Is it a smart strategy to argue in terms of right to the city? Can we, as lawyers, articulate some technical translation of such a right capable of making it enforceable?

We have described how municipalities have transformed abandoned industrial plants into residential zones, changing the rules on intended use often to the advantage of the very same owners and managers which still own the plant but have abandoned it to transfer production to the global south. If the ownership of abandoned buildings is public (for example, a vacant military complex) the cash-strapped public sector often tries to sell it to a private developer often at an extremely undervalued price. When such buyers are not available, municipalities themselves create private law-governed special purpose vehicles (SPV) that borrow money from banks to buy the buildings, allowing the municipality to all but 'pretend' it has actually sold them when in fact it has just borrowed more money to make its books look better. This kind of financial creativity falls short of 'cooking' the accounting books. Once again, financial needs guide the urban development. City dwellers are excluded from any decision-making.

For example, in Pisa in 2012 an abandoned factory was occupied and transformed into a thriving commons with a library, a tailor, a school for migrants, a nursery school, a bicycle mechanic, a farmers market, a restaurant and a gym.[22] For a few months, the *Colorificio Toscano* thrived, with hundreds of low-income people bettering their lives and finding a purpose, before being brutally evicted by the police. The Mayor of Pisa and the corporate owner of the empty factory planned to transform the area into residential buildings, sharing rent-seeking purposes. The classic coalition of the public and the private against the commons quashed the experience of the *Colorificio Toscano*.

dismesse. Un'occasione per la classificazione dei beni demaniali sul territorio' *TRIA – Rivista Internazionale di Cultura Urbanistica*, 111-121 (2011).

[22] A. Quarta and T. Ferrando, 'Italian Property Outlaws: From the Theory of the Commons to the *Praxis* of Occupation' 15(3) *Global Jurist*, 261-290 (2015); VVAA, *Rebelpainting. Beni comuni e spazi sociali: una creazione collettiva* (Pisa: Rebeldia, 2012).

To take another example, in 2013 in Torino, a large portion of a beautiful royal complex which had been abandoned for decades, *la Cavallerizza Reale*, was occupied to protest against the unacceptable lack of care for the building and the planned privatization of the complex. During the occupation it surfaced that the municipality had already sold the complex to an SPV which it wholly owned one hundred percent and that the city had already cashed some eleven million euros borrowed from a major bank enabling it to put this further debt service out of the books and making it look much better than its grim reality of quasi-bankruptcy. The occupation is continuing to provide citizens with access to a beautiful park and some cultural or political entertainment, but the substantial privatization of the area (for a luxury hotel and boutiques) is just a matter of closing the deal with some 'private investors'.

There are no legal remedies against such scandals. There is no such thing, legally speaking, as a right to the city. There is no way to bring these issues to the courts according to Italian law. The *Colorificio Toscano* in Pisa was private property and the right of property includes the criminally sanctioned power to exclude anybody from the premises. Non-use while waiting for the best moment to sell is a classic stick in the property bundle.[23] To be sure, there are, here and there, provisions of the Civil Code that can be interpreted to limit the unfair or arbitrary power of exclusion from the proprietary sticks.[24] Municipalities do have some power to act in case of nuisances created by non-use or perhaps, with a direct application of the Constitution, even in general against antisocial uses of ownership.[25] Unfortunately, such interpretations require some willingness to take risks. They also require mayors less cozy with corporate interests than the one of Pisa. Who else would have standing to claim a right to the city? The answer is simple: no one.

The *Cavallerizza Reale* was a public property and the municipality owns it. It is free to privatize it, and this choice is

[23] O. Liivak and E.M. Penalver, 'The Right Not to Use in Property and Patent Law' *Cornell Law Faculty Publications*, 1437-1494 (2013), available at http://scholarship.law.cornell.edu/facpub/639 (last visited 12 October 2015).

[24] A. Quarta, 'Cose Derelitte' *Rivista di diritto civile*, 776-799 (2014).

[25] U. Mattei, 'Una primavera di movimento per la «funzione sociale della proprietà»' *Rivista critica del diritto privato*, 531-550 (2013).

political, mostly in the hands of the mayor, and is not justiciable. This is a fundamental constitutional trait of the Western legal tradition that limits due process protection to private property and not to public property whose management is assumed to be an intimate part of political discretion. Municipalities, as any other owner, are free to create an SPV and to transfer to it the public property for sale. The municipality-owned but independent SPV is free to mortgage out the property to the bank.

Proprietary freedom and sovereign political discretion share the same logic: concentration of power and exclusion. Who would have standing to challenge this? Who can claim enforcement of his right to the city? The answer is simple: no one.

If there is no technical content in the notion of right to the city, it might be possible that there are some strategic political reasons to use this right. We submit that this might not be the case. Indeed, the logic of rights might well be part of the problem rather than part of the solution to the progressive transformation of commons into capital which has characterized the evolution of the Western legal tradition and of its most successful product, bourgeois liberal constitutionalism.[26] Indeed the logic of rights is borrowed from that of property and is a powerful device to individualize and atomize society. The logic of rights implicitly opposes that of duties and thus erases any social duty owed by the stronger toward the weaker or toward community.

As extensively argued elsewhere, the fundamental institutions of the modern (bourgeois) compromise between private property and state sovereignty are grounded in the idea of individualized power (of the owner or of the chief executive) to be exercised excluding anyone who is not within the chain of command. This is the very structure of power that the inclusive and collective logic of the commons struggles to overcome and must resist. Historically, the right of resistance was an eighteenth-century transformation of a previous collective duty to resist theorized by French Huguenot jurists, and held by the people through their magistrates against an unfaithful ruler.[27] The transformation of a collective duty to resist into an

[26] F. Capra and U. Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Oakland, CA: Berrett-Koehler Publishers, 2015).

[27] E. Meiksins Wood, *Liberty and Property: A Social History of Western*

individual right of resistance has been the strategy to make this right irrelevant since the only legitimate way to exercise the right has been individual litigation in the courts of law. It is easy to see how the language of an individual right to the city can dangerously substitute the notion of a 'collective duty to make the city', by actively and effectively reclaiming it.

Further, the very structure of rights is enshrined in the Cartesian logic of an opposition between the subject (*res cogitans*) and an object (*res extensa*). This mechanistic opposition has generated the positivistic vision of a separation between a domain of facts (that can be scientifically described) and a domain of values (that are the domain of personal arbitrary choices).[28] This vision, dominant in the current Western understanding of the reality, is a mechanistic trap that is not only epistemologically outdated but also politically disempowering. A right to the city separates the domain of the subject (the individual citizen owning the right) from the object (the city as some sort of furniture of the earth). Nothing is more dangerous politically than objectifying the city. The city cannot be seen as an object but rather as the complex and dynamic interplay of plural subjectivities that make it while inhabiting it. Its epistemology cannot be positivistic but rather fully phenomenological, just like that of the commons.[29] All these caveats should be taken into consideration when suggesting the existence of a right to the city.

III. Collectively Claiming the City as a Common

Recently, citizens have criticized the neoliberal style in managing public assets and services as sources of rent extraction. In 2011, twenty-seven million Italians (an absolute majority of those entitled to vote) stopped the privatization of the water supply system and of other municipal services of economic relevance (transportation,

Political Thought from the Renaissance to the Enlightenment (London-New York: Verso, 2012).

[28] F. Capra, *The Turning Point: Science, Society, and the Rising Culture* (London: Flamingo-Fontana, 8th ed, 1990).

[29] U. Mattei, *Beni comuni. Un manifesto* (Roma-Bari: Laterza, 2011).

garbage collection) by a nationwide referendum.[30] Encouraged by this major political success, social movements denounced the existence of abandoned public buildings as an injustice, often deciding to occupy vacant spaces and to take care of the buildings themselves.[31] Legally, occupation is a criminal offense,[32] but many scholars argue now that in these cases of proprietary disobedience it is 'generative' and the Constitution protects it. In fact, squatters or occupants of theaters always open the occupied building to collectivity and offer services to the neighborhood thus securing the social function of these assets (Art 42 Constitution). These movements usually claim the right to the city by regenerating spaces and asking (through conflict and dissent) the municipal authorities for more participation in the urban decision-making processes. In this way, cities are obtaining a new political subjectivity when creatively resisting austerity measures and becoming interesting laboratories in which people can experiment new political coalitions and new legal solutions.

Two main practices deserve some further attention: one, 'temporary use', is a bottom-up approach granting to squatters a temporary use and thus recognizing the importance of their civic activism. The other, the 'municipal regulation of the commons', perhaps can be described as a top-down solution. It is nevertheless quite an enlightened response to civic activism that would be a mistake to simply dismiss as paternalistic. In any case, we use these two examples to describe how city planning can be organized as a dynamic activity, while the traditional legal tool of the city plan still deploys a static approach that favors private investors over city dwellers.

1. Temporary Use and the Insurgence of Urban Commons

Squatters generally give a second life to the occupied abandoned

[30] U. Mattei and A. Quarta, *L'acqua e il suo diritto* (Roma: Ediesse, 2014); U. Mattei, 'Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance' 112 *South Atlantic Quarterly,* 366-376 (2013).

[31] S. Bailey and U. Mattei, 'Social Movements as Constituent Power: The Italian Struggle for the Commons' 20 *Indiana Journal of Global Legal Studies*, 965-1013 (2013).

[32] A. Quarta and T. Ferrando, n 22 above.

building, as occurred for instance in Berlin at the beginning of the nineties: after the wall fell, artists, architects and activists occupied vacant buildings and demanded the municipality consider projects of temporary use as a strategy of urban regeneration.[33]

Temporary uses provide the possibility to modify the neoliberal city planning urbanism, starting from a study of the way in which value can be generated by producing public spaces.[34] The regeneration of empty buildings benefits all the stakeholders: the public or private owner benefits from a reduction in maintenance costs; the neighborhood enjoys the positive externalities produced by regeneration, while the temporary users can find a place in which they can work or live. In this way, 'temporary' is not a synonym for 'exceptional', because the new use is chosen with a bottom-up approach which involves the neighborhood where buildings exist and may become durable.

At the same time, the regeneration contributes to an ecological development of the city and assures to temporary users an active role in the city planning.

At the moment, Italy does not have a national legal framework about temporary use. True, the transformation of industrial areas is the subject of a bill[35] but this approaches the issue just as an economic problem, without considering an approach linked to urban development. In spite of the absence of national regulation, some local authorities have recognized temporary uses for the period between the old and the new function of an abandoned area or building. In 2012, for instance, the Municipality of Milan approved a plan to regenerate abandoned or underutilized buildings. The purpose is to loan them for use to non-profit organizations, start-up companies or socio-cultural projects that pay a social rent.[36]

Temporary users can actively change the city, because they *use* urban spaces while, according to a neoliberal approach, citizens

[33] D.S. Silverman, 'The Temporary Use and Economic Development' 66 *Planning & Environmental Law: Issues and decisions that impact the built and natural environments*, 8-10 (2014).

[34] D. Patti and L. Polyak, 'From practice to policy: frameworks for temporary use' 8 *Urban Research & Practice,* 122-134 (2015).

[35] Disegno di Legge 24 March 2015 no 1836 'Misure per favorire la riconversione e la riqualificazione delle aree industriali dismesse'.

[36] Delibera Giunta Comunale Milano 30 March 2012 no 669.

should just *consume* in urban spaces.[37] In this perspective, there is also the possibility to fill the gaps of participated city planning,[38] an institutional solution that falls short from generating a shared control of urban development. In fact, citizens' participation consists in the collection of their opinions before starting a particular building, infrastructural or urbanistic project. Municipalities usually call experts to listen to citizens and collect their opinions; however, at this point, the project is almost definitive and complete, so that experts can just make it more acceptable or they can try to mediate between the planner and the citizens if people resist the project. Because of such a participatory scheme in these cases, citizens' participation is passive and it often is useless, a sort of democratic fig leaf to cover unpopular projects. In fact, after the experts' intervention the project is unlikely to change, even if citizens ask to stop or cancel it.

To the contrary, an idea of an 'instantaneous city' is behind temporary use: a place of subjectivity in which inhabitants have some possibilities to transform and organize urban spaces by themselves. It is thus a much more genuine and advanced form of participation. This is why the very notion of a right to the city, in spite of its returning scholarly popularity, needs to get in tune with that of the city as a common. Very often, the rhetoric of rights, with its load of possessive individualism, is at odds with notions of duties of care and community.

According to Lefebvre's theory, 'urbanity' is the result of a productive process created by the inhabitants of a city. The reuse of abandoned buildings and the struggle against privatization are just two examples of those activities that produce the city and new public spaces. If this is the chosen perspective, it should not be difficult to harmonize the right to the city with the discourse on the commons.[39] In fact, throughout the last five years, many Italian social movements

[37] F. La Cecla, *Contro l'urbanistica* (Torino: Einaudi, 2015).

[38] D. Ciaffi and A. Mela, *Urbanistica partecipata: modelli ed esperienze* (Roma: Carocci, 2011).

[39] U. Mattei, 'Protecting the Commons' n 30 above; Id, *Beni comuni* n 29 above; M.R. Marella, *Oltre il Pubblico e il Privato* (Verona: Ombre Corte, 2012); S. Rodotà, *Il terribile diritto. Studi sulla proprietà e i beni comuni* (Bologna: Il Mulino, 3th ed, 2013); Id, *Il diritto di avere diritti* (Roma: Laterza, 2014).

have used the category of the commons to denounce the unjust abandonment of buildings by occupying them.

After the already mentioned great success of the referendum in 2011, the language of the commons has been utilized to frame and support a large variety of struggles, including claims against the privatization abandonment of environmental resources and cultural goods (whether public or private), as well as to defend workers and their rights. As a consequence of this apparently inextricable complexity, Maria Rosaria Marella has recently tried to provide a simplified taxonomy of the commons by combining the different interpretations and the variety of utilities they produce.[40] Today, the notion of commons – which goes beyond the public/private opposition – includes material goods (water, but also natural resources linked with the environment or with the historical, cultural or artistic patrimony of the country) and immaterial resources (such as intellectual creations and traditional knowledge, which cannot be crystallized because they are in continuous transformation).

However, the notion of commons cannot be detached from its political essence, considering its transformative potential. For this reason, it can be used to frame and legitimize claims to obtain the fulfillment of social rights (health, university, culture), and to publicly discuss the ways in which urban space is organized. From this perspective, we can thus consider the city as a commons, looking for a new political argument against expanding urbanization, destruction of green areas, and dismantlement of cultural specificities of certain neighborhoods operated by gentrification. In this field 'thinking like a commoner'[41] means that the city is the first place where people can try to collectively live and transform it, claiming a public use of its places. A consequence of a commoner's claims is that urban development needs inclusive rules and a real participatory government.

The life of the commons is dynamic, so today this category is different and broader than that defined by the Rodotà Commission[42]

[40] M.R. Marella, n 39 above.

[41] D. Bollier, *Think Like a Commoner: A Short Introduction to the Life of the Commons* (Gabriola Island: New Society Publisher, 2014).

[42] This Commission was created by the Minister of Justice in 2007 with the mandate to propose a reform of the existing regime of public goods, contained in

eight years ago before its politicization through the referendum of 2011.[43] In Italy today the commons are not merely an important generative legal concept beyond private property and public property. They are the complex institutional outcome of continuous pressures and social struggles, including those generated by the occupations as expression by the collective who re-appropriate enclosed and abandoned spaces.

2. City Regulations of the Commons: An Alternative to Occupations?

Municipalities can react to occupations and to the claims of the right to the city in three different ways.[44] They can ignore the phenomenon. They can repress it through the police. They can co-opt the experience by adopting acts receptive to the claims of the protesters. The first two reactions generally prevail in Italy. Nevertheless, the idea that citizens can take care of urban spaces solicits municipalities to find a legal framework to encourage inhabitants who want to collaborate with the public administration without taking an antagonistic position (that is: not occupying). Across Europe, this legal framework has different forms: for instance, many municipalities discourage through taxation the abandonment of property and provide for special registers to record empty buildings. In Italy, quite interestingly a new wave of city regulations deploys the language of the commons to limit the anti-social consequences of the owner exercising the right not to use his

Arts 822 through 830 of the Italian Civil Code. The Commission introduced the category of the commons, beside the categories of the public goods and of the private goods belonging to the public. Commons were defined as goods that produce utilities that are functional to the fulfillment of fundamental human rights and the free development of any human being. These goods belong to the natural and cultural patrimony of the country such as rivers, streams, lakes, air, forests, flora, and fauna, but also to all those goods considered of archaeological, cultural, and environmental relevance. See U. Mattei, E. Reviglio and S. Rodotà eds, *I beni pubblici* n 12 above.

[43] In 2011, a referendum stopped the privatization of the water supply system introduced by the Italian Government; the slogan of the referendum campaign used the idea that water is a commons. See U. Mattei and A. Quarta, n 30 above.

[44] L. Rossini, 'Teorie globali per azioni locali: i processi autonomi di riappropriazione dello spazio' *Folio*, 19-20 (2014).

property, and to abandon it.[45] In most cities, however, a registry of vacant properties does not exist and the exact quantity of abandoned properties is unknown. Consequently, private property continues to be carefully protected by municipal authorities embracing the dominant neoliberal creed. While a few private law scholars are now struggling to deploy the commons to re-open the debate on the abuses of property rights in light of the appalling conditions of the homeless and the poor, for the time being we can only register a few significant developments involving public property owned by municipalities.

In the last couple of years many Italian municipalities have adopted particular city regulations on the shared care of urban commons.[46] In 2013, the Municipality of Bologna, following the suggestion of two public law scholars Gregorio Arena and Christian Iaione,[47] ruled for the first time in favor of citizens' cooperation for the care and the regeneration of the urban commons (Art 1, para 1). This act defines urban commons as tangible, intangible, and digital goods that citizens and the Municipality consider functional to recognize individual and collective welfare, through participatory and deliberative procedures. Citizens and Municipality share responsibility for the care or the regeneration of these goods in order to improve their collective enjoyment. Citizens can take part in this process individually or through social associations, formal or informal. They identify the building, the square, the street or the flowerbed for which they want to care (public spaces or private spaces or subject to public use), then present a cooperation proposal to the Municipality or respond to a public call when the initiative to propose some asset for commoning is taken by the municipality.

In a second phase citizens and the municipality sign an agreement (*patto di cooperazione*), outlining the ways in which they want to care for urban commons, the powers and liabilities, the division of expenses, the insurance, and the strategy to involve other

[45] A. Quarta, 'Cose Derelitte' n 24 above.

[46] Much information about regulations is available at www.labsus.org, laboratory of subsidiarity leaded by G. Arena (last visited 20 October 2015).

[47] G. Arena and C. Iaione eds, *L'Italia dei beni comuni* (Roma: Carocci, 2012); G. Arena, *Cittadini attivi: un altro modo di pensare l'Italia* (Roma-Bari: Laterza, 2011).

inhabitants as well as the agreement's duration. The municipality regularly lists all the available spaces and evaluates proposals, merging them together should they be too numerous. In the Bologna model, the solution of any dispute is referred to a particular conciliation committee. The municipality can recognize certain fiscal benefits for participating citizens and provide the equipment needed by citizens to carry out their care activities.

Many other Italian cities have adapted the Bologna act to their own local needs. Among the variety of experiments, in November 2014, the Municipality of Chieri, a thirty-seven thousand-person city in the Turin Metropolitan area, approved the most original version directly borrowing from the experience of the 'cultural occupations' of the *Teatro Valle* in Rome and of the *Asilo Filangieri* in Naples. In the Chieri model, the 'community' or 'commoning unit', rather than the volunteer citizen, can identify the commons (through any means including occupation) and is the real protagonist of the process. The commoning unit, understood to be in a fully horizontal relationship with the municipal authority, enjoys full power in the management of the recognized common. By signing the agreement, the municipality no longer exercises any power over the urban commons and leaves full freedom to the community. This element is very important in order to distinguish the volunteering of the individual citizen from the commoning of a collective movement which can also produce a pluralistic political subjectivity. The regulations of Chieri acknowledge the possible transfer of the urban commons to the community, using particular solutions that assure a collective management. The Chieri model thus sets the conditions to transform the commoning rights into a private law institution, such as a foundation or a community land trust[48] or a trust in the interest of future generations. Through this strategy, which can be referred to as a counterhegemonic use of private law, the commoning unit will be able to legally protect its management of the urban commons including in the case in which a new municipal administration decides to privatize the entrusted urban common in the future. Paradoxically, the due process guarantees of private property

[48] About Community Land Trust, see A. Di Robilant, 'Property and Democratic Deliberation, The *Numerus Clausus* Principle and Democratic Experimentalism in Property Law' 62 *American Journal of Comparative Law*, 367-416 (2014).

expropriation can be put to the service of the commons if the governance of the collective entity (foundation or trust) is organized in a way coherent with the criteria of openness, inclusion, and participation. The commons can thus become a form of 'generative' property protected against expropriation and privatization through the ordinary means of civil justice. Another important innovation of the Chieri model is the 'jury of the commons' – composed of five citizens selected through a draw which are in charge of resolving potential conflicts especially on the interpretation of what is or what is not a common.

These regulations are one of the many manifestations of the discourse on the commons that implies two different strategic alternatives: in fact, legal scholars interested in commons can use the existing rules and fill them with a new 'generative' meaning, or try completely new proposals, which however require a quite a mighty political force to be put in place.[49] The experience with the Rodotà Commission which, despite generating major scholarly attention and producing significant case law developments,[50] never succeeded to be actually discussed in Parliament, may suggest that the first more humble and local strategy can better serve the interest of the commons. Municipal regulations, in spite of the quite condescending attitude of some of the 'harder' social movements before them, have the potential to transform cities and produce a redistributive effect if two elements are respected. The first element requires the involvement of citizens in the process leading to the approval of the regulation. This is fundamental especially when a local social movement is active on the territory and struggles for some legal recognition of its claims. An active role of social movements is desirable, especially because these regulations are a concrete proposal to get a minimum legal framework to reuse public spaces, in a context of suffocating bureaucratic procedures such as that of Italian municipal bureaucracies.

The second crucial aspect is to consider how innovative the cooperation agreements can be since they can dictate basic care

[49] U. Mattei, *Il benicomunismo e i suoi nemici* (Torino: Einaudi, 2015).

[50] The Italian Corte di Cassazione 14 February 2011 no 3665, *Giustizia civile*, 595 (2011) has for the first time used the concept of common to indicate the particular condition of some natural resources.

measures like painting or cutting grass, all the way to allowing an open community to manage an abandoned industrial area. In this latter case, the community could produce new forms of work and welfare from below, achieving a redistributive effect. The critics of such regulations should consider this aspect.

Naturally, it is only the bottom-up activation of affected communities that can counter the paternalistic approach that characterized many of these regulations, making them yet another legal instrument to criticize the role of property in the city and the distribution of resources. City regulations of the commons must contain basic guidelines to facilitate community self-organization and the political action of the administrations that enact them should be monitored for the honesty of the devolution of power that such regulations allow. Only if they serve as tools of diffusion of power can they produce the generative effect typical of the commons.[51] Outside of this 'devolutionary' political nature, municipal regulations of the commons are reduced to simple tools by which local government obeys the current austerity machine by means of exploitation of the participation of citizens in good faith. They would fall short from working in the direction of producing a deep transformation of this system.

IV. Final Remarks

In conclusion, many urban dwellers display a desire to participate in city planning in an active way. This is a lesson we can learn both from the occupy movement and the regulations about the care of urban commons. The reuse of spaces and buildings is a bottom-up alternative to a key concept of the Italian city planning vocabulary that is the 'area use zoning' (*destinazione d'uso*). In fact, while zoning is a static concept which can be modified only by obtaining an administrative act, the concept of reuse is dynamic, factual and shared. Reuse is a form of urban commoning, ecologically desirable and generative of new opportunities.

In understanding and overcoming the neoliberal urban planning that has hijacked zoning regulations, the 'static-dynamic' dichotomy

[51] U. Mattei, *Il benicomunismo* n 49 above.

in the determination of urban spaces is a promising instrument. A municipality needs a long period to create its urban plan, so when the moment of execution comes the city – in its social aspects and considering inhabitants' needs – may have radically changed. In this sense, the zoning plan draws a static vision of the city that legal scholars might help to balance with its dynamic reality of urban transformation. Giving voice to inhabitants' interests by temporary uses can fill this gap in timing (from the plan to its actual execution) and information (what are the shared needs of the dwellers). With innovative legal tools coherent with the vision of the commons, municipalities can also balance the interests of city dwellers and private investors. In the discussed neoliberal balance of power only the latter can influence municipalities to modify the zoning plan for an urban variation, while ordinary citizens – as we said – are de facto disempowered. Temporary uses present a characteristic that is typical of the commons since it unites physical aspects (the material regeneration) with social and political profiles (participation and forms of self-government that a community adopts to manage the commons). It is a generative process, because inhabitants travel a shared learning path to manage the commons, with a positive empowerment effect on the whole community.

Through reuse and commoning, cities can adaptively change thanks to the daily practices of their inhabitants.[52] Reuse translates an ecological sensitivity in a time when the majority of the world population lives in urban areas rather than the countryside. Yet, states cannot continue urban sprawl as they have in the past without endangering the very subsistence of human civilization on the planet. European states must pursue the EU goal of net zero land expansion by 2050.[53]

Cities cannot continue to grow in extension like sponges, leaving islands of urban emptiness within their tissue. Municipalities should encourage the spontaneous regeneration of vacant buildings and most importantly recognize commoning occupations because of their generative capacity outside of a formalistic and hypocritical opposition between legality and illegality.

[52] F. La Cecla, n 37 above.

[53] P. Bonora, *Fermiamo il consumo di suolo: il territorio tra speculazione, incuria e degrado* (Bologna: Il Mulino, 2015).

The Flow of Personal Data on the Internet: The Italian and European Google Cases*

Francesco Giacomo Viterbo**

Abstract

The recent judgement of the European Court of Justice of 13 May 2014 (hereinafter: the Judgement) focused on the activity of the Google platform as a provider of indexed content, including personal data; this activity consists of locating information published on the web by third parties, indexing it automatically, storing it temporarily, and finally, making it available to internet users according to a particular order of preference. The Court has stated that these operations must be classified as 'processing' (within the meaning of Directive 95/46), and are activities that can be distinguished from and are additional to the activities carried out by publishers of websites, and have additional effects on the data subject's fundamental rights. This means that, especially in an online environment, the types of data processing, as well as the rules to be applied are becoming more diversified, even when considering the rights that can be exercised by data subjects. The key question to be answered is therefore not *whether*, but *how* data protection principles and rules have to be applied in each specific case.

This can be illustrated by the measures set forth by the Italian *Garante per la protezione dei dati personali* (hereinafter: the *Garante*) in order to bring the processing of personal data carried out under Google's new privacy policy into line with the Italian Data Protection Code. These measures tackle the problem of applying 'criteria for making data processing legitimate' and 'principles relating to data quality' on the internet, and focus on the legal requirements for the data subject's prior consent with respect to a wide array of features offered to its users. It is exactly on this ground that one point of connection between the Data Protection Directive and the e-Privacy Directive will be analysed. The measures seem to emphasise the role of data subjects' consent in the area of marketing and behavioural advertising, where there is

* Case C-131/12 *Google Spain SL, Google Inc.* v *Agencia Española de Protección de Datos (Aepd), M. Costeja González* (European Court of Justice Grand Chamber 13 May 2014); Autorità Garante per la protezione dei dati personali, 10 July 2014 'Decision Setting Forth Measures Google Inc. is Required to Take to Bring the Processing of Personal Data under Google's New Privacy Policy into Line with the Italian Data Protection Code'.

** Associate Professor of Private Law at the University of Salento.

no room for contractual agreements. Nonetheless freedom of contract within the scope of personal data protection does not seem to be ruled out. In this context, personal data are not negotiable goods and cannot be treated in the same way as any other kind of tradable commodity.

I. The Case of Google/Aepd, M. Costeja González on the Processing of Personal Information in the Online Environment: Introductory Remarks

The recent case of *Google/Aepd, M. Costeja González* is a break with the past in that the European Court of Justice (CJEU) has established the legal approach to be followed for the protection of

[1] Case C-131/12 *Google Spain SL, Google Inc.* v *Agencia Española de Protección de Datos (Aepd), M. Costeja González* (European Court of Justice Grand Chamber 13 May 2014), available at www.eur-lex.europa.eu, and in *Computer Law Review International,* 77 (2014). This judgement has been implemented by the Data Protection Authorities represented in the Data Protection Working Party (WP 29) through the publication of the following document: 'Guidelines on the implementation of the Court of Justice of the European Union Judgement on 'Google Spain and Inc. v. Agencia Española de Protección de Datos (Aepd) and Mario Costeja González' C-131/12', adopted on 26 November 2014. In Italy the Judgement has been followed by the 'Decision Setting Forth Measures Google Inc. is Required to Take to Bring the Processing of Personal Data under Google's New Privacy Policy into Line with the Italian Data Protection Code' adopted by Autorità Garante per la Protezione dei Dati Personali 10 July 2014, available at www.garanteprivacy.it (document web no 3295641). The Judgement has raised a 'global' debate on the mentioned legal issues: see M. Schmidt-Kessel, C. Langhanke and I. Gläser, 'Recht auf Vergessen und piercing the corporate veil-zugleich Anmerkungen zur Google-Entscheidung des EuGH, Rs. C-131/12 Google Spain SL und Google Inc.' *Zeitschrift für Gemeinschaftsprivatrecht*, 192-197 (2014); P. De Hert and V. Papakonstantinou, 'How the European Google Decision May Have Nothing to Do with a Right to Be Forgotten', available at https://www.privacyassociation.org/privacy_perspectives/post/how_the_european_google_decision_may_have_nothing_to_do_with_a_right_to_be (last visited 20 October 2015); C. Kuner, 'The Court of Justice of EU's Judgement on the 'Right to be Forgotten': An International Perspective', available at http://www.ejiltalk.org/the-court-of-justice-of-eus-judgment-on-the-right-to-be-forgotten-an-international-perspective/ (last visited 20 October 2015); J.W. Kropf, 'Google Spain SL v. Agencia Española de Protección de Datos (AEPD). Case C-131/12' 108 *The American Journal of International Law*, 502-509 (2014); O. Linskey, 'Control over Personal Data in a Digital Age: *Google Spain* v *AEPD and Mario Costeja Gonzalez*' 78 *Modern Law Review*, 522-534 (2015); in Italy, see G. Resta and V. Zeno Zencovich eds, *Il diritto*

personal data in the online environment.[1] This case typifies the main challenges posed by the flow of personal information on the internet. It may be summarised as follows.

A Spanish citizen, Mr Costeja González, lodged a complaint with the data protection supervisory authority (Aepd) against a company that publishes a daily newspaper with a large circulation and against Google Spain and Google Inc. Mr Costeja González explained that if an internet user entered his name in the search engine of the Google group ('Google Search'), he would obtain links to two pages of that newspaper, published many years earlier, on which an announcement mentioning his name had appeared for a real estate auction connected with attachment proceedings for the recovery of social security debts. He stated in this context that the attachment proceedings concerning him had been fully resolved for a number of years, and that reference to them now was entirely irrelevant. Therefore he requested, first, that the publisher of newspaper be required to remove or alter those pages so that the personal data relating to him no longer appeared, or to use certain tools in order to protect the data. Second, he requested that Google Spain or Google Inc. be required to remove or conceal the personal data relating to him so that these data ceased to be included in the search results.

It is well known that, generally speaking, search engines are services that help their users to find information on the web.[2] However, in the context of the so-called Web 2.0, search engines are only one facet of a much more complex environment that every day creates an infinite number of threats to the fundamental rights of individuals. Indeed the relationships between providers and users have become more and more complex, and need to be better analysed.

First, most content available online is user-generated: this potentially means that all users of the internet may participate in 'writing' the web.[3]

all'oblio su internet dopo la sentenza Google Spain (Roma: Roma TrE-Press, 2015), 1-281.

[2] For a more detailed definition of a 'search engine', see Data Protection Working Party (WP 29), Opinion 1/2008 on data protection issues related to search engines, adopted on 4 April 2008, para 2, available at http://ec.europa.eu/.

[3] M. Viola de Azevedo Cunha, L. Marin and G. Sartor, 'Peer-to-peer Privacy Violation and ISP Liability: Data Protection in the User-generated Web' 2 *International Data Privacy Law*, 50 (2012).

The evolution of web communities and hosted services such as social network services ('SNS') is a relatively recent phenomenon. SNS are information society services (as defined in Art 1 para 2 of Directive 1998/34/EC as amended by Directive 1998/48/EC), which can broadly be defined as online communication platforms that enable individuals to join or create networks of like-minded users. They provide tools that allow users to post their own material, including personal data, for the purpose of generating a description or 'profile' of themselves (user-generated content, such as a photograph or a diary entry, music or video clip or links to other sites), and provide a list of contacts for each user with which the user can interact.[4] In many cases, individuals' profiles can be found by everyone through search engines if they are not protected against this.

The advent of social media has given everyone a number of platforms on which it is possible to create content, as well to find and disclose personal information on a large and permanent scale. Google offers a wide array of features to its users, ranging from a web search engine (Google Search) to email (Gmail); from online mapping (Street View on Google Maps) to the marketing of advertising space (DoubleClick); from a browser (Google Chrome) to social networking (Google +); from online payment services (Google Wallet) to a virtual store for purchasing apps, music, movies, books and magazines (Google Play); from services allowing users to search for, display and post videos (YouTube) to text storage, sharing and revision services (Google Docs and Google Drive); from satellite imaging software (Google Earth) to statistical analysis and monitoring tools to study website visitors (Google Analytics); and so on. Among the other most popular platforms used worldwide we can name Facebook for personal information, Wordpress for blogs, Twitter for short messages, e-Bay for auctions; this list is far from being exhaustive.[5] Information that in the past would not have been

[4] For more details, see Data Protection Working Party (WP 29), Opinion 05/2009 on online social networking, adopted on 12 June 2009, paras 1-2, available at http://ec.europa.eu/. For more details on the issues related to relationships between social networks and users as a field for applying the civil law, see C. Perlingieri, *Profili civilistici dei social networks* (Napoli: Edizioni Scientifiche Italiane, 2014), 11-105.

[5] M. Viola de Azevedo Cunha, L. Marin and G. Sartor, n 3 above, 51.

published in the mass media may now feature on social media, thereby creating 'news' that may then be taken up and more broadly disseminated by the traditional media. Likewise, the activity of search engines and of the other online platforms plays a decisive role in the overall dissemination of such information, in that it renders it accessible to any internet user who makes a search on the basis of the data subject's name, including internet users who would not otherwise have found the news published on a web page or by the traditional media. This has created an interdependent relationship between social media and the mass media; the barriers between them are breaking down.[6]

Furthermore, the digitization of modern communications makes it possible for governments, private corporations and individuals to collect vast amounts of personal data around the globe. Corporations are keen to use the same or similar technologies to gauge consumer habits, with the objective of personalising advertising, and in doing this they manage a huge amount of personal data.

Needless to say, online services are often provided 'free' in exchange for a user's personal data. Meanwhile, the providers of those services do not merely allow or give access to content hosted on the online platform, but take advantage of these activities, in return for payment, by, for example, allowing advertising to carried out by undertakings who wish to use this tool in order to offer their goods or services to the internet users, in such a way that advertising is tailored to each available user-profile. Likewise, SNS generate much of their revenue through advertising, which appears alongside the web pages that are set up and accessed by users. Therefore, the platforms mentioned above such as Google Search are mostly run by commercial companies who usually make a profit by associating advertisements with both the internet users' search terms and the user-generated materials, often by selecting the ads on the basis of

[6] N. Witzleb, D. Lindsay et al, 'An Overview of Emerging Challenges in Privacy Law', in N. Witzleb, D. Lindsay et al eds, *Emerging Challenges in Privacy Law* (Cambridge: Cambridge University Press, 2014), 3. The creation of search engines has carried out a further ground where information and data circulate, which was previously unknown: A. Mantelero, 'Il futuro regolamento EU sui dati personali e la valenza 'politica' del caso Google: ricordare e dimenticare nella digital economy', in G. Resta and V. Zeno Zencovich eds, n 1 above, 135.

the content of such material: users who post large amounts of information about their interests on their profiles offer a refined market to advertisers who wish to serve targeted advertisements based on that information.

Along with this economic interest pursued by Web 2.0 operators behaving as profit-seeking private companies, a paramount importance has to be attached to the function of the internet in society, ie the public interest in sharing and networking knowledge, news and any kind of information available on the World Wide Web. Nowadays, it is generally acknowledged that 'the web has become a forum where everyone can effectively exercise their civil, economical, and political rights' and that 'it is the place where one can develop one's social personality'.[7] Moreover, the recent 'Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to human rights for Internet users', adopted on 16 April 2014 at the one-thousand one-hundred ninety-seventh meeting of the Ministers' Deputies, has declared that the 'Internet has a public service value' and that 'People, communities, public authorities and private entities rely on the Internet for their activities and have a legitimate expectation that its services are accessible, provided without discrimination, affordable, secure, reliable and ongoing'.[8] This certainly justifies the legitimate interest of individuals in having access to the online environment, as the CJEU stated in para 81 of the Judgement. Much more doubtful is whether the fundamental right of freedom of expression, understood as 'the freedom to receive and impart information and ideas', in Art 11 of the European Charter of Fundamental Rights, may also be a legitimate basis for having access to all information published on the web, as well as for processing personal data in any circumstances.[9]

[7] M. Viola de Azevedo Cunha, L. Marin and G. Sartor, n 3 above, 51. On the 'generativity' of the internet, see J. Zittrain, 'The Generative Internet' 119 *Harvard Law Review*, 1974-2040 (2006).

[8] See para 3 of the document, available at https://wcd.coe.int/ViewDoc.jsp?id=2184807 (last visited 20 October 2015).

[9] 'The Court emphasizes the right of individuals to remove their personal data from the results generated by search engines, but barely mentions the right to freedom of expression, and never refers at all to Art 11 of the Charter of Fundamental Rights. It also states (para 81) that the right to data protection generally overrides the interest of the general public in finding information relating to a data subject's

II. The Issue of Personal Data Protection in the Online Environment: Four Problematic Aspects

The issue of personal data protection in the online environment raises a number of problematic aspects regarding the safeguards of fundamental rights of individuals.

First, given that user-generated content often concerns third parties, and content providers (eg search engines) help to make publications on the internet easily accessible to a worldwide audience, the production and distribution of user-generated content on the web may even be socially dangerous – we may consider, for instance, defamation, violations of copyright, participation in criminal activities, offences against the dignity of the weak and so forth. *Inter alia*, the online distribution of user-generated content disclosing third parties' personal information can amount to a violation of data protection rights, as well of the right to respect for private and family life and of other fundamental rights, since it may take place outside the conditions laid down in data protection legislation.[10] A good illustration of this is the Italian case of *Google/ Vivi Down*, which concerned a group of teenagers who recorded themselves insulting and physically assaulting an autistic boy;[11] the video, despite its sensitive content, was uploaded onto the Google-

name, while at the same time stating that the balance between the two must depend on the specific case at issue': C. Kuner, n 1 above.

[10] M. Viola de Azevedo Cunha, L. Marin and G. Sartor, n 3 above, 51-52.

[11] Tribunale di Milano 12 April 2010 no 1972, *Foro italiano*, II, 279 (2010), which sentenced three Google executives to six months' imprisonment for the violation of Art 167(1)(2) of decreto legislativo 30 June 2003 no 196 (Personal Data Protection Code, hereinafter: the Code); however the sentence has been overruled by the judgement of the Corte di Appello di Milano, Sezione Penale, I, 27 February 2013 no 8611, *Foro italiano*, II, 593 (2013), which has in turn been upheld by the Corte di Cassazione 17 December 2013 no 5107, *Giurisprudenza italiana*, 2016 (2014). For particularly detailed analyses, see G. Sartor and M. Viola de Azevedo Cunha, 'The Italian Google-Case: Privacy, Freedom of Speech and Responsibility of Providers for User-Generated Contents' *International Journal of Law and Information Technology*, 15 (2010); R. Mendez, 'Google Case in Italy' *International Data Privacy Law*, 137 (2011); N.C.N. Hampson, 'The Internet is not a Lawless Prairie: Data Protection and Privacy in Italy' *Boston College International and Comparative Law Review*, 477 (2011); G. Cassano, 'Google v. Vividown. Responsabilità 'assolute' e fine di internet?' *Vita notarile*, 2 (2010); and G. Resta, 'Diritti individuali e libertà della rete nel caso Vivi Down' *Giurisprudenza di merito*, 1577 (2013).

Videos platform by a user, with the obvious consequence of shamefully violating the privacy and dignity of that boy.[12]

Second, the personal information posted online by a user, which is frequently done on social networks, can create a rich profile concerning that person's interests and activities. Furthermore, according to para 37 of the Judgement, 'the organisation and aggregation of information published on the internet that are effected by search engines with the aim of facilitating their users' access to that information may, when users carry out their search on the basis of an individual's name, result in them obtaining through the list of results a structured overview of the information relating to that individual that can be found on the internet enabling them to establish a more or less detailed profile of the data subject'. Personal data published on social network sites and then stored and indexed by search engines can be used by third parties for a wide variety of purposes, including unlawful purposes, which may put the fundamental rights of data subjects at great risk because of such problems as identity theft, financial loss, discrimination and other violations of their dignity.[13]

Third, according to the analysis of the CJEU, the effect of the interference with those fundamental rights of the data subject is heightened because of the important role played by the internet and search engines in modern society, which render the information contained in this environment 'ubiquitous'.[14] This makes the exercise of the right to ask for personal information to be deleted or removed from the web, ie the so-called 'right to be forgotten' (or 'right to oblivion') much more difficult.[15]

[12] Google-Videos was an online service provided by Google Inc. It was a platform on which users could upload and share videos at any time at no charge. This service has recently been incorporated into the platform provided by YouTube which has been purchased by Google Inc.

[13] See Data Protection Working Party (WP 29), n 4 above, para 1.

[14] See the para 80 of the Judgement.

[15] For more details, see European Commission, 'Factsheet on the 'Right to be Forgotten' ruling (C-131/12)', 3 June 2014, available at http://ec.europa.eu/justice/newsroom/data-protection/news/140602_en.htm (last visited 20 October 2015). It is possible to note that the case at issue may not even be concerned with the right to be forgotten. As already explained, a 'right to be forgotten' would essentially include a 'right to delete' or 'to have deleted', but this is not what the Judgement does. It did

Fourth, most of the online operators, in their role as service providers, collect and process vast amounts of user data, including IP addresses, detailed reports of past online behaviour and personal data provided by users themselves when signing up to use personalised services.[16]

With this background, it is time to focus on the current debate on the application of Directive 95/46 which, according to Art 1, has the object of protecting the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data, and of removing obstacles to the free flow of such data. But before discussing *whether* data protection legislation may be applied, it is necessary to distinguish between two significant categories of subjects who are involved in the complex environment of the internet.

On the one hand, at least two subsets of subjects operating in the online environment can be identified: service providers and content providers. On the other hand, we can consider the legal position of users and third parties, namely both individuals who need personal data protection (data subjects), and advertisers, ie undertakings who ask for a contract with providers in order to use the web as a platform on which to offer their goods or services.

Although a wide variety of services and content are provided in the online environment, the scope of this paper will cover the activities of search engine providers, as well as those of other intermediary service providers, with the aim of assessing the extent

not ask for the deletion of the information from the original source: P. De Hert and V. Papakonstantinou, n 1 above. Furthermore, the original information will still be accessible using other search terms or by direct access to the publisher's original source: see the Working Party 'Guidelines' adopted on 26 November 2014, n 1 above, 2. In the opinion of many scholars, the right to be forgotten represents the biggest threat to free speech on the Internet in the coming decade. It 'could make Facebook and Google, for example, liable for up to two percent of their global income if they fail to remove photos that people post about themselves and later regret, even if the photos have been widely distributed already': J. Rosen, 'The Right to Be Forgotten' 64 *Stanford Law Review Online*, 88 (2012). In the recent Italian debate, see G. Finocchiaro, 'Il diritto all'oblio nel quadro dei diritti della personalità', in G. Resta and V. Zeno Zencovich eds, n 1 above, 29-42; and S. Rodotà, *Il diritto di avere diritti* (Roma-Bari: Laterza, 2012), 213-221.

[16] See Data Protection Working Party (WP 29), Opinion 1/2008 on data protection issues related to search engines, para 1.

of their obligations under Directive 1995/46, as well as the entitlements of users playing the role of data subjects.[17] The following analysis will not focus on third party advertisers, for whom the application of data protection law does not seem to be disputed.

III. The Issue of *Whether* the Data Protection Directive Applies to Service/Content Providers. Two Key Arguments: the Definition of 'Processing of Personal Data' and the Effectiveness of Protection

Before the Judgement, Opinions 1/2008 and 05/2009 adopted by Data Protection Working Party clarified the cases in which the issues related to the application of Directive 1995/46 seem to be less problematic.

It is interesting to note that a 'key conclusion' of both these Opinions was that the Data Protection Directive generally applies to the processing of personal data by both search engines and SNS providers, even when their headquarters are outside the European Environment Agency (EEA).[18] According to this analysis, the combined effect of Arts 4(1)(a) and 4(1)(c) of the Data Protection Directive is that its provisions apply to the processing of personal data by search engine providers and by SNS providers, in both cases when they are multinationals, and even when they do not have an establishment in the territory of a Member State.[19] In this case it can be sufficient that

[17] Users may be distinguished according to whether they hold an account that has been created following registration for 'authenticated' access to Google's features – these being the so-called 'authenticated users' – or hold an account under which they use those features without having first authenticated themselves – these being the so-called 'non-authenticated users'; there is an additional group of users, ie the so-called 'passive users', whose data may be acquired by the provider although they do not use its features directly: see para 1 of the 'Decision Setting Forth Measures Google Inc. is Required to Take to Bring the Processing of Personal Data under Google's New Privacy Policy into Line with the Italian Data Protection Code' adopted by Autorità Garante per la Protezione dei Dati Personali 10 July 2014, n 1 above.

[18] See point no 1 of para 5 of Opinion 05/2009 on online social networking, and para 4.1.2 of Opinion 1/2008 on data protection issues related to search engines.

[19] Art 4(1)(a) states that a Member State's data protection law should be applied when certain operations of personal data processing by the controller are carried out 'in the context of the activities of an establishment' of that controller on the territory

the provider makes use of equipment, automated or otherwise, in the territory of a Member State (for example, it makes use of a cookie or similar software device) for the purpose of processing personal data, in order that the data protection law of that Member State should apply.

From this perspective the Working Party has confirmed that a provider who processes user data, including IP addresses and/or persistent cookies containing a unique identifier, falls within the scope of the definition of 'controller' under the Directive. This conclusion is related to both search engine providers and SNS providers in their role as service providers when they are collecting and processing vast amounts of data concerning users and even third parties, on their own initiative, and it means that they have corresponding responsibilities towards data subjects.[20] When they are required to do so, they provide all the 'basic' services related to user management (eg the registration and deletion of accounts), and they also determine the use that may be made of user data for advertising and marketing purposes – including advertising provided by third parties. Therefore, in the view of the Working Party, data protection law should generally apply in relation to the processing of user data by service providers.

According to Opinion 1/2008, a different approach would be required for cases in which online service providers fulfil their role as 'content providers' (or 'web hosting providers'). This occurs, for instance, when search engines process information, including personal information, by crawling, analysing and indexing the World Wide Web and other sources of user-generated content that they make searchable and therefore easily accessible through these

of a Member State. Art 4(1)(c) states that a Member State's data protection law still applies where 'the controller [...] for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community'. See also the 'Working document on determining the international application of EU data protection law to personal data processing on the Internet by non-EU based web sites', adopted on 30 May 2002 by the Data Protection Working Party.

[20] See para 3.1 and point no 2 of para 5, of Opinion 05/2009 on online social networking; see para 4.1.2 of Opinion 1/2008 on data protection issues related to search engines.

services.[21] In this regard the Working Party remarks that the Data Protection Directive does not contain a special reference to the processing of personal data by 'information society services that act as selection intermediaries'.[22]

This explains why there is an ongoing debate over whether and to what extent the Personal Data Protection law may apply to the activity of such intermediaries, as well over whether and to what extent they should be liable for illegal user-generated content. However, the debate only comes to a focus on the former question, which seems to be separate from the latter, although the two issues continue to affect each other.

Indeed, according to some scholars, the liability exemptions for service providers provided by Art 14(a)(b) of the e-Commerce Directive (2000/31/EC) with regard to content generated by users should also apply to violations of the Personal Data Protection law.[23] The rationale for such an interpretation would be the principle of neutrality, which is connected with the aforementioned pivotal role played by internet service providers (ISPs) in our information society, if we consider, for instance, that search engines play a crucial role as a first point of contact for accessing information freely on the internet. In this case, the principal controllers of personal data would be the 'information providers', ie the users who have uploaded

[21] See para 4.2 of Opinion 1/2008 on data protection issues related to search engines. See also M. Viola de Azevedo Cunha, L. Marin and G. Sartor, n 3 above, 58.

[22] See para 4.2.2 of Opinion 1/2008 on data protection issues related to search engines.

[23] See both G. Sartor, 'Search Engines as Controllers: Inconvenient Implications of a Questionable Classification. Case C-131/12, Google Spain and Google Inc. v. AEPD et Costeja Gonzalez' 21 *Maastricht Journal of European and Comparative Law*, 564-575 (2014); and M. Viola de Azevedo Cunha, L. Marin and G. Sartor, n 3 above, 66: 'it seems to us that even with regard to third parties' data protection, the current rules limiting the liability of host providers with regard to user-generated content give the most appropriate balance between the interests and the rights involved'. Art 14 of Directive 2000/31, entitled 'Hosting', provides that 'the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information'.

content, including the personal data of third parties, inasmuch as the search engine provider, acting as an intermediary, cannot have practical control over the personal data involved, and the scope of its intervention is limited to the possibility of removing the data from its servers.[24] From this perspective, Directive 95/46 should only apply to users whenever they go beyond a 'purely personal or household activity'.[25] This is illustrated by the landmark *Lindqvist* case of 2003, in which the CJEU stated that the Data Protection Directive applied to the activity of a Swedish catechist who posted on web pages, on her own initiative, information, including sensitive data, about herself and some other parishioner-catechists.[26] In this judgement the Court did not intend the expression 'transfer of data to third countries' to cover the loading, by an individual in the territory of a Member State, of data onto an internet page. Such reasoning of the Court was taken into consideration by Advocate General Jääskinen in the case at issue in order to argue that the internet search engine service provider cannot be generally considered as having the position of data controller.[27] In this view, a national data protection authority could not require an internet search engine service provider to withdraw information from its index except for the cases in which this service provider has not complied with the exclusion codes on a web page or in which a request emanating from the website regarding an update of cache memory has not been complied with.[28]

[24] M. Viola de Azevedo Cunha, L. Marin and G. Sartor, n 3 above, 66.

[25] Directive 95/46 does not apply to the processing of personal data 'by a natural person in the course of a purely personal or household activity', pursuant to Art 3(2). In its Opinion 05/2009 on online social networking, the Working Party has affirmed that when users go beyond a purely personal or household activity they become data controllers. In this case they are subject to data protection obligations, and in particular they have to collect the consent from the data subjects whose information (or images) they are making available on the web.

[26] Case C-101/01 *Gota Hovratt* v *Bodil Lindqvist* (European Court of Justice 6 November 2003) available at www.eur-lex.europa.eu; for a particularly detailed analysis see T.M. Ubertazzi, 'Sul bilanciamento tra libertà di espressione e privacy' *Danno e responsabilità*, 386 (2004).

[27] Case C-131/12 *Google Spain SL, Google Inc.* v *Agencia Española de Protección de Datos (Aepd), M. Costeja González*, Opinion of Mr Advocate General Jääskinen delivered on 25 June 2013, n 1 above, paras 79, 84 and 89.

[28] See ibid paras 93 and 99.

Using a completely different approach towards the issue of ISP liability for illegal user-generated content, it is possible to note that a search engine provider, when operating as an 'intermediary service provider', may become jointly responsible for violations of privacy and of data protection rules committed by users, insofar as it supplies the means through which the violations are committed, by making the information ubiquitous and searchable; furthermore it does that for a profit. Therefore both the service provider and the user could be considered as data controllers, and the Personal Data Protection Directive could apply to them both. However, from a rather different perspective, which became dominant with the leading case of *Vuitton* v *Google* of 2010, such a conclusion would be possible only when the service provider does not limit itself to an intermediary role, so only when it has played an active role of a kind that gives it knowledge of, or control over, the personal data.[29] Indeed, according to what the CJEU says in para 114 of that judgement with regard to the application of the liability exemptions in Art 14 of the e-Commerce Directive, it would be necessary to examine whether the role played by the service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, or active, pointing to a knowledge or control of the data that it stores. In the latter case those exemptions would not be applicable to the service provider, and its liability could be based on a violation of the Data Protection law.

It is interesting to note that all the foregoing approaches entail the application of the Data Protection Directive whenever personal data are processed in an online environment that is enjoyed by European users. This occurs even when it comes to applying the provisions under which the Directive itself limits the scope of its application. Therefore the question debated seems to be not *whether* such Directive rules have to be applied, but rather *how* they should be applied, namely to establish, for example, who is the data controller, what measures should be taken to protect data subjects, and so forth.

Likewise, in the Judgement the CJEU stated that the operation of

[29] Joined Cases C-236/08 and C-238/08 *Google* v *Louis Vuitton* (European Court of Justice Grand Chamber 23 March 2010) available at www.eur-lex.europa.eu: the question faced in this judgement concerns the liability of Google Inc. as a referencing service provider.

loading personal data onto an internet page must be considered to be a 'processing of personal data' within the meaning of Art 2(b) of Directive 95/46. In spite of the opinion delivered by the Advocate General, this is true even when the operation is carried out by a search engine provider that, in exploring the internet automatically, constantly and systematically in search of the information that is published there, 'collects' such data, which it subsequently 'retrieves', 'records' and 'organises' within the framework of its indexing programmes, 'stores' on its servers, and, as the case may be, 'discloses' and 'makes available' to its users in the form of lists of search results.[30] Furthermore, the Court has specified that this activity falls within the scope of the Directive whenever it is orientated towards the inhabitants of a Member State in which the provider has set up a branch or subsidiary through which it intends to promote and sell advertising space.[31]

The Judgement represents a real break with the past inasmuch as the CJEU focuses the rationale of its interpretation of the legal framework concerning the processing of personal data in the web context on the fundamental principles and values set out in the Nice Charter as well the current EU Treaties. Indeed, the Court remarks that the notion of 'establishment', within the meaning of Art 4(1)(a) of Directive 95/46, and of 'processing of personal data', within the meaning of Art 2(b), cannot be interpreted restrictively since such interpretation would be contrary not only to the clear wording of the Directive but also to its objective, which is to ensure, through a broad definition of those concepts, an effective and complete protection of data subjects. In brief, an interpretation which lets providers and users escape the obligations and guarantees laid down by Directive 95/46 would compromise the Directive's 'effectiveness and the effective and complete protection of the fundamental rights and freedoms of natural persons which the Directive seeks to ensure'.[32]

[30] See paras 26-28 of the Judgement. Since 2006 the Italian *Garante* stressed that the indexing activity performed by a search engine service provider falls within the definition of 'processing' under Directive 95/46: see Autorità Garante per la Protezione dei Dati Personali, 18 January 2006, available at www.garanteprivacy.it (document web no 1242501).

[31] Ibid para 60.

[32] Ibid para 58. On the paramount importance of interpreting the law in the light of the fundamental principles and values enshrined by Constitution and the EU

Moreover, this principle has been both enshrined by the recent 'Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to human rights for Internet users', adopted on 16 April 2014 at the one-thousand one-hundred ninety-seventh meeting of the Ministers' Deputies within the Council of Europe, and implemented by the proposal for a 'General Data Protection Regulation' in the context of the ongoing revision of the European Data Protection Directive.[33]

IV. The Question of *How* the Data Protection Principles and Rules Should Be Applied in the Case at Issue and in the Wider Context of Internet Services: Who is the Controller?

In the light of the application of Directive 95/46, it is clear that the following question must be asked: 'Who is the controller, within the meaning of Art 2(d)?' In the foregoing paragraphs we have remarked that an 'intermediary service provider' (ie, for instance, a search engine provider or SNS provider) who processes user data falls within the scope of the definition of 'controller', and that, in cases of user-generated content that entail the publication of personal data on the web, both the 'intermediary service provider' and the user, ie the 'information provider', can play the role of

Treaties, see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 561 and 581.

[33] See recital 20 of the 'Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data (General Data Protection Regulation - GDPR), COM(2012) 11 final.', (Bruxelles, 25 January 2012), and recital 20 of the General Data Protection Regulation (GDPR) adopted as a 'General Approach' by Ministers in the Council on 15 June 2015 available at http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf (last visited 20 October 2015), according to which the Regulation should be applied to 'the processing of personal data of data subjects residing in the Union by a controller not established in the Union' where 'the processing activities are related to the offering of goods or services to such data subjects irrespective of whether connected to a payment or not, which takes place in the Union'.

'controller' unless the user does not go beyond a purely personal or household activity.

It is interesting to note that, before the Judgement, the question debated was 'whether an intermediary should be considered to be the controller itself or a controller jointly with others with regard to a certain processing of personal data'.[34] From this perspective, the service provider should be considered as a simple 'processor' in cases where its activity is neutral, in the sense that its role is merely technical, automatic and passive, and as a 'controller' in cases where it plays an active role of such a kind as to give it knowledge of, or control over, the data stored. This means that the active provider falls within the scope of the definition of 'controller', alone or jointly with the 'information provider' or with other bodies that co-determine the purposes and means of the processing of the personal data in that online environment.

It is true that all concrete means of the intermediary activity and of the data processing must be taken into account in order to answer to the question at issue. Nevertheless, in the Judgement, the CJEU established an important criterion concerning the application of the Directive when it pointed out that 'the processing of personal data carried out in the context of the activity of a search engine *can be distinguished from* and *is additional to* that carried out by publishers of websites, consisting in loading those data on an internet page [...]. Inasmuch as the activity of a search engine is therefore liable to affect significantly, *and additionally compared with that of the publishers of websites*, the fundamental rights to privacy and to the protection of personal data, the operator of the search engine as the person determining the purposes and means of that activity must ensure, within the framework of its responsibilities, powers and capabilities, that the activity meets the requirements of Directive 95/46'[35] (italics ours). In brief, it comes to differentiating the processing of personal data carried out by the publisher of a web site, ie the 'information provider', from that carried out by the 'intermediary service provider', because these can have different legal grounds, different

[34] See para 4.2.2 of Opinion 1/2008 on data protection issues related to search engines.

[35] See paras 35 and 38 of the Judgement.

purposes and different consequences for the fundamental rights of data subjects. This is a further break with the past.[36]

The case at issue is illustrative here. Indeed, according to the Court's remarks, 'the processing by the publisher of a web page consisting in the publication of information relating to an individual may, in some circumstances, be carried out 'solely for journalistic purposes' and thus benefit, by virtue of Art 9 of Directive 95/46, from derogations from the requirements laid down by the Directive, whereas that does not appear to be so in the case of the processing carried out by the operator of a search engine'; furthermore 'it must be stated that not only does the ground, under Article 7 of Directive 95/46, justifying the publication of a piece of personal data on a website not necessarily coincide with that which is applicable to the activity of search engines, but also, even where that is the case, *the outcome of the weighing of the interests* at issue *to be carried out under Article 7(f) and subparagraph (a) of the first paragraph of Article 14 of the Directive may differ* according to whether the processing carried out by the operator of a search engine or that carried out by the publisher of the web page is at issue, given that, first, *the legitimate interests justifying the processing may be different* and, second, *the consequences of the processing for the data subject, and in particular for his private life, are not necessarily the same*'[37] (italics ours). This approach is very significant for an effective protection of data subjects' rights, insofar as the operator of a search engine can be obliged to remove, from the list of the results displayed following a search made on the basis of a person's name, links to web pages published by third parties and containing information relating to that person, even in a case in which that publication on the web is, in itself, lawful.[38]

Therefore, especially in the online environment, we have to distinguish between the various types of data processing, reserving to each of them a different treatment even in relation to the rights that

[36] See 'Guidelines on the implementation of the Court of Justice of the European Union Judgement on 'Google Spain and Inc. v. Agencia Española de Protección de Datos (Aepd) and Mario Costeja González' C-131/12' adopted by Working Party, Part I para A, n 1 above.

[37] See paras 85-86 of the Judgement.

[38] Ibid para 88.

can be exercised by data subjects. In other words, the types of data processing are becoming more diversified, as are the rules to be applied.

V. Focusing on the Application of Directive 95/46 to the 'Intermediary Service Provider': The Legal Grounds for a Lawful Processing of Personal Data

Given the foregoing, the application of Directive 95/46 to the processing of personal data carried out by an 'intermediary service provider' can give rise to further questions for analysis.

As the Court underlines in paras 71-74, all processing of personal data must meet a twofold legal test, which means that it must comply, first, with the principles relating to data quality set out in Art 6 of the Directive and, secondly, with one of the criteria for making data processing legitimate, listed in Art 7 of the Directive.

In detail, the controller has the task of ensuring that personal data are processed 'fairly and lawfully', that they are 'collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes', that they are 'adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed', that they are 'accurate and, where necessary, kept up to date' and, finally, that they are 'kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed'. In this context, the controller must take every reasonable step to ensure that data that do not meet those requirements are erased or rectified. It is clear that some of the listed obligations cannot be required to be fulfilled if they are interpreted as meaning that service providers would be responsible (or jointly responsible) for the lawfulness of data processing carried out by third parties such as users, publishers of web pages and advertisers. The provider cannot be made responsible (or jointly responsible) since it cannot reasonably control all user-generated content.[39] This could

[39] In the view of Advocate General Jääskinen, 'the internet search engine service provider cannot in law or in fact fulfil the obligations of controller provided in Arts 6, 7 and 8 of the Directive in relation to the personal data on source web pages

interfere with its role as intermediary in the information society without there being reasonable grounds. By contrast, the provider should ensure the compliance with the law of all data processing attached to its own role as intermediary. Therefore the Judgement is right to explain that the conditions required for the lawful processing of personal data that is carried out by a (search engine) provider must be assessed separately from the processing of such data by others.

More doubtful is the statement that a request for the removal or rectification of information must be addressed to the provider or the publisher of the website, depending on the role played by each one of them as data controller. From this point of view a criticism of the judgement at issue seems reasonable, inasmuch as such requests concerning data subjects' rights should be brought directly before the supervisory authority or the judicial authority, so that it can carry out the necessary checks and order the controller to take specific measures accordingly.[40] Otherwise there would be a risk that those who want to prevent the distribution of information about themselves would threaten to sue providers for privacy violations, and in so doing that they could induce the providers to censor the relevant content, even when it is lawful.[41] Moreover, providers do not have the professional ability to decide a huge number of issues involving the fundamental rights and freedoms of a huge number of data subjects.

On the other hand, the right to the protection of personal data is not an absolute right,[42] inasmuch as the processing of personal data

hosted on third-party servers'. See also M. Viola de Azevedo Cunha, L. Marin and G. Sartor, n 3 above, 66.

[40] For more details on such a critical observation, see S. Sica and V. D'Antonio, 'La procedura di de-indicizzazione', in G. Resta and V. Zeno Zencovich eds, n 1 above, 159-161; a different opinion is stressed by F. Pizzetti, 'Le Autorità garanti per la protezione dei dati personali e la sentenza della Corte di giustizia sul caso Google Spain: è tempo di far cadere il 'Velo di Maya' ', in G. Resta and V. Zeno Zenchovic eds, n 1 above, 271-272.

[41] M. Viola de Azevedo Cunha, L. Marin and G. Sartor, n 3 above, 66.

[42] See recital 3a of the proposed GDPR. On this point, cf Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert* v *Land Hessen* (European Court of Justice Grand Chamber 9 November 2010), available at www.curia.europa.eu, para 48. On the assumption mentioned, see also N. Witzleb, D. Lindsay et al, 'An Overview of Emerging Challenges in Privacy Law', n 6 above, 1.

can be legitimate pursuant to Art 7 of Directive 95/46, even where the data subject has not given his or her consent and even if the data subject has asked for the processing to cease.

As regards the provider when hosting user-generated content that includes personal data, the legal ground for making the processing of the data legitimate is covered by subpara (f) of that Article, which permits the processing of personal data where it is necessary for the purposes of legitimate interests that are being pursued by the controller or by third parties, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject. In such cases, the application of data protection law necessitates a balancing of the opposing rights and interests involved, in the context of which account must be taken of the significance of the data subject's rights that arise from Arts 7 and 8 of the Nice Charter. For instance, the removal of information and links from the list of results generated by search engines in an online environment can be essential for protecting the privacy or dignity of a person, but could have effects upon the legitimate interests of internet users who may be interested in having access to that information. That balance may, however, depend in specific cases on the nature of the information in question and its sensitivity for the data subject's private life, and on the interest of the public in having that information, an interest that may vary, in particular, according to the role played by the data subject in public life.[43]

Moreover, as regards the provider when processing users' data, the legal ground required by Art 7 may be found in its subpara (b), which permits the processing of personal data if this is necessary for the performance of a contract to which the data subject is party. In such cases, the Directive prevents the controller from carrying out any data processing for further and different purposes, unless it has collected a specific data subject's consent, as required to give a legal

[43] See para 81 of the Judgement. For more details on the criteria to be taken into account for both making the balancing test and identifying the correct rule to be applied in a particular case, see 'Guidelines on the implementation of the Court of Justice of the European Union Judgement on 'Google Spain and Inc. v. Agencia Española de Protección de Datos (Aepd) and Mario Costeja González' C-131/12' adopted by Working Party, n 1 above, 'Part II: List of common criteria for the handling of complaints by European data protection authorities'.

ground for any further data processing, or alternatively can find another legal ground as provided for by Art 7.

VI. Users' Consent as a Legal Ground for Data Processing for the Purpose of Profiling Users: The Decision Adopted by the *Garante* against Google on 10 July 2014 Enhancing Users' Data Protection

In the light of the foregoing, during recent months the European data protection authorities have focused their attention on the activity of Google Inc. (hereinafter, Google) in EU Member States.

Having concluded an administrative proceeding in order to check the lawfulness and fairness of the processing operations performed by Google under its privacy policy, the Italian *Garante* adopted an important decision on 10 July 2014, setting out a number of measures that must be implemented by that company no later than the beginning of 2016.[44]

It is interesting to remark that in the course of this proceeding, the *Garante* found that Google had failed to request users' consent for the purpose of profiling them and in order to display customised behavioural ads and to analyse and monitor their navigation, and had failed to provide data subjects with information concerning the clarification of the particular purposes and the mechanisms relied upon in processing personal data. This means that Google will be violating Arts 7, 13, 23, 24 and 122 of the Italian Personal Data Protection Code (hereinafter: the Code) unless it implements the measures requested by the *Garante*. The decision at issue is consistent with the Judgement in one aspect, whilst the protection of data subjects seems to be stronger in another.

Indeed the above-mentioned approach set out by the Court of Justice towards the activity of a service provider, in the light of data

[44] See n 1 above. More precisely, the *Garante* has established that the measures set forth under its decision must be implemented no later than 18 months from the date of the decision itself. Furthermore, more recently, the *Garante* has adopted general guidelines on the processing of personal data for the online profiling of users: Autorità Garante per la Protezione dei Dati Personali 19 March 2015, available at www.garanteprivacy.it (document web no 3881513).

protection law, has been followed by the *Garante* when differentiating between the following three types of data processing whose purpose is to profile users: a) processing of personal data relating to authenticated users in connection with the emailing service called Gmail; b) matching the personal data collected in connection with the provision and use of several of the features made available to users; and c) using cookies and other identifiers as necessary to trace back specific actions or recurring behavioural patterns in the use of the available features to identified or identifiable entities. The *Garante* has analysed each of these types of data processing in order to assess their compliance with the law on a case-by-case basis, having regard to the individual features offered by the provider. This is an approach that can be used by other data protection authorities.

In its analysis, the *Garante* has emphasised the failure to request users' consent in all of the aforesaid cases of data processing carried out by Google.[45]

It is illustrative to look at the cases under a) and c) above regarding the emailing service and the use of cookies, in which Google performs processing of the personal data of authenticated users for multiple purposes. According to the *Garante*'s decision, some of these purposes (eg filtering spam; detecting viruses; enabling users to perform text searches) are purely technical in nature and are related directly to the provision of the service, so that the data processing 'falls under the scope of the derogation from consent obligations because it is performed to fulfill obligations arising out of the contract for the provision of emailing services'; as regards purposes that go beyond those mentioned, in particular in order to display, to authenticated users, customised ads based on behavioural advertising technology, 'it is conversely necessary for Google to obtain its users' prior informed consent'.

In fact, given that behavioural advertising is based on the use of identifiers that enable the creation of very detailed user profiles, providers are bound by Art 5(3) of Directive 2002/58/EC (ie the e-

[45] On this issue, see also the 'Simplified Arrangements to Provide Information and Obtain Consent Regarding Cookies' set out by the *Garante*: Autorità Garante per la Protezione dei Dati Personali 8 May 2014, available at www.garanteprivacy.it (document web no 3167654).

Privacy Directive, in its revised version), pursuant to which placing cookies or similar devices on users' terminal equipment or obtaining information through such devices is only allowed with the informed consent of the users.[46] In particular, the current wording of this Article is based on a distinction between at least two different scenarios. In the first of these, the storing of information is only allowed, 'on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive 95/46, inter alia about the purposes of the processing'. The second scenario is where the storing of information is considered as legitimate. This is the case where it only takes place for the transmission of an electronic communication or where it is necessary to provide a service requested by the user.[47]

The processing of personal data for technical purposes that are directly connected with the provision of the service requested by the data subject/user should therefore be legitimate on the ground provided for by Arts 7(b) of Directive 95/46 and 24(1)(b) of the Code, inasmuch as, in such cases, the processing is necessary for the performance of contractual obligations. Instead of this, the processing of personal data consisting in profiling authenticated users for further purposes, such as serving targeted advertising, should be based on the legitimate ground provided for by Arts 7(a) of Directive 95/46 and 23 of the Code, which means that, in such cases, Google would have to obtain the prior informed consent of authenticated users.

Such differentiation may be consistent with the ordinary context of market trading, in which both the request to collect and process personal data for purposes that go beyond the performance of contractual obligations, and the informed consent given by the data subject, give rise to a sort of negotiation that is additional to and

[46] See Data Protection Working Party (WP 29), Opinion 2/2010 on online behavioural advertising, adopted on 22 June 2010, 3. Art 5(3) of Directive 2002/58 has been amended by Art 2 of Directive 2009/136/EC of 25 November 2009. For more details on consent, see E. Kosta, *Consent in European Data Protection Law* (Leiden: Brill-Nijoff, 2013), 261-381.

[47] For more details on this provision, see P. Hustinx, 'Do not Track or Right on Track. The Privacy Implications of Online Behavioural Advertising', 7 July 2011,

outside of the scope of the contract. For precisely this reason, the data subject's consent may be freely given, as required by law.

By contrast, in the online environment, the above services and features are very frequently offered free to end-users. It follows that, in such cases, the request to collect and process personal data, for the purpose of displaying customised ads based on behavioural advertising technology to users, could be encompassed within the core business of the contract and accepted by the user as a compensation for the provision of the service that is offered free.

In this connection, it should be pointed out that if one accepts the offer of a free-of-charge service and the consideration consists in a given data processing operation, it would be unfair to require the data subject to give his or her consent to the processing – pursuant to Art 23 of the Code – inasmuch as such consent would not be freely given as required by the law.[48] In fact, the data subject's consent would be linked to the need to have access to a number of services such as emailing, social networking and online payment, which are more and more essential in our lives. In such cases, the only consent to be required would have to concern the conclusion of a contractual agreement; therefore, the processing of users' data for the purpose of profiling them through behavioural advertising technology should be grounded in Arts 7(b) of Directive 95/46 and 24(1)(b) of the Code, rather than in Arts 7(a) of Directive 95/46 and 23 of the Code.

It is interesting to remark that in its earlier decision of 12 October 2004, the *Garante* established, with regard to the offer of free-of-charge online services, that the 'consideration' could consist in 'lawful, fair as well as proportionate user profiling', providing that no additional consent was requested to process user data – as such consent would not have been freely given.[49]

In the afore-mentioned decision of 10 July 2014, the *Garante* looks beyond this problem and enhances the consumers' right to data

available at https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/EDPS/Publications/Speeches/2011/11-07-07_Speech_Edinburgh_EN.pdf (last visited 20 October 2015).

[48] F.G. Viterbo, *Protezione dei dati personali e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2008), 233.

[49] Autorità Garante per la Protezione dei Dati Personali, 12 October 2004, available at www.garanteprivacy.it (document web no 1108836). For further remarks see F.G. Viterbo, n 48 above, 230-233.

protection. As regards the activities performed in order to provide emailing services, it has been established that the processing of the data subject's information for purposes that are not directly and closely related to the provision of those specific services requires the data subject's prior informed consent, in particular when the purpose pursued by the service provider is to display, to its users, customised ads based on behavioural advertising technology. So, as pointed out by the *Garante* in the para 1 of its decision, since the company's business model is grounded first and foremost in its advertising revenues, the above services and features are offered free to end-users in the vast majority of cases. Nonetheless, it is necessary for the service provider to obtain its users' consent. Moreover, the *Garante* is even more explicit in the new '*vademecum*' called 'Up with Tips. Down with Spam. Privacy-Proof Marketing from Your Telephone to the Supermarket', which explains to consumers their rights and how to exercise them in order to prevent a company from violating their privacy.[50] In particular, the '*vademecum*' explains that the provision of a commodity or service cannot be bound to the consumer's consent to the processing of personal data for the purpose of sending ads. In such cases, both the editor of a website that does not permit consumers to enjoy a service and the operator of a supermarket that refuses to issue a loyalty card behave unfairly. In brief, the data subject cannot be compelled to give consent to the processing for marketing purposes.[51] The *Garante* has so ensured that consent should be given specifically and freely.

In other words, pursuant to the measures set out by the *Garante*, the processing of personal data for marketing and similar purposes must be outside the scope of freedom of contract, which means outside the contractual agreements between service providers and users, irrespective of whether the service is offered free-of-charge or for a fee. Namely, in such cases, the 'consideration' *could not* consist in 'lawful, fair as well as proportionate user profiling'. It follows that the information given to data subjects does not have to specify whether the provision of the requested personal data is obligatory or voluntary. This means that Google cannot establish that the consent

[50] Autorità Garante per la Protezione dei Dati Personali, 20 April 2015, available at www.garanteprivacy.it (document web no 3867816).

[51] See ibid 11.

to the use of cookies for the purposes of profiling the user and serving targeted advertising is an obligatory condition that must be met in order for the service to be provided without charge, meaning that if cookies are disabled, the service will not work.

This statement set out by the *Garante* seems to cover even the interpretation of Arts 5(3) of the e-Privacy Directive and 122 of the Code.[52] It follows that the user cannot be informed of the obligatory nature of allowing the cookie to be used for the purpose of profiling him/her, because the storing of information in the terminal equipment of the user is only allowed with his/her informed consent. This is not the case where the cookies are technically necessary in order for the service to be provided.

It is interesting to note that the storing of information or the accessing of information stored in the terminal equipment of the user is an operation which must be distinguished from the subsequent recording and elaboration of the collected personal data, even if both operations are aimed at the purpose of profiling the user. The former operation requires the user's consent under Arts 5(3) of the e-Privacy Directive and 122 of the Code; the latter (processing) operation requires the user's consent under Directive 95/46 and Art 23 of the Code. In both cases, the user must be provided with clear and comprehensive information in accordance with the Data Protection Directive before giving his or her consent. However, it can be argued that the consent required by the e-privacy Directive should be considered autonomously from the consent provided for by the data protection law. This approach can be supported by noting that, according to recital 24 of the 2002 version of the e-Privacy Directive and recital 65 of the revised version, the rationale of Art 5(3) is that the storing of information and the accessing of information stored in

[52] In order to support the above perspective, we have to emphasise para 3.II of the 'Working Document: Privacy on the Internet – An Integrated EU Approach to On-line Data Protection' adopted by the Data Protection Working Party on 21 November 2000, according to which the providers of free internet services would not fall outside the scope of application of the e-Privacy Directive since it has been made clear, in the jurisprudence of the European Court of Justice, that to make the e-Privacy Directive applicable 'the remuneration does not necessarily have to be paid by the recipient of the service; it can for instance also be paid by advertisers'; see Case C-109/92 *Wirth* v *Landeshauptstadt Hannover* (European Court of Justice Fifth Chamber 7 December 1993) available at www.eur-lex.europa.eu.

the user's terminal are considered to be an intrusion into the private sphere of the user, irrespective of whether the information is or is not personal data.[53] Moreover, as regards such a 'particular' regulation of consent, recital 66 refers to 'the methods of providing information and offering the right to refuse' which 'should be as user-friendly as possible'.

In this scenario, in which the user is informed of the voluntary nature of consenting to the use of the cookies for the purpose of profiling him/her, Google could obtain a unique prior consent to both operations. Such consent must be given in accordance with both the Data Protection Directive and the e-Privacy Directive so that it is given specifically and freely.

According to Opinion 2/2010 and Working Document 02/2013 adopted by the Data Protection Working Party, in order for browsers or any other applications to be able to 'deliver' a valid consent, by default, they should reject third-party cookies and require the data subject to engage in an affirmative action to accept both the setting of cookies and the continued transmission of information contained in cookies by specific web sites.[54] If browsers, by default, are configured to reject cookies, in each and every case, the user should be allowed to give his/her prior informed consent to the processing of personal data related to the use of cookies, in compliance with the opt-in rule.[55]

It is clear that, in certain cases, the obligation to request the data subject's consent is not a tool that can ensure the effective protection of individuals with respect to the processing of information related to them. An adequate protection of data subjects' rights may be ensured by virtue of all other principles and

[53] The rationale for Art 5(3) of Directive 2002/58 mentioned above has been underlined by P. Hustinx, n 47 above, 3.

[54] See para 4.1.1 of the 'Opinion 2/2010 on online behavioural advertising', n 46 above and para 3 of the 'Working Document 02/2013 providing guidance on obtaining consent for cookie – Adopted on 2 October 2013'. According to P. Hustinx, n 47 above, 5, since most current browsers accept cookies by default and most current users lack the skills to change browser settings, this scenario is too often not realistic at the moment. However, this could of course change in the future.

[55] A. Mantelero, 'Si rafforza la tutela dei dati personali: data breach notification e limiti alla profilazione mediante i cookies' *Diritto dell'Informazione e dell'Informatica*, 781-804 (2012).

rules binding the controller in light of the data protection law, ranging from the obligation to give clearly worded and easily accessible information to data subjects, pursuant to Art 13 of the Code, to discretion in selecting the methods for the processing of personal data under Art 4(1)(f) of the Code, ie the standards and measures ensuring that the processing of users' data for profiling purposes is compliant with the law.[56]

As regards the information to be given by the provider, the *Garante* has pointed to the adoption of a multi-layered approach to the information notice, in which a first layer requires that the notice should accommodate all the information of general import that is most relevant to users, and the second layer requires the notice to contain information that may be reserved for policies relating to the individual features, or for providing examples that clarify how personal data are processed.

As regards the methods for the processing of personal data, it is interesting to note that, in cases involving a high level of complexity for controllers and serious threats for data subjects, freedom of enterprise and discretion in selecting the measures that ensure the compliance of the data processing with the law are usually much more limited, inasmuch as they must meet the measures set forth by the *Garante*. Indeed, it is exactly from this viewpoint that Google must ensure that it is possible for users to exercise their rights fully, eg by refusing consent and/or changing their mind at any time, and in a user-friendly manner; for this purpose 'there must be a phase or moment, during the user's navigation experience, when he or she should be enabled to make a choice out of several options', according to what has been stated by the *Garante* in its decision.

[56] In this regard, see paras 2 and 4 of the decision which is discussed here (Autorità Garante per la Protezione dei Dati Personali, 10 July 2014). Furthermore, the Italian case law has established that, even in cases in which no consent is required for the processing of personal data (eg if the processing is necessary for the performance of obligations resulting from a contract), the other obligations under the data protection law should still be met, beginning with the information required to be given to the data subject pursuant to Art 13 of the Code: see Tribunale di Torino 21 October 2009, *Data bank online De Jure*.

VII. The Question of whether Personal Data May Be a Kind of (Online) Tradable Commodity. The Extent of Freedom of Contract within the Scope of Personal Data Protection

The question of *how* to apply data protection principles and rules includes the issue of the compatibility of the rules governing a data subject's consent and the processing of personal data with the rules governing negotiations and contracts; in particular, it must be clarified whether personal data can be negotiable goods.

It would seem that such problems could be solved on a case-by-case basis by considering the interest that the data subject intends to protect. This means that if personal data is considered to be similar to a commodity or to goods that may be destined to be appropriated or commercially exploited, then the protection and circulation regime proper to such goods would be applicable, being loanable from copyright law and contract law. Furthermore, in European law there are now regulations that expressly protect data as 'digital content', and give special treatment to the commercial use of data in sales law.[57] When, on the other hand, the protection of fundamental rights is at stake, the data protection law should apply, insofar as the forms of protection it establishes would be exclusively tailored to interests relating to the person and to personal rights.[58]

A similar approach, based on the hybrid nature of personal data protection, with rationales oriented towards both economic rights and human rights, has been argued by considering the choice that the European legislator would have made, in the European Charter on Fundamental Rights, to separate the provision setting out the right to

[57] See Directive 2011/83/EU in relation to the rights of the consumer, which expressly protects 'digital content' according to its definition as 'data which are produced and supplied in digital form' (see Art 2, n 11). See also Arts 2(j) and 5(b) of the Draft Common European Sales Law (CESL): COM (2011) 635 final, backed by the European Parliament on 26 February 2014, in which digital data are treated as tradable goods in the same manner as other goods.

[58] This problem is discussed by C. Kuner, F.H. Cate et al, 'Privacy – an Elusive Concept' 3 *International Data Privacy Law*, 141 (2011): 'one of the most important things protected by privacy law is personal data, which has become a valuable commercial commodity. And it is here that we observe the tension between the dual nature of privacy as a human right and a subject of commercial interest'.

respect for private and family life pursuant to Art 7 from the right to protection of personal data pursuant to Art 8: namely that these provisions have evolved into two highly distinct concepts because of which personal data have nothing to do with fundamental freedoms but have to be protected only for their market value.[59] Indeed, Art 1(2) of Directive 95/46 prohibits any restriction on the free flow of personal data between Member States. Furthermore, the basic assumption that underlies this utilitarian approach towards personal data protection is given by an empirical observation of present day practice in the marketplace and social life, especially in the online world. It has been pointed out that on the internet individuals often make deals for the disclosure, collection, use and reuse of their personal data, in certain situations receive some form of compensation, and thus 'exploit' and 'sell' their habits, customer/user-profile and even sensitive personal data.

Nevertheless such an interpretation seems to be unsatisfactory because the concept of personal data protection is ill-suited to a definition in terms of exchange for a value as well of ownership.[60] In

[59] On this point, see C. Prins, 'Property and Privacy: European Perspectives and the Commodification of our Identity', in L. Guibault and P.B. Hugenholtz eds, *The Future of the Public Domain* (Netherlands: Kluwer Law International, 2006), 244.

[60] This approach has particularly been proposed by scholars in the United States: R.A. Posner, 'The Right of Privacy' 12 *Georgia Law Review*, 393 (1978); J. Litman, 'Information Privacy/Information Property' 52 *Stanford Law Review*, 1283 (2000); A. Bartow, 'Our Data, Ourselves: Privacy, Propertization, and Gender' 34 *University of San Francisco Law Review*, 633 (2000); L. Lessig, 'Privacy as Property' 69 *Social Research*, 247 (2002); P.M. Schwartz, 'Property, Privacy and Personal Data' 7 *Harvard Law Review*, 2056 (2004); in Italy see V. Zeno Zencovich, 'Profili negoziali degli attributi della personalità' *Diritto dell'informazione e dell'informatica*, 547 (1993). In the European debate, see Y. Poullet, 'Data Protection between Property and Liberties. A Civil Law Approach', in H.W.K. Kaspersen and A. Oskamp eds, *Amongst Friends in Computers and Law. A Collection of Essays in Remembrance of Guy Vandenberghe* (The Hague: Kluwer Law International, 1990), 160; L.A. Bygrave, *Data Protection Law. Approaching its Rationale, Logic and Limits* (The Hague: Kluwer Law International, 2002), 120; N. Purtova, *Property Rights in Personal Data: a European Perspective* (The Hague: Kluwer Law International, 2011), 1; T. Hoeren, 'Dateneigentum – Versuch einer Anwendung von § STGB § 303a StGB im Zivilrecht' *Multimedia und Recht*, 486 (2013); G. Spindler, 'Datenschutz – und Persönlichkeitsrechte im Internet – der Rahmen für Forschungsaufgaben und Reformbedarf' *Gewerblicher Rechtsschutz und Urheberrecht*, 996 (2013).

truth, it is very difficult to find a general notion concerning the right to property in the most important civil codes enacted in the European Member States within the last century. However, a recent attempt to formulate such a notion may be found in the experience of the 'codification' of the principles and general rules of the main private law areas in the EU context which have given rise to the DCFR, under Art VIII-1:202: '«Ownership» is the most comprehensive right a person, the owner, can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property'.[61] Within the meaning of this definition and of the subsequent definition of 'co-ownership' under Art VIII-1:203, we can argue that personal data cannot be vested with rights in property.[62] On the other hand, the commercial exploitation of personal data cannot be detached from those aspects concerning the vulnerability and the human personality of the data subject, so that it is not possible for these two facets to be considered and regulated separately. In other words, the problem is that the disciplines to be applied to these different aspects can interfere with each other: eg the creation and selling on the market of a big databank, obtained through the profiling of a large number of citizens and even processing their sensitive data, may appear lawful from the sole perspectives of copyright law and contract law, but such an operation can lead to the infringement of data protection rules having a mandatory character, which can make the contract – or some of its terms – void and unenforceable.[63]

[61] DCFR stands for 'Draft Common Frame of Reference'. It contains 'Principles, Definitions and Model Rules of European Private Law' and its Articles and Comments were prepared by the Study Group on a European Civil Code and the European Research Group on Existing EC Private Law (the 'Acquis Group'): C. von Bar et al, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* (Munich: Sellier European Law Publishers, 2009), 422.

[62] In Book VIII of the DCFR, 'co-ownership' means 'two or more co-owners own undivided shares in the whole goods and each co-owner can dispose of that co-owner's share by acting alone, unless otherwise provided by the parties'.

[63] F.G. Viterbo, n 48 above, 235-242. For more details on the contractual nature of agreements between (social network) service providers and users, see F. Astone, 'Il rapporto tra gestore e singolo utente: questioni generali' *Annali italiani del diritto*

Even if some believe that it is possible to sell personal data, this opinion leads to a false perspective. Personal data are not simply pieces of information. They are pieces of information about a particular, identified or identifiable natural person and can be capable of revealing some of the most intimate and delicate aspects of that individual's personality, such as his/her state of health or sex life, for example. Their significance is not linked to the economic and quantitative criterion of marketability but, rather, to a rationale based on the protection of human rights and values.[64] This argument may be inferred from the law that is expressly devoted to guaranteeing the protection of personal data, irrespective of whether it is possible to attach an economic value to them: indeed, in the personal data protection laws there is no provision for a specific contract that would allow the transfer or assignment of personal data by the data subject or the data controller to another data controller. It is precisely in this respect that personal data seem to differ from all other goods in the Italian and EU legal order. On the one hand, they pose as elements creating the data subject's personal identity. On the other hand, personal data possess a capacity to be an important resource that may be the object, not of appropriation but, rather, of *access*; neither for enjoyment nor for consumption but, rather, for *processing* – by third parties for specific and worthy purposes.[65] Therefore personal data may be deemed to be intangible goods that are *not transferable*, within the meaning given to this term by the most important civil codes enacted in the EU context. The only transferable goods can be the benefits and (pecuniary) utilities that the data controller receives *through* and *after* the processing of personal data that is carried out in full compliance with personal data protection law. From this perspective, when referring to personal data, the concept of processing not only embraces all those

d'autore, della cultura e dello spettacolo, 107 (2011); and C. Perlingieri, 'Gli accordi tra i siti di *social networks* e gli utenti' *Rassegna di Diritto civile*, 120 (2015), who stresses that these contracts are not considered to be free, but are commutative and involve the issue of the 'marketability' of the attributes of the human person. For an analysis of the checks that can be carried out on contracts in the light of the fundamental principles and values of the legal system, see P. Perlingieri, 'Il principio di legalità nel diritto civile' *Rassegna di diritto civile*, 187 (2010).

[64] F.G. Viterbo, n 48 above, 149-152.

[65] Ibid 153-155.

operations that result in the movement of the data but also implies that a special set of rules is applied to all matters regarding personal data. This regime is wholly autonomous, and is different from the rules of the *ius commune* concerning the transfer of ownership and intellectual property.[66]

Therefore, by way of consideration for the supply of a free online service, the user is not able to sell his/her personal data, but can allow personal data to be processed by the provider for specified and lawful purposes and in compliance with data protection law. In other words, at the time of entering into the contractual agreements, the data subject cannot waive the protection of his/her personal data and the consequent rights that are conferred for this purpose, such as the rights to be informed that processing is taking place, to be aware of each specific purpose for which personal data are processed, to consult the data, to request corrections and even to object to processing in certain circumstances, and so forth.

A different conclusion would lead to the infringement of the data subject's fundamental rights. Given the high level of protection for human dignity, personality and fundamental rights guaranteed by both the Charter of Fundamental Rights of the EU and the ECHR, and given the fundamental principles and rules provided in the Italian Constitution and the constitutions of the other EU Member States, individuals are not able to waive the protection of their fundamental rights by means of a contract.[67]

[66] Ibid 156-158.

[67] See M. Hartlev, 'The Concept of Privacy: An Analysis of the EU Directive on the Protection of Personal Data', in D. Beyleveld, D. Townend et al eds, *The Data Protection Directive and Medical Research Across Europe* (Aldershot: Ashgate, 2004), 29, who remarks that Art 6 of the Directive, together with Arts 10-12 and Art 17, emphasise the importance attached to the individual's right to an inviolate personality so that 'it is not possible to derogate from these provisions, even with the consent of the data subject'; L. Bergkamp, *European Community Law for the New Economy* (Antwerp: Intersentia, 2003), 123, who argues: 'even if an individual wants to give up some or all of his privacy rights (eg to obtain a lower price for a product or service), EU law will not let him do so. The EU privacy rights cannot be waived in any matter'. For a wider perspective, see J. Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' 113 *The Yale Law Journal*, 1153-1190 (2004); P. Perlingieri, 'L'incidenza dell'interesse pubblico sulla negoziazione privata' *Rassegna di Diritto civile*, 933 (1986), and Id, *Il diritto dei contratti fra persona e mercato* (Napoli: Edizioni Scientifiche Italiane, 2003), 60.

The fundamental rights of the persons to whom data refer (ie the right to respect for private and family life and the rights to the protection of dignity and personal identity, above all) constitute the axiological parameter for selecting and evaluating the arrangements for processing information. This parameter is integrated with the 'purpose specification principle', which gives relevance to the transparency of the purpose of the processing, as well with the 'data minimisation principle' and the other criteria for the lawfulness and fairness of the processing, as specified in Art 6(1) of the Directive.[68] All these criteria, parameters and principles express the idea of and demand for proportionality.[69] They can be considered 'mandatory' not only for natural and legal persons but even for the EU and national legislators and authorities that are responsible for tackling issues in the Area of Freedom, Security and Justice (AFSJ). Because of an infringement of those principles, the Court of Justice of the EU has declared Directive 2006/24/EC (the Data Retention Directive) to be invalid.[70]

[68] The above-mentioned principles refer to all types of personal data processing, even if Art 3 of the Italian Code seems to give them a more restricted significance, stating that 'Information systems and software shall be configured by minimising the use of personal data and identification data, in such a way as to rule out their processing if the purposes sought in the individual cases can be achieved by using either anonymous data or suitable arrangements to allow identifying data subjects only in cases of necessity': for more details on this provision see G. Buttarelli, 'Articolo 3', in C.M. Bianca and F.D. Busnelli eds, *La protezione dei dati personali. Commentario al D.Lgs. 30 giugno 2003, n. 196*, I (Padova: Cedam, 2007), 34; R. D'Orazio, 'Il principio di necessità nel trattamento dei dati personali', in R. D'Orazio, V. Cuffaro and V. Ricciuto eds, *Il Codice del trattamento dei dati personali* (Torino: Giappichelli, 2007), 21.

[69] In the 'Opinion 01/2014 on the application of necessity and proportionality concepts and data protection within the law enforcement sector', adopted on 27 February 2014, the 'Article 29 Data Protection Working Party' has emphasised these linked criteria and principles: 'The principle of purpose limitation is about understanding *why* certain personal data is being processed. This means being as specific as possible about the purposes for which a proposed measure might warrant collection and processing of personal data. By doing so it should also lead to better compliance with the data minimisation principle. The data minimisation principle exists to ensure that only the minimum amount of personal data is processed to achieve the purpose set out. These data protection principles link very closely with the concept of proportionality in a privacy context' (para 5.7).

[70] See Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* v *The*

Freedom of contract, within the scope of personal data protection, does not seem to be cancelled by virtue of the mandatory character of the aforesaid fundamental principles and rules of data protection law, nor by the conclusion that personal data are not negotiable goods. Indeed, one can imagine clauses or agreements directed at establishing the adoption, during processing, of particular security measures extending beyond the minimum standards provided for by law, as well as of a particular 'retention policy' and 'deletion policy',[71] or at distinguishing (in the constitution of an association) the data that may be processed for online communication to the public from the remaining data that has been collected for membership purposes, or at prohibiting the assignment of data to third parties, even when the conditions laid down by the law can be satisfied. Recently, the *Garante* has suggested the performance of a contract by both the manager of a website ('publisher') and the manager of another website that installs the cookies by way of the former ('third party'), in order to ensure that the 'third party' shall not cross the information contained in 'technical cookies' with other data that it already processes.

By contrast, the freedom of contract seems to be ruled out in the area of marketing and behavioural advertising by virtue of the measures adopted by the Italian supervisory authority, according to which the processing of personal data for marketing purposes cannot have the performance of a contract as its legal ground. As a mandatory rule, such data processing cannot be bound to the

Minister for Communications et al (European Court of Justice Grand Chamber 8 April 2014) available at http://curia.europa.eu/. In the previous judgement of 2 March 2010 the German Federal Constitutional Court abrogated the national implementation of the Data Retention Directive, basing its analysis on a 'privacy test', similar to the one developed by the ECtHR under the criteria contained in Art 8(2) of the ECHR. The German Court followed this scheme and made a check of three requirements (legality, legitimacy and proportionality): for more details see K. de Vries, R. Bellanova et al, 'The German Constitutional Court Judgement on Data Retention: Proportionality Overrides Unlimited Surveillance (Doesn't It)', in S. Gutwirth, Y. Poullet et al eds, *Computers, Privacy and Data Protection: an Element of Choice* (London-New York: Springer, 2011), 4-23.

[71] The 'retention policy' concerns the maximum retention period of users' personal information. The 'deletion policy' sets out the conditions under which a data subject can request the deletion of the personal data related to him/her.

performance of a contract and should be grounded on the data subject's prior (free and informed) consent.

Thus, applying the measures set forth by the supervisory authorities along with negotiating the data protection policy to be adopted by the controller are very important tools by which individuals can strengthen the protection of their fundamental rights and freedoms from the threats derived from the necessary processing/movement of their personal data.[72]

[72] F.G. Viterbo, n 48 above, 167-168.

Are Foreigners Entitled to a Right to Housing?

Luca Ettore Perriello*

Abstract

Under the reciprocity clause set forth by Art 16 of the Provisions on the Law in General, foreigners are entitled to the same civil rights as citizens, as long as such rights are afforded to citizens in the foreigners' countries of origin. Still, Art 16 must be constitutionally interpreted so as to accomplish the full protection of human rights. Therefore, reciprocity does not apply to the fundamental rights the Constitution affords to each and every individual as a human being, rather than as the citizen of a State.

Ownership *per se* is not a fundamental right. However, different aims of ownership may characterize the right to ownership as a fundamental right such that the purchase of property may not be restricted by reciprocity. When property is hence purchased for business purposes, reciprocity may still be preserved as a means of political pressure and national promotion. Conversely, when property is purchased to be a home, property becomes 'personal', and ownership is considered to be an inviolable right protected as a right to housing.

I. Court of Cassation 21 March 2013 no 7210: The Case

An Iranian citizen sues an Italian company seeking the nullity or the annulment of a promise to sell part of a three-story building, two stables, barns, coops and courtyards, which he has undertaken to buy for three hundred forty million lire. The plaintiff claims that, as an Iranian citizen, he is not entitled to enter into such a contract, due to the lack of reciprocity as laid down under Art 16 of the Provisions on the Law in General.[1]

The Court of First Instance allows the application and declares

* PhD Candidate in Private Law, Università degli Studi del Sannio.

[1] Art 16 of the Provisions on the Law in General provides that a foreigner is afforded the same civil rights as an Italian citizen based upon reciprocity, that is, subject to the condition that the same rights are afforded to an Italian citizen in the foreigner's country of origin.

the contract to be null and void, because it amounts to a violation of a mandatory rule, such being the principle of reciprocity.

The Court of Appeal overrules the first instance decision, rejects the application for the nullity and declares the contract to be terminated by operation of law. The Court rules that the principle of reciprocity provides a safeguard only to Italian citizens, and thus, an Iranian citizen is not allowed to bring an action based upon the said principle. The case moves on to the Court of Cassation.

In the case at issue, the Court of Cassation holds that reciprocity does not apply to rights that the Constitution and international charters afford to each and every individual. Inviolable rights and fundamental liberties have an indivisible nature and are afforded to individuals, not as parts of a political community, but as human beings. From a universal perspective of the protection of man, no distinction shall be drawn between citizens and foreigners, or between foreigners with or without a residence permit. Art 16, which is still in force and secures civil rights to foreigners subject to reciprocity, must be constitutionally interpreted in compliance with Art 2 of the Constitution[2] in order to accomplish the full protection of human rights.

Contracts to acquire ownership of immovable property do not achieve the fundamental rights of the individual. In this area, reciprocity still plays a key role in pushing other States, outside of the European Union, to adjust their legislation for Italian citizens living abroad.

However, even in the area of economic rights and ownership, where inviolable rights are not at stake, the legislature passed a law on immigration (decreto legislativo 25 July 1998 no 286), which has significantly reduced the area to which the principle of reciprocity might apply, making it generally not necessary for reciprocity to be fulfilled when a foreigner lives in Italy with a lawful residence permit.[3]

[2] Under Art 2 of the Constitution, 'the Republic recognizes and guarantees the inviolable rights of man, both as an individual and in the social organizations wherein his personality is developed, and it requires the performance of fundamental duties of political, economic, and social solidarity': translation by M. Cappelletti et al, *The Italian Legal System. An Introduction* (Stanford, CA: Stanford University Press, 1967), 281.

[3] Decreto legislativo 25 July 1998 no 286, Art 2 para 2. Over the years, different issues related to immigration have been addressed by Italian legislation. See: decreto

Even under the legislation in force before decreto legislativo 25 July 1998 no 286, foreigners holding a residence permit, despite not complying with Art 16 of the Provisions on the Law in General, were entitled to acquire ownership of immovable property forming their family home or their place of business. Ownership has different regulations within the Constitution, and Art 42 para 2 of the Constitution aims to make ownership accessible to everybody in order to foster their integration into the national community and to provide them with the economic stability and safety that only 'personal' ownership may grant, banishing any discrimination based upon citizenship.[4] This is why the contract at issue cannot be declared null and void, although it was entered into before the said statute was enacted.

II. Reasons and History Behind Reciprocity. From the Early Codifications to a Constitutional Perspective

The principle of reciprocity set forth in Art 16 of the Provisions on the Law in General states that foreigners enjoy the civil rights afforded to Italians only to the extent that Italians enjoy the same rights in the foreigners' countries of origin.

Although most of the jurisdictions before the Italian unification enforced different kinds of reciprocity,[5] the 1865 Italian Civil Code, highly inspired by liberal theories, did not provide for such a principle and adopted the opposite principle of equality between foreigners and citizens, rejecting those alternative and restrictive

legge 23 May 2008 no 92 and legge 15 July 2009 no 94 (security measures); decreto legislativo 19 November 2007 no 251 and decreto legislativo 28 January 2008 no 25 (right of asylum); legge 5 February 1992 no 91 (citizenship); legge 11 August 2003 no 228 (human trafficking).

[4] Art 42 para 2 of the Constitution reads as follows: 'Private property is recognized and guaranteed by the law, which determines the manner of its acquisition and enjoyment and its limits, in order to assure its social function and render it accessible to all'; translation by M. Cappelletti et al, n 2 above, 290.

[5] Before the Italian unification of 1861, only the Grand Duchy of Tuscany provided for complete equality between citizens and foreigners: E. Calò, *Il principio di reciprocità* (Milano: Giuffrè, 1994), 5.

proposals to extend civil rights only to foreigners who were resident in Italy.[6]

Reciprocity first appeared in the current 1942 Civil Code, at a particular time in Italian history when nationalism and protectionism dominated the State's economy.[7] The legal system did not protect fundamental rights at a Constitutional level, nor did it grant rights to foreigners; the new Code was embedded in the middle of the system and endowed with Constitutional relevance.[8] The 1942 legislature was consistent with affording political rights to Italian citizens only, and by enacting Art 16, it entrenched reciprocity for foreigners' 'civil' rights, ie economic rights and liberties.[9]

In this context, the reasoning behind reciprocity was promotional in nature, that is, it was aimed at prompting foreign countries to

[6] A. Giardina, 'Dell'applicazione della legge in generale: Art. 16', in A. Scialoja and G. Branca eds, *Commentario del Codice civile* (Bologna-Roma: Zanichelli-Foro italiano, 1978), 2-4. When enacting the 1942 Civil Code, the complete equality between citizens and foreigners, as laid down under the 1865 Civil Code, was interpreted as a sign of weakness of the Government in its international relations when it had to obtain favors for Italians living abroad. Italy could not provide anything in exchange, because, with the said provision, Italy had already conceded it all: E. Calò, n 5 above, 15.

[7] The 1942 Civil Code originated from a context mainly focused on immovable property, work and business, and in which economic rights were prominent. The debate over personal rights was just beginning. A historical interpretation may be sufficient to conclude that Art 16 does not regard the fundamental rights of the individual: F. Ranieri, 'Fatto illecito civile. Danneggiati italiani e stranieri a confronto. Tutela risarcitoria differenziata?' *Diritto, immigrazione e cittadinanza*, 72-90, 75 (2011).

[8] A. Galoppini, 'Acquisti immobiliari dello straniero e condizione di reciprocità' *Il Diritto di famiglia e delle persone*, 186-205, 191 (1998).

[9] P. Gazzi, 'Risarcimento del danno dello straniero, condizione di reciprocità prevista dall'art. 16 delle preleggi e Fondo di garanzia vittime della strada' *Responsabilità civile e previdenza*, 1113-1120, 1114 (1998), points out that when the 1942 Civil Code was enacted, fundamental rights had not yet been established in a Constitution, and the protection of human rights was based only on economic rights. Legal scholars would consider just two types of rights: civil rights and political rights, the latter not being afforded to foreigners. As far as civil rights were concerned, even before 1942, the legislature passed a series of laws undermining the liberal approach of the 1865 Civil Code and forbidding foreigners to enter certain professions, such as that of a notary public, or to act as the president or chief executive officer of a fiduciary company. The 1942 legislature merely turned what was largely provided for in a number of laws into a general principle.

introduce legislation in favor of Italians living abroad.[10] Countries willing to invest in Italy, or whose citizens were willing to engage in business in Italy, were thus encouraged to extend equal rights to Italians living in their territories.

Supposedly, the aim of reciprocity was also to act as a political reprisal[11] against those countries that did not secure civil rights to Italian expatriates.[12] A reciprocity clause often implies a judicial evaluation and criticism of governments, thereby entering the field of foreign relations, which is traditionally a matter for the State.[13]

[10] A. Coaccioli, *Manuale di diritto internazionale privato e processuale* (Milano: Giuffrè, 2011), 231, fn 15; M.M. Winkler, 'Il principio di reciprocità nell'era dei diritti fondamentali' *Responsabilità civile e previdenza*, 1178-1188, 1181 (2012); E. Vitta, *Diritto internazionale privato* (Torino: Utet, 1972), I, 452-453. Even the Court of Cassation in the case at issue states that, when it comes to contracts to acquire ownership of immovable property, reciprocity plays a role in encouraging other States, outside of the EU, to change their legislation in the most liberal way, in favor of Italian citizens living abroad. In any case, the application of the principle of reciprocity today, when Italy has shifted from a country with a high level of emigration into a country with a high level of immigration, might trigger a perverse effect, in that a principle thought to help the weakest, ie the Italians leaving their home country in 1940s, may now harm the weakest, ie non-EU immigrants: P. Mengozzi, *Il diritto internazionale privato italiano* (Napoli: Editoriale Scientifica, 2004), 62.

[11] C. Focarelli, 'La reciprocità nel trattamento degli stranieri in Italia come forma di ritorsione o rappresaglia' *Rivista di diritto internazionale*, 825-865 (1989). According to Corte di Appello di Milano 22 June 1999, *Rivista di diritto internazionale privato e processuale*, 1093-1094 (2000), Art 16 provides a promotional retaliation.

[12] In the 1940s, many countries, such as France, Belgium and the US, experienced strong immigration from Italy, due to the economic crisis triggered by the war and the political and racial persecution that took place during the Fascist regime. As a result, these countries enacted restrictive measures against Italian immigrants, affecting entry, residency and business. In this context, reciprocity was enforced in retaliation for these kinds of anti-Italian legislation. However, it is hard to imagine that the United States, for instance, would have been encouraged to ease their restrictive measures against Italians for fear of reprisals from Italian authorities against American citizens in Italy. It was unlikely that such a threat from the Italian government could affect the political and economic relations with other States. Indeed, reciprocity revealed a dangerous misunderstanding of the balance of power between Italy and other countries: A. Galoppini, n 8 above, 190.

[13] Cf J.B. Hackman, 'The Constitutionality of Alien Inheritance Statutes' 10(3) *New York Law School Journal of International and Comparative Law*, 383-420, 391 (1989), who questions the constitutionality of inheritance statutes (the so-called

Notwithstanding the narrow reasoning behind the principle of reciprocity laid down in the 1942 Civil Code, the 1948 Italian Constitution does not rule it out, though in Art 10, it requires the status of the foreigner to be regulated by law in compliance with international norms and treaties.

The reference made in Art 10 to law cannot be fulfilled by national laws only; indeed, international law, and EU law especially, are of vital importance in regulating the foreigner's status.[14] National law, EU law and international law must not be intended as a multitude of separate systems; rather, they make up a single, complex and open legal order, where rules and principles having different origins mix with each other.[15] International customs (Art 10

'iron curtain' statutes) featuring the right of aliens to take property depending on the reciprocal right of US citizens similarly to take property in the alien's country, on three grounds. 'First, the statutes invade the exclusive federal power over foreign affairs. Second, the statutes burden an alien beneficiary's right to equal protection. Third, the statutes burden the alien beneficiary's right to due process.' On this matter, see also M.A. Frank, 'Alien Inheritance Statutes: An Examination of the Constitutionality of State Laws Restricting the Rights of Nonresident Aliens to Inherit from American Decedents' 25(2) *Syracuse Law Review*, 597-622 (1974).

[14] The perspective that the world revolves around Europe and that everyone outside of Europe is a 'non-European' must be dismissed. A modern policy must not be to impede the free movement of persons on the planet, but to establish solidarity between States by means of international conventions and adequate intervention in southern countries. Law alone cannot stop a force of nature, which calls for the preservation of its existence: P. Perlingieri, 'I diritti civili dello straniero', in Id, *La persona e i suoi diritti* (Napoli: Edizioni Scientifiche Italiane, 2005), 85-98, 89. Cf also M. Luciani, 'Cittadini e stranieri come titolari dei diritti fondamentali. L'esperienza italiana' *Rivista critica del diritto privato*, 203-236 (1992); P. Stancati, 'Le libertà civili del non cittadino: attitudine conformativa della legge, assetti irriducibili di garanzia, peculiarità degli apporti del parametro internazionale', in VVAA, *Lo statuto costituzionale del non cittadino. Atti del XXIV Convegno annuale. Cagliari, 16-17 ottobre 2009* (Napoli: Jovene, 2010), 25-132; V. Zambrano, 'Diritti civili dello straniero e rilievo della condizione di reciprocità', in A.A. Carrabba ed, *I diritti civili dello straniero* (Napoli: Edizioni Scientifiche Italiane, 2001), 29-45.

[15] P. Perlingieri, 'Complessità e unitarietà dell'ordinamento giuridico vigente', in Id, *L'ordinamento vigente e i suoi valori* (Napoli: Edizioni Scientifiche Italiane, 2006), 3-32. Professor P. Perlingieri has coined the expression *'sistema italo-comunitario delle fonti'*, ie 'Italian-European system of sources'. Even insisting on the distinction between legal systems, the European legal system cannot be granted an autonomous application, so as to be separable from the national legal system. It is no coincidence that European sovereignty originated from a precise and partial

para 1 of the Constitution),[16] international conventions (Art 117 para 1 of the Constitution)[17] and EU law (Arts 11[18] and 117 of the

limitation of sovereignty accepted by the Italian Republic, as set forth in Art 11 of the Constitution. Conversely, the theory of the plurality of legal orders was notably advocated by S. Romano, *L'ordinamento giuridico* (Firenze: Sansoni, 2nd ed, 1951), 104-223; Id, *Principii di diritto costituzionale generale* (Milano: Giuffrè, 1947), 58-59. For an overview of the monistic and dualistic theories, see: A. Falzea, *Ricerche di teoria generale del diritto e di dogmatica giuridica* (Milano: Giuffrè, 1999), I, 496-517; N. Lipari, 'Diritto privato e diritto privato europeo' *Rivista trimestrale di diritto e procedura civile*, 7-25 (2000); L. Paladin, *Le fonti del diritto italiano* (Bologna: il Mulino, 1996), 426-431; V. Scalisi, 'Interpretazione e teoria delle fonti nel diritto privato europeo' *Rivista di diritto civile*, 413-437 (2009); Id, 'Complessità e sistema delle fonti di diritto privato' *Rivista di diritto civile*, 147-179 (2009). The evolution of the Constitutional Court's approach to the relation between national law and EU law is highlighted by I. Nicotra, *Diritto pubblico e costituzionale* (Torino: Giappichelli, 2010), 483. The Court has admitted that, after the ratification of the EU treaties, Italy is now part of a legal system that is 'autonomous, integrated and coordinated' with the national one: Corte costituzionale 15 April 2008 no 102, *Giurisprudenza costituzionale*, 2641-2646 (2008).

[16] Under Art 10 para 1 of the Constitution, 'the Italian legal order shall conform to the generally recognized rules of international law'; translation by M. Cappelletti et al, n 2 above, 282. The provision is generally interpreted as referring to international customs: A. Cassese, 'Principi fondamentali: Art. 10', in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zanichelli-Foro italiano, 1975), 485-508; E. Cannizzaro and A. Caliguri, 'Sub Art. 10', in R. Bifulco, A. Celotto and M. Olivetti eds, *Commentario alla Costituzione* (Torino: Utet, 2006), 244-250.

[17] Art 117 of the Constitution was amended by legge 18 October 2001 no 3. The amended para 1 reads as follows: 'The legislative power is exercised by the State and the Regions in compliance with the Constitution and the constraints coming from EU law and international duties.' For a comment, see E. Malfatti, 'Leggi costituzionali e di revisione costituzionale (1994-2005): Legge cost. 18 ottobre 2001, n. 3 (Riforma del titolo V)', in G. Branca and A. Pizzorusso eds, *Commentario della Costituzione* (Bologna-Roma: Zanichelli-Foro Italiano, 2006), 263-396; A. Cossiri, 'Sub Art. 117', in S. Bartole and R. Bin eds, *Commentario breve alla Costituzione* (Padova: Cedam, 2008), 1045-1051. With regard to the 'internationalization' of private law, see VVAA, *L'incidenza del diritto internazionale sul diritto civile. Atti del 5° Convegno Nazionale* (Napoli: Edizioni Scientifiche Italiane, 2011).

[18] Art 11 sets forth the conditions for the limitations of sovereignty, allowing Italy to join the EU and other international organizations. However, the limitation of sovereignty, as provided for by Art 11, cannot be achieved by allowing EU institutions to jeopardize the fundamental values behind the Constitution and the Republic. Cf A. Cassese, 'Principi fondamentali: Art. 11', in G. Branca ed, *Commentario della Costituzione* n 16 above, 577-588; M. Cartabia and L. Chieffi,

Constitution) shape the system and influence judges regarding the extent to which they must combine provisions of different sources (the State, the Regions, the European Union, the international community), balance values and compose interests in accordance with a Constitutional interpretation that is respectful of inalienable rights. Every source of law is part of this unique legal order and must be applied by the Constitutional Court, the European Court of Justice (hereinafter ECJ) and the European Court of Human Rights (hereinafter ECHR) as a single jurisdiction driven by a spirit of sincere mutual cooperation.[19]

In such Italian-European legal system, EU citizens and their family members, albeit not citizens of a Member State,[20] do not fall

'Sub Art. 11', in R. Bifulco, A. Celotto and M. Olivetti eds, *Commentario alla Costituzione* n 16 above, 279-288.

[19] On the mutual cooperation between the courts, see: P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008); Id, 'Diritto comunitario e identità nazionali' *Rassegna di diritto civile*, 530-545 (2011); A. Tartaglia Polcini, 'Integrazione sistematica e assiologica dirimente nel dialogo tra Corte costituzionale e Corte di giustizia', in P. Femia ed, *Interpretazione a fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 421-478; A. Rovagnati, 'Fragilità e forza di un sistema giurisdizionale *sui generis*. I rapporti tra Corte di Giustizia delle Comunità europee e giudici nazionali di ultima istanza alla luce della più recente giurisprudenza comunitaria', in N. Zanon ed, *Le Corti dell'integrazione europea e la Corte costituzionale italiana* (Napoli: Edizioni Scientifiche Italiane, 2006), 353-388; G. Vettori, 'Dialogo fra le corti e tecnica rimediale', in VVAA, *L'incidenza del diritto internazionale* n 17 above, 455-471.

[20] On this matter, see decreto legislativo 6 February 2007 no 30, implementing directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. With regard to family reunification, see Arts 29 and 29-bis decreto legislativo 25 July 1998 no 286. On the recognition of *kafalah*, see: Corte di Cassazione 2 February 2015 no 1843, with a note by M. Di Masi, 'La Cassazione apre alla *kafalah* negoziale per garantire in concreto il *best interest of the child*' *La nuova giurisprudenza civile commentata*, 707-724 (2015); Corte di Cassazione-Sezioni unite 16 September 2013 no 21108, *Rivista di diritto internazionale*, 271-279 (2014). In the literature, see: R. Senigaglia, 'Il significato del diritto al ricongiungimento familiare nel rapporto tra ordinamenti di diversa «tradizione». I casi della poligamia e della «kafala» di diritto islamico' *Europa e diritto privato*, 533-575 (2014); C.E. Tuo, 'Riconoscimento degli effetti delle adozioni straniere e rispetto delle diversità culturali' *Rivista di diritto internazionale privato e processuale*, 43-80 (2014); G. Magno, 'Ingresso in Italia del

within the definition of 'foreigner' and are not subject to reciprocity. Every national of a Member State is a citizen of the Union – such citizenship being additional to and not replacing national citizenship (Art 9 of the Treaty on European Union) – and 'any discrimination on grounds of nationality' shall be prohibited (Art 18 of the Treaty on the Functioning of the European Union; Art 21 of the Charter of Fundamental Rights of the European Union).[21] In this context, it is no coincidence that Italian immigration law does not apply to EU citizens (Art 1 para 1 decreto legislativo 25 July 1998 no 286).

Likewise, reciprocity does not apply to citizens of countries that have signed economic agreements with Italy that are designed for the mutual protection and promotion of investments, such agreements – ratified by Italian law – being *lex specialis*, prevailing over Art 16.[22]

Finally, by virtue of international conventions, reciprocity need not be met by stateless persons[23] or refugees,[24] provided that they have resided in Italy for at least three years.

minorenne straniero affidato in «kafalah» a coniugi italiani: una questione da chiarire' *Il Diritto di famiglia e delle persone*, 99-110 (2014).

[21] The same rights possessed by EU citizens are afforded to citizens of the countries – Liechtenstein, Iceland and Norway – that have signed the Agreement on the European Economic Area (on May 2 1992), as well as to citizens of Switzerland, by virtue of the Swiss-EU Bilateral Agreement on the Free Movement of Persons (on 21 June 1999), and citizens of San Marino, by virtue of the Convention of friendship and good neighborhood (on 31 March 1939): B. Nascimbene, 'La capacità dello straniero: diritti fondamentali e condizione di reciprocità' *Rivista di diritto internazionale privato e processuale*, 307-326, 315 (2011).

[22] See A. Busani, 'Acquisti immobiliari dello straniero non regolarmente soggiornante in Italia sottoposti a condizione di reciprocità' *Notariato*, 371-383, 378-379 (2013), in particular, fn 44, for a list of the main economic agreements signed by Italy.

[23] Art 7 para 2 of the Convention relating to the status of stateless persons, adopted in New York on 28 September 1954, ratified by Italy in legge 1 February 1962 no 306.

[24] Art 7 para 2 of the Convention relating to the status of refugees, adopted in Geneva on 28 July 1951 and ratified by Italy in legge 24 July 1954 no 722. Within the Constitution, refugee status is regulated by Art 10 para 3, under which 'foreigners who, in their own countries, are denied the effective exercise of democratic freedoms guaranteed by the Italian Constitution, shall have the right of asylum in the territory of the Republic, in accordance with the conditions established by law'; translation by M. Cappelletti et al, n 2 above, 282. According to Corte costituzionale 23 March 1968 no 11, *Giurisprudenza costituzionale*, 311-363 (1968), it is not reasonable to impose

III. Reciprocity between *Status Personae* and *Status Civitatis*

Although some might suggest that reciprocity has been tacitly abrogated by the Constitution,[25] a Constitutional interpretation of Art 16 may just overcome any apparent conflict with the Constitution itself,[26] insofar as fundamental rights are afforded to individuals, not as citizens of the State, but as human beings. Reciprocity was not abrogated and is still in force, as long as it is interpreted by means of Art 2 of the Constitution, which sets forth the recognition and guarantee of the inviolable rights of man, as well as the performance of fundamental duties of political, economic and social solidarity.[27]

reciprocity on foreigners who are citizens of countries that deny the effective exercise of democratic freedoms.

[25] The tacit abrogation of Art 16 has been advocated by some renowned scholars: P. Barile, *Il soggetto privato nella Costituzione italiana* (Padova: Cedam, 1953), 57; Id, *Diritti dell'uomo e libertà fondamentali* (Bologna: il Mulino, 1984), 32-34; A. Cassese, 'Principi fondamentali: Art. 10', in G. Branca ed, *Commentario della Costituzione* n 16 above, 512-515; A. La Pergola, *Costituzione e adattamento dell'ordinamento interno al diritto internazionale* (Milano: Giuffrè, 1961), 325, fn 74. Where reciprocity means that a foreigner may be secured rights, subject to the condition that equal rights are secured to an Italian citizen in the foreigner's country of origin, it takes individuals into account, not as human beings, but as manifestations of a State's sovereignty. If this is true, then reciprocity breaches the protection of inviolable rights and the principle of equality set forth by Arts 2 and 3 of the Constitution, because it establishes an unreasonable discrimination based on an element not depending on the foreigner at all, ie the legal treatment of Italians in the foreigner's legal system: P. Rescigno, 'Gli acquisti in Italia dello straniero' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 169-188, 174 (1983). More recently, some have argued that reciprocity makes no sense in a globalized world, where national boundaries are dissolving and international cooperation is developing on an unprecedented scale. In this scenario, legal systems tend to attract foreign investments, instead of rejecting them: M.M. Winkler, n 10 above, 1182-1183.

[26] Art 16 actually complies with Art 10 of the Constitution, as no customary or conventional rule of international law imposes equality between citizens and foreigners based on their national legal systems with regard to any right. Moreover, the reference made to international treaties within Art 10 seems to disprove the alleged complete equality between citizens and foreigners. Art 10 means only that any possible discrimination between citizens and foreigners must be subject to law: P. Rescigno, 'Gli acquisti in Italia dello straniero' n 25 above, 174-175.

[27] For the Constitutional interpretation of Art 16 by means of Art 2 of the Constitution, see: Corte di Cassazione 11 January 2011 no 450, *Foro italiano*, 394-402 (2011); Corte di Cassazione 7 May 2009 no 10504, *Diritto e Fiscalità*

Art 16, which secures 'civil rights' to foreigners subject to reciprocity, cannot refer to the fundamental rights of the individual; a different interpretation would be unconstitutional, as it breaches the guarantee set forth by Art 2 of the Constitution. Any legal interpretation must be logical-systematical and teleological-axiological, ie designed to accomplish Constitutional values.[28]

It is by means of a Constitutional interpretation of Art 16 that inalienable rights and duties making up the *status personae* are granted to foreigners, regardless of reciprocity. The Court of Cassation embraces such interpretation and calls for a universal and indivisible protection of the human being, going beyond national boundaries, political communities, residency, citizenship and security reasons.[29]

dell'assicurazione, 375-380 (2010). In the literature, see: R. Di Raimo, '«Principio di reciprocità» e «diritti inviolabili dell'uomo»' *Rassegna di diritto civile*, 646-655 (1990); F. Parente, 'L'assetto normativo dei diritti fondamentali della persona tra *status civitatis* e posizione di migrante: le suggestioni della «condizione di reciprocità»' *Rassegna di diritto civile*, 1108-1133 (2008).

[28] On the criticism of the literal rule known as *in claris non fit interpretatio* and the advocacy of a systematic and axiological interpretation, see: P. Perlingieri, 'L'interpretazione della legge come sistematica ed assiologica. Il broccardo *in claris non fit interpretatio*, il ruolo dell'art. 12 disp. prel. c.c. e la nuova scuola dell'esegesi' *Rassegna di diritto civile*, 990-1017 (1985); M. Pennasilico, 'Legalità costituzionale e diritto civile' *Rassegna di diritto civile*, 840-876 (2011); P. Maddalena, 'Interpretazione sistematica e assiologica del diritto' *Giustizia civile*, 65-77 (2009); V. Scalisi, 'Regola e metodo nel diritto civile della postmodernità' *Rivista di diritto civile*, 283-310 (2005).

[29] Too often in the balance between liberty and security, the liberties of a vulnerable minority (the foreigners) have been sacrificed for the purported security of the majority (the citizens). This has happened especially in the US in the wake of the terrorist attacks of September 11. Cf D. Cole, 'Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?' 25(2) *Thomas Jefferson Law Review*, 367-388, 368-369 (2002-03), who criticizes the ambivalent approach of the US Supreme Court, which, on the one hand, has insisted that foreigners are entitled to those rights the Constitution does not expressly reserve to citizens; on the other hand, it has allowed foreigners to be expelled because of their race and to be deported for political associations that were lawful at the time they were engaged in, it has upheld laws barring foreigners from owning land, it has permitted the indefinite detention of foreigners stopped at the border on the basis of secret evidence they could not confront, and it has allowed states to bar foreigners who were otherwise qualified from employment as public school teachers and police officers, based solely on their status as foreigners.

Status personae is not identified with legal capacity, ie the eligibility, acquired at birth, to have rights and duties. Indeed, it is the subjective manifestation of an incontestable, unnegotiable, objectively protected value: the value of the human personality. It is the legal position of man in the community, a unique and complex situation consisting of 'inviolable rights' and 'mandatory duties' (Art 2 of the Constitution), typical and atypical, entailed by man's living in a community.[30] The rights and duties making up the *status personae* are meant to fulfill the existential needs of humankind; as such, they bear no reciprocity. Their protection is 'multilevel', ie involving national, supranational and international dimensions, operating with different levels of integration and interference, different rationales and different effectiveness.[31]

Some of these rights are typical, ie provided for by the law, and most of them are set forth by the Constitution, such as: the right to proceed at law for the protection of rights and legitimate interests and the right of defense at any stage in legal proceedings (Art 24);[32] the right to health (Art 32);[33] and the worker's right to a

[30] P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 666-668.

[31] With regard to the multilevel protection of fundamental rights and the challenges it poses, see: I. Pernice, 'Multilevel Constitutionalism in the European Union' 27(5) *European Law Review*, 511-529 (2002); G. Martinico, 'Complexity and Cultural Sources of Law in the EU Context: from the Multilevel Constitutionalism to the Constitutional Synallagma' 8(3) *German Law Journal*, 205-230 (2007); I. Pernice and R. Kanitz, 'Fundamental Rights and Multilevel Constitutionalism in Europe' 7(4) *WHI Paper*, 1-20 (2004); G. Di Federico, 'Fundamental Rights in the EU: Legal Pluralism and Multi-level Protection after the Lisbon Treaty', in Id, *The EU Charter of Fundamental Rights* (Amsterdam: Springer Netherlands, 2011), 15-54.

[32] The legal system affords the right to proceed at law to foreigners, on the same terms as citizens: Corte di Cassazione-Sezioni unite 11 April 1981 no 2112, *Rivista di diritto internazionale privato e processuale*, 345-349 (1983).

[33] The right to receive sanitary treatments is 'conditioned' by the need for a balance with other constitutionally protected interests. However, there is a hard core within the right to health that must be afforded to foreigners as well, regardless of their position according to the law governing entry and residence, although the legislature might enact different ways to exercise this right: Corte costituzionale 17 July 2001 no 252, *Giurisprudenza costituzionale*, 2168-2174 (2001). See also Art 35 para 3 decreto legislativo 25 July 1998 no 286, under which foreign citizens not complying with the rules on entry and residence can obtain urgent or necessary outpatient and hospital treatments.

remuneration proportionate to the quantity and quality of their work, to a weekly rest and to annual paid holidays (Art 36).[34]

Interestingly, the courts have long debated whether a foreigner is entitled to seek compensation for damages, both economic and non-economic. The solution to the matter has recently been that, regardless of reciprocity, foreigners might claim compensation for damages suffered, although some distinctions are still to be made.[35]

In any case, the above list is just by way of an example. The human *persona* is an open value not implying a specific right or duty provided for by the law, but appearing in an endless, potentially atypical series of situations connected with the existential aspects of humankind.[36] The Italian Constitutional system is founded on the

[34] Foreign workers' right to a remuneration proportionate to the value of the work performed and sufficient to provide a free and dignified existence for themselves and their families, as well as their right to rest and paid holidays, are not subject to reciprocity: Corte di Cassazione 4 March 1988 no 2265, *Giurisprudenza italiana*, 129-131 (1989).

[35] Corte di Cassazione 11 January 2011 no 450, n 27 above. The Court states that the right to health, the right to psycho-physical integrity and the right to family relations are fundamental rights. Compensation for economic and non-economic damages suffered from the breach of such rights might be sought by any foreigner, with no discrimination in terms of citizenship allowed. Such compensation might be claimed, not only against the wrongdoer, but also against the insurer or the Guarantee Fund for road accident victims. However, where reciprocity is not met, damages consisting in loss or damage to property cannot be claimed by the foreigner. In this case, the right to ownership is infringed, and such right is not a fundamental right. For a comment on the decision, see: I. Prisco, 'Protezione dei diritti fondamentali e inapplicabilità della condizione di reciprocità', in G. Perlingieri and G. Carapezza Figlia eds, *L'«interpretazione secondo Costituzione» nella giurisprudenza. Crestomazia di decisioni giuridiche* (Napoli: Edizioni Scientifiche Italiane, 2012), I, 87-96. On this matter, see also: Corte di Cassazione 7 May 2009 no 10504, n 27 above. Foreigners are also entitled to compensation for wrongful conviction, regardless of reciprocity: Corte di Cassazione 7 April 2000 no 2225, *Cassazione penale*, 3510-3511 (2001).

[36] P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Camerino-Napoli: Università degli Studi di Camerino. Scuola di perfezionamento in diritto civile-Edizioni Scientifiche Italiane, 1982), 174-175; D. Messinetti, 'Personalità (diritti della)' *Enciclopedia del diritto* (Milano: Giuffrè, 1983), XXXIII, 355-406, 371-373; G. Giampiccolo, 'La tutela giuridica della persona umana e il c.d. diritto alla riservatezza' *Rivista trimestrale di diritto e procedura civile*, 458-475, 465-466 (1958). Conversely, for a typical and atomistic approach to the theme of personality, see: A. De Cupis, 'I diritti della personalità', in A. Cicu and F. Messineo eds, *Trattato*

general clause for the protection of the human personality (Art 2 of the Constitution): the *persona* is a general value to be preserved, even in circumstances not provided for by the law. Individuals do not have a personal right in themselves, besides the rights provided for by the law, but all of the positions referring to them must aim to fulfill the value of the *persona*. The *persona* is considered to be a plastic value, staying clear of the traditional division between typical and atypical situations and able to adapt to an infinite variety of circumstances, cultural environments and social changes.

Status personae is endowed with absolute independence and can exist without any other status; all of the other statuses revolve around the *status personae* and are committed to its achievement.[37]

Above all, *status personae* is not affected by *status civitatis*, ie the position of man in a State political community. Foreigners do not enjoy: the right to vote (Art 48 Constitution) and to address petitions to the Parliament (Art 50 Constitution), the right of admission to public offices and elective posts (Art 51 Constitution), the duty to contribute toward public expenses (Art 53 Constitution) and the right to petition for referendum (Arts 75 and 138 Constitution).[38]

di diritto civile e commerciale (Milano: Giuffrè, 1982), IV, 32-37; P. Rescigno, 'Personalità (diritti della)' *Enciclopedia giuridica* (Roma: Istituto dell'Enciclopedia Italiana, 1990), XXVI, 5; A. Baldassarre, 'Diritti inviolabili' *Enciclopedia giuridica* (Roma: Istituto dell'Enciclopedia Italiana, 1989), XII, 18-21.

[37] R. Di Raimo, n 27 above, 648-649. Legal theory is highly influenced by the traditional distinction between *status civitatis* and a multitude of other particular statuses (entrepreneur, worker, consumer, producer). However, these statuses convey a strong and not always reasonable particularism. Rights and duties that are not dependent on citizenship shall be allocated within the *status personae*, ie a number of rights and duties afforded to man as such, not as a consumer, producer, worker or citizen: P. Perlingieri, 'I diritti civili dello straniero' n 14 above, 88-89.

[38] The Convention on the Participation of Foreigners in Public Life at Local Level, signed in Strasbourg on 5 February 1992, ratified by Italy on 8 March 1994, grants foreign residents the right to freedom of expression, assembly and association, as well as the right to take part in consultative bodies at the local level. However, chapter C of the Convention, which grants the right to vote in local elections, was not ratified by Italy. Cf G. Franchi Scarselli, 'Una legge misconosciuta sulla partecipazione degli stranieri alla vita pubblica' *Quaderni costituzionali*, 649-651 (2000). Another guarantee is provided for by Art 8 para 5 decreto legislativo 18 August 2000 no 267, under which the municipal charter must endorse the participation of EU citizens and lawfully resident foreigners in public life at the local level.

IV. The Italian Law on Immigration: Grounds for Analogy in the Court's Reasoning

The unconditional equality between foreigners and citizens, when it comes to fundamental rights, is also solemnly set forth by Italian immigration law. Under Art 2 para 1 decreto legislativo 25 July 1998 no 286, commonly known as *testo unico sull'immigrazione*, 'foreigners present at the border or within the State's territory are afforded the human person's fundamental rights provided for by national law, international conventions in force and generally recognized principles of international law.'

The provision should not be overestimated, because, within the aforementioned statute, the effectiveness of many rights extended to foreigners seems very low.[39] However, it is significant that, on the one hand, reference is made to foreigners 'present' at the border, implying a neutral concept – 'presence' – which is broader than 'stay', the latter being lawful or unlawful; on the other hand, the foreigner's status is regulated not only by national law, but also, and mainly, by international law, both customary and conventional.[40]

Still, the exercise of civil rights, regardless of reciprocity, remains a prerogative of foreigners who are lawfully staying in Italy with a residence permit – unless reciprocity is required by law or international conventions –, whereas foreigners not holding a residence permit are allowed to exercise civil rights, provided that reciprocity is met pursuant to Art 16. As a matter of fact, under Art 2 para 2 decreto legislativo 25 July 1998 no 286, 'the foreigner lawfully staying in the State's territory enjoys the rights in civil matters[41] afforded to the

[39] F. Parente, n 27 above, 1127-1128. The ambiguity and fancifulness behind decreto legislativo 25 July 1998 no 286 is well stressed by P. Perlingieri, 'I diritti civili dello straniero' n 14 above, 90. Many of the provisions set forth by the said legislation are useless and repetitive of what the Constitution already provides, and they create more problems than they are intended to solve.

[40] B. Nascimbene, n 21 above, 316. Foreigners merely 'present' in Italy, regardless of the lawfulness of the 'stay', have the right to diplomatic protection, that is, the right to contact the authorities of their country of citizenship (Art 2 para 7). No reference to 'presence' or 'stay' is made within the provision (Art 2 para 5) that affords the right to proceed at law for the protection of rights and legitimate interests on an equal footing with citizens, as regards the relations with the public administration and access to public services.

[41] For the ambiguity and narrowness behind the notion of 'rights in civil

Italian citizen, unless international conventions in force for Italy and this statute provide otherwise.' Hence, the legislature sets forth the status of the foreigner who is lawfully staying with a residence permit, ie a foreigner who, on the one hand, has not breached the law on entry and stay, and on the other hand, holds an EU long-term residence permit or a residence permit on the grounds of work, business, study, family or humanitarian reasons (Art 1 decreto del Presidente della Repubblica 31 August 1999 no 394). Such foreigner is supposed to be wholly absorbed into the national community and enjoys the citizen's 'civil rights', regardless of reciprocity.

Conversely, where reciprocity is not met, foreigners not holding a residence permit, lawfully[42] or unlawfully staying in Italy, are denied the exercise of 'civil rights'. Such foreigners are required to meet reciprocity in order, for example, to run a business[43] or to acquire ownership of property.

It shall be kept in mind that, even before the 1998 immigration law was enacted, the legislation allowed foreigners staying in Italy with a residence permit to enjoy some civil rights and liberties,

matters', compared to that of the 'civil rights' set forth in Art 16, and the alleged intention of the 1998 legislature to afford just a few 'civil rights' to foreign residents, see F. Parente, n 27 above, 1129, and especially fn 50, for further references.

[42] Foreigners staying in Italy for visits, business, tourism or study, for periods not exceeding three months, are not required to apply for a residence permit. Instead, they must report their presence in the country according to procedures that vary, depending on whether the country of origin applies the Schengen Agreement (Arts 1 and 2 decreto Ministero dell'Interno 26 July 2007). Foreigners complying with these procedures may lawfully stay in Italy, although they are not exempted from reciprocity, save for fundamental rights: B. Nascimbene, n 21 above, 318.

[43] On the application of reciprocity when a foreigner sets up an Italian company or buys shares in an Italian company, see: Tribunale di Verona 11 April 1995, with a note by F. Mariani, 'Condizione di reciprocità e omologazione degli atti societari' *Notariato*, 142-145 (1996); Tribunale di Napoli 12 January 1995, with a note by R. Donnini, 'Condizione di reciprocità per la costituzione di società da parte di soggetti stranieri' *Le Società*, 953-954 (1995). Foreign nationals are required to meet reciprocity in order to be appointed as directors of Italian companies: A. Busani and M. Molinari, 'Condizione di reciprocità e nomina di cittadino straniero nel consiglio di amministrazione di s.p.a.' *Le Società*, 158-171 (2011); *contra*, L.G. Radicati Di Bronzolo and A. La Mattina, 'Condizione di reciprocità e partecipazione di stranieri nel consiglio di amministrazione di s.p.a.: osservazioni critiche' *Le Società*, 642-647 (2011).

regardless of reciprocity. The Court, in the case at issue, refers to such legislation in order to uphold the validity of the contract entered into by the foreign party. In fact, the case revolves around a contract signed by an Iranian citizen holding a residence permit in 1993. At that time, non-EU citizens were allowed to buy shares in cooperatives or to run a business.[44] Above all, Art 1 legge 30 December 1986, no 943, which aimed to grant non-EU workers who were lawfully staying in Italy with a residence permit, as well as their families, equal treatment and non-discrimination with Italian workers, included the right to 'the availability of housing'.

The Court observes that the choice made by the legislature before 1998 to do without reciprocity, although only in some areas, in order to accomplish the better social inclusion of the foreigner who is lawfully staying within the national community, gives way to the opportunity to extend, by means of analogy, the area of those civil rights, whenever the *eadem ratio* occurs. This way, when it comes to cases involving lawfully staying foreigners before 1998, the Court does not completely rule out reciprocity, but it allows a reasoning by analogy.[45]

V. The Foreigner's Right to 'Personal' Ownership

Analogy is one, yet not the only, ground upon which the Court develops its reasoning. Above all, the Court, in a crucial passage, emphasizes that ownership has taken on different statuses in the

[44] Arts 9 and 10 decreto legge 30 December 1989 no 416.

[45] For harsh criticism of the Court's reasoning, see R.S. Bonini, 'Acquisti immobiliari, reciprocità e interpretazione analogica' *La nuova giurisprudenza civile commentata*, 821-827 (2013). According to the author, the Court seems to forget that under Art 14 of the Provisions on the Law in General, analogy is not allowed for 'exceptional' norms, ie rules deviating from a principle. Indeed, before the 1998 immigration law was enacted, the general rule on the foreigner's capacity was the one based on reciprocity, whereas provisions affording civil rights regardless of reciprocity were 'exceptional', and, as such, not capable of analogy. However, such criticism is not persuasive, as it has been argued that exceptional norms, by connecting principles and rules in a singular relation, can be applied even analogically in their context, in any situation ascribed to that relation: P. Perlingieri and P. Femia, *Nozioni introduttive e princípi fondamentali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2004), 18-19 and fn 22 for bibliography.

Constitution, and when it comes to buying ownership of property to be used as a family home or place of business, the Supreme Charter tends to make ownership accessible to 'everybody'. 'Personal' ownership, providing stability and safety, prevents discrimination based upon citizenship: Its purchase must not be restricted by reciprocity.

The Court's reasoning appears to be utterly interesting, as it opens up the idea of 'personal' ownership as an unassailable right of the individual, and as such, not subject to reciprocity.

It is now quite undisputed that ownership *per se* cannot be labeled as an inviolable and fundamental right, because it is designed to achieve the protection of the human *persona*. Ownership is not 'sacred' or 'inviolable': Rather, the *persona* is 'sacred' and 'inviolable'. The *persona* must be protected, not for what it 'has', but for what it 'is'. This is the modern Constitutional perspective, in which the categories of 'having' are in a subordinate, though functional, relation with the categories of 'being'.[46] And in this context, it is no coincidence that the Constitution demands that private ownership shall have a social function and be accessible to everybody.

Recently, even the traditional relation between ownership and freedom has been questioned, in order to expose the true nature of private ownership as a 'depriving' power, eventually enslaving the owner and third parties.[47] Indeed, on the one hand, 'power' was found in the origins of ownership, and power brings subjection, ie a position in which the weak party is subjected to the powerful one. The freer the owner, the less free the non-owner, so that freedom can be linked to ownership, just as much as enslavement can be linked to it. On the other hand, there are legal limits and psychological restraints making immovable property not abandonable, chaining owners to their properties. The recent boost in property taxes has

[46] For an in-depth analysis of the relation between the human personality, private enterprise and ownership, and the supremacy of 'being' over 'having', see P. Perlingieri, *La personalità umana* n 36 above, 150-155. The author stresses the shift in perspective from the nineteenth century literature, which developed the idea of ownership without boundaries, closely related to an absolute concept of freedom. In this context, property was thought to be an expression of the human personality, so that 'to be' was 'to have'.

[47] U. Mattei, *Senza proprietà non c'è libertà. Falso!* (Bari: Laterza, 2014), e-book, 25-26, 35-36, 45.

pushed many owners to get rid of their properties, but they cannot do so, either because they cannot find a buyer, they do not wish to donate, or they cannot use the legal remedy of dereliction, whose lawfulness, when it comes to immovable property, is disputed. Ultimately, being an owner does not convey being free: Indeed, private ownership obliges.

Ownership *per se* is not an inviolable right, nor does ownership imply freedom. However, different aims of ownership may, under certain circumstances, characterize the right to ownership as a fundamental right and its purchase as not being restrictable by any reciprocity clause.[48] This way, any aprioristic and dogmatic approach asserting the inviolability of ownership *per se* must give way to a functional and dynamic concept of ownership, allowing distinctions based on the purposes behind the ownership itself.

Hence, when property is purchased for business purposes by foreign individuals or companies, political orientations about foreign investments might be involved in a delicate balance between national interests and economic freedom. In this field, reciprocity may still be preserved as a means of political pressure and national promotion.[49]

Conversely, when property is purchased for use as a home, property becomes 'personal',[50] and ownership is deemed to be an inviolable right.[51] The right to a home might be inferred from

[48] *Contra* R.S. Bonini, n 45 above, 825, who points out that the reasons behind the purchase of property by the foreign party cannot be relevant in order to afford a legal capacity that otherwise, the foreign party would not have. Indeed, the foreign party may purchase 'personal' property, and decide to lease it and make profits, instead of using it as a personal home.

[49] A. Galoppini, n 8 above, 196.

[50] The concept of 'personal' property is not new in legal theory. Cf U. Mattei, n 47 above, 33-34, who believes that there is some kind of relation between ownership and needs, which has nothing to do with property accumulation. 'Personal' ownership of certain properties, which are culturally and quantitatively necessary in different contexts to live a free and dignified life, might convey a true connection with freedom and dignity, which are two dimensions of 'being' and not 'having'.

[51] The discrimination in the purchase of ownership based on citizenship breaches a public order principle, ie the principle that properties belong, in private ownership, to individuals or companies, without any discrimination based on nationality as to companies, and without any discrimination based on citizenship as to individuals: P. Rescigno, 'Gli acquisti in Italia dello straniero' n 25 above, 187, who observes that other reasons behind the non-application of reciprocity in the area of

Constitutional provisions on substantial equality (Art 3) and the social function of ownership, as well as its accessibility to everybody (Art 42).[52]

Internationally, the human right to housing has been significantly recognized by a number of charters.[53] Among these, the European

the purchases of immovable property include the chances to know foreign law and the heterogeneity of the notions of ownership within foreign jurisdictions. On the impossibility of applying reciprocity to the right to housing, see also E. Calò, n 5 above, 181-184. *Contra* P. Criscuoli, 'Acquisti immobiliari dei cittadini comunitari e degli extracomunitari' *Immobili & proprietà*, 100-108, 101 (2013), who doubts that housing is an inviolable right.

[52] Actually, the Italian Constitution does not include an explicit right to housing, although some infer it from the principle of 'substantial' equality set forth in Art 3, as housing tends to remove the obstacles that impede the full development of the human personality. The Constitutional Court grounds the recognition of the right to housing on the principle of equality: Corte Costituzionale 7 April 1988 no 404, *Giurisprudenza italiana*, 1627-1635 (1988); Corte Costituzionale 25 February 1988 no 217, *Giurisprudenza costituzionale*, 833-842 (1988). Housing is referred to as a fundamental social right by Corte Costituzionale 21 March 2007 no 94, *Giurisprudenza costituzionale*, 902-919 (2007) and Corte Costituzionale 26 March 2010 no 121, *Giurisprudenza costituzionale*, 1358-1425 (2010). On the right to housing in Italian law, see E. Bargelli, 'Abitazione (diritto alla)' *Enciclopedia del diritto* (Milano: Giuffrè, 2013), Ann VI, 1-19. The author believes the Constitutional relevance of the right to housing cannot be based on Art 47, which protects people's savings and their application towards ownership of the home. The exclusive reference to Art 47 would trigger the wrong idea, ie that the right to housing might be fulfilled only by the purchase of ownership – such idea being enforced, with questionable outcomes, by the Italian legislature after World War II under the slogan '*non tutti proletari ma tutti proprietari*' ('not all proletarians but all owners') – whereas ownership is just one, and not the only, means to fulfill the right to housing. Cf also: U. Breccia, *Il diritto all'abitazione* (Milano: Giuffrè, 1980); M.A. Ciocia, *Il diritto all'abitazione tra interessi privati e valori costituzionali* (Napoli: Edizioni Scientifiche Italiane, 2009); A. De Vita, 'Diritto alla casa in diritto comparato' *Digesto discipline privatistiche. Sezione civile* (Torino: Utet, 1990), VI, 34-69; S. Civitarese Matteucci, 'L'evoluzione della politica della casa in Italia' *Rivista trimestrale di diritto pubblico*, 163-210 (2010).

[53] The Universal Declaration of Human Rights, adopted in 1948, includes a right to housing as part of the broader right to a standard of adequate living and to security (Art 25). Two subsequently adopted treaties further develop the rights outlined in the Declaration: the International Covenant on Economic, Cultural and Social Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both of which entered into force in 1976. Especially, Art 11 ICESCR significantly states that parties 'recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and

Convention on Human Rights does not include a right to housing *per se*, although the provisions on civil and political rights, especially the right to respect for private and family life (Art 8) and the protection of property (Art 1 Protocol no 1), have been interpreted by the ECHR as leading to the development of a right to housing.[54]

On the European level, immovable property traditionally does not fall within the competence of the Union, and national housing policies are not affected by 'vertical' harmonization. However, a 'diagonal' harmonization of housing may sometimes be pursued as a consequence of: harmonization in areas falling within the competence of the Union, social policies pursued through 'soft' harmonization, and legal principles set forth by national and European courts and bodies.[55]

Significantly, in a recent decision, the ECJ held that national legislation allowing the recovery of a debt based on potentially unfair contractual terms by the extrajudicial enforcement of a charge on immovable property – including a family home – provided as security by the consumer, is not precluded, insofar as that legislation does not make it excessively difficult or impossible to protect the rights conferred on consumers by EU law, which is a matter for national courts to determine. When the consumer and his family are evicted from the accommodation forming their principal family

housing.' Several other treaties address specific aspects of the right to housing: the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Covenant on the Elimination of All Forms of Racial Discrimination (CERD). For our purposes here, Art 5 CERC states that 'States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] the right to housing.'

[54] See A. Kucs et al, 'The Right to Housing: International, Regional and National Perspectives' 64-65 *Cuadernos Constitucionales de la Cátedra Fadrique Furiò Ceriol*, 101-123, 105-111 (2008), for an analysis of ECHR case law relating to housing. The ECHR has emphasized that the loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should, in principle, be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under the Convention: Eur. Court H.R. *McCann* v *The United Kingdom*, Judgment of 13 May 2008, available at www.hudoc.echr.coe.int.

[55] E. Bargelli, n 52 above, 3-4.

home, national courts shall provide for interim measures by which unlawful mortgage enforcement proceedings may be suspended or terminated.[56]

Recognizing a right to housing does not mean the government should provide a free house to everyone. Indeed, the right shall not be interpreted narrowly: It is more than a 'roof over one's head'; rather, it encompasses 'the right to live somewhere in security, peace and dignity.'[57]

[56] Case C-34/13 *Monika Kušionová* v *SMART Capital a.s.* (European Court of Justice Third Chamber 10 September 2014), available at www.eur-lex.europa.eu. The ECJ grounds its decision on the idea that the right to accommodation is a fundamental right under EU law. The loss of a family home is not only such as to undermine consumer rights, but it also places the family of the consumer concerned in a particularly vulnerable position. In this context, the proportionality of the penalty shall be taken into serious account when enforcement of a charge is directed at immovable property used as the family home. With regard to mortgage enforcement proceedings and their compatibility with directive 93/13/EC on Unfair Terms in Consumer Contracts, see also: Case C-415/11 *Mohamed Aziz* v *Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (European Court of Justice First Chamber 14 March 2013), available at www.eur-lex.europa.eu; Case C-169/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García* v *Banco Bilbao Vizcaya Argentaria SA*. (European Court of Justice First Chamber 17 July 2014), available at www.eur-lex.europa.eu. In recent literature, see: A. Las Casas, M.R. Maugeri and S. Pagliantini, 'Cases: ECJ – Recent Trends of the ECJ on Consumer Protection: *Aziz* and *Constructora Principado*' 10(3) *European Review of Contract Law*, 444-465 (2014); K. Sein and K. Lilleholt, 'Enforcement of Security Rights in Residential Immovable Property and Consumer Protection: An Assessment of Estonian and Norwegian Law' 1(1) *Oslo Law Review*, 20-46 (2014); S.I. Sánchez, 'Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis: Aziz v. Catalunyacaixa' 51(3) *Common Market Law Review*, 955-974 (2014).

[57] For such evocative remarks, see M. Foscarinis, 'Advocating for the Human Right to Housing: Notes from the United States' 30(3) *New York University Review of Law and Social Change*, 447-481, 458-460 (2006), who quotes the Committee on Economic, Social and Cultural Rights (CESCR), the UN body responsible for monitoring and interpreting the ICESCR. The Committee has incorporated the concept of adequacy into the right to housing, and it defined the right to adequate housing to include seven components: legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. Cf also: Id, 'The Growth for a Movement for a Human Right to Housing in the United States' 20 *Harvard Human Rights Journal*, 35-40 (2007). The concept of adequacy related to housing is also stressed in the ECHR case law, in which the right to housing is seen through the concept of 'home' rather than 'property', attaching a human dimension to the right:

VI. Conclusions: A New Approach to Citizenship Theories

Once 'personal' ownership is recognized as an inviolable right, which, as such, is secured to any foreigner, regardless of reciprocity, property theory may also suggest intriguing solutions to the long-standing dispute between citizenship theories, providing a reasonable third alternative to the traditional, yet anachronistic, principles of citizenship acquisition: *ius soli* (by birth on the territory) and *ius sanguinis* (by birth to a citizen parent).

In fact, if, in the area of private ownership, an individual may gain ownership of property by continuous, peaceable, public possession for a certain period of time (the so-called acquisitive prescription), then a similar rationale might apply to established foreigners seeking citizenship: a State-dispensed, rather than a private, good, which has increasingly become a new kind of property, as it grants securities and opportunities. The acquisition of citizenship should not rely on the moment of the foreigner's entry into the country – which might even be unlawful – but on the life thereafter. Just like someone who has possessed a property without permission might acquire legal title to it under certain circumstances, a foreigner who has entered the country, with or without permission, and has resided in it peacefully and continuously, might acquire a legal title to citizenship. This way, citizenship will not be seen as an act of charity or human compassion, but as a legal title stemming from a continuous, peaceful and actual presence of the foreigner in the State's territory.

It is a new approach, emphasizing the importance of rootedness in the citizenship acquisition process and allowing those who are not eligible for citizenship, because they were not born to citizens or in the State's territory, to become citizens after establishing real and effective ties with the community and not by accidents of fortune.

A. Kucs et al, n 54 above, 111. With regard to the debate on the right to housing in the US, see: F.I. Michelman, 'The Advent of a Right to Housing: A Current Appraisal' 5(2) *Harvard Civil Rights-Civil Liberties Review*, 207-226 (1970); N. Rotunno, 'State Constitutional Social Welfare Provisions and the Right to Housing' 1 *Hofstra Law & Policy Symposium*, 111-148 (1996); K.D. Adams, 'Do We Need a Right to Housing?' 9(2) *Nevada Law Journal*, 275-324 (2008-09); C.P. Derricotte, 'Poverty and Property in the United States: A Primer on the Economic Impact of Housing Discrimination and the Importance of a U.S. Right to Housing' 40(3) *Howard Law Journal*, 689-708 (1996-97).

This new principle of citizenship acquisition, which we shall call *ius nexi*, could operate alongside *ius soli* and *ius sanguinis* to correct their inequalities, especially when a foreigner who is rooted in a country, working regularly and owning a home or a place of business, is denied the exercise of the rights connected to the *status civitatis*, eventually becoming an outcast from the community.[58]

This perspective fully complies with the protection of the *persona*, social solidarity, effective equality and integration within the community, which are pursued by Italy, the EU and international organizations.

[58] The interaction between property and citizenship, and the development of the *ius nexi* principle, have been brilliantly suggested by A. Shachar, 'Earned Citizenship: Property Lessons for Immigration Reform' 23(1) *Yale Journal of Law and the Humanities*, 110-158 (2011). For a criticism of the principle of *ius nexi*, see V.M. Muniz-Fraticelli, 'What Justice Entails' 7(2) *The Ethics Forum (Les Ateliers de l'éthique)*, 18-33 (2012). Cf also: R. Bauböck, 'Boundaries and Birthright: Bosniak's and Shachar's Critiques of Liberal Citizenship' 9(1) *Issues in Legal Scholarship*, 1-19 (2011); S. Benhabib, 'Birthright Citizenship, Immigration, and Global Poverty' 63(3) *University of Toronto Law Journal*, 496-510 (2013); P. Weil, 'From Conditional to Secured and Sovereign: The New Strategic Link Between the Citizen and the Nation-state in a Globalized World' 9(3-4) *International Journal of Constitutional Law*, 615-635 (2011); A.B. Tirres, 'Property Outliers: Non-Citizens, Property Rights and State Power' 27(1) *Georgetown Immigration Law Journal*, 77-134 (2012); J. Lim, 'Immigration, Asylum, and Citizenship: A More Holistic Approach' 101(4) *California Law Review*, 1013-1078 (2013); K. Johnson, 'Theories of Immigration Law' 46(4) *Arizona State Law Journal*, 1211-1252 (2014); E. Zoller, 'Citizenship After the Conservative Movement' 20(1) *Indiana Journal of Global Legal Studies*, 279-312 (2013).