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Comparative Legal Metrics: An Introduction

Giulio Napolitano*

The aim of this symposium is to discuss the significance of the themes raised by the volume 'Comparative Legal Metrics. Quantification of performance as a regulatory technique' edited by Mauro Bussani, Sabino Cassese and Marta Infantino.[1] The book collects fourteen essays (preceded by an introduction and closed by a concluding chapter, both authored by the editors), that were presented in a workshop organized within the framework of the 21st General Congress of the International Academy of Comparative Law (IACL), held Asunción, Paraguay, on October 2022.

According to the editors' view, the research underlying the volume originated from an empirical observation.[2] Over the last decades, the trend of measuring performances has become global and pervasive – and increasingly more so since the so-called digital revolution. As a matter of fact, many jurisdictions around the world have aspired to ground public policies and regulation on rational basis, through the collection and elaboration of a set of quantitative information and data. In this way, the quality of regulation and the level of accountability of public decision-makers can be greatly enhanced, reducing the risk of bureaucratic drifts and administrative inefficiency.

The effects of the proliferation of performance measurements across a growing number of fields – from education to health, from work to credit, from justice to consumer sector – have been widely studied by social scientists, but legal research on this phenomenon has remained minimal. One of the aims of the book is actually to prove that the quantification turn has produced fundamental changes in the ways in which the law is seen and used. In particular, the spread of social quantification has implied substantial turns in governance and regulatory techniques, whereby performance-based measures are relied on to steer behavior towards desired goals, predominantly with a carrot and stick approaches, reporting

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[1] M. Bussani, S. Cassese and M. Infantino eds, *Comparative Legal Metrics. Quantification of Performance as a Regulatory Technique* (Leiden: Brill, 2023).

[2] M. Bussani, S. Cassese and M. Infantino, 'Quantification of Performance as a Regulatory Technique: An Introduction', in Ead eds, n 1 above, 1.

obligations, quantity (rather than quality) and form (rather than substance). In this perspective, performance-based quantification qualifies as a form of regulatory intervention, that also profoundly affects how regulation is understood and applied.[3] Further – as the editors argue –, the ways in which this happens are multifarious. Performance-based measures are always adopted and applied in legal contexts and sectors that react differently to the quantification turn. The volume thus aims to provide a better understanding about which forms of quantitative measures are widespread, in which sectors and regions, have been implemented, and finally by whom and with what regulatory effects.[4]

The editors gathered high-profile scholars from Brazil, China, the European Union, Mexico, India, Japan, Poland, South Africa, Switzerland, and the United Kingdom, and asked them to reflect on the regulatory impact of performance-based quantitative tools in one of the following fields: domestic justice and education, national policy-making, trans/inter-national measurements of market-related activities. The volume is correspondingly divided into three parts. The first two parts deal with the spread of legal metrics in the management of core functions and services at the domestic level, focusing respectively on justice and education (Part I) and policy-making (Part II), while Part III analyzes how legal metric is used within and across state boundaries for the (self-)regulation of market-related activities.

More in particular, the seven contributions in Part I investigate performance-based quantitative assessments of justice and courts in Brazil,[5] Mexico,[6] India[7] and Switzerland[8] (Chapter 1-5), as well as the actual or prospective uses of legal metrics in the education systems in South Africa[9] and Poland[10] (Chapter 6-7). The four chapters in Part II address the use of performance-based tools in policy making from a variety of perspectives: Chapter 8 concerns Africa in general – and South Africa more specifically –, it examines how the digitalization of the public administration

[3] M. Bussani, S. Cassese and M. Infantino, n 2 above, 1-18; Ead, 'Quantification of Performance as a Regulatory Technique: A Comparative Appraisal', in Ead eds, n 1 above, 323-364.

[4] ibid

[5] P.R. Borges Fortes, 'Revisiting 'Justice in Numbers' in Brazil: Quantified Justice, Managerial Judges, and Numeroids as a Regulatory Technique', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 21-38.

[6] L. José Béjar, J.A. Casanovas, C.A. Villanueva, 'Performance- Based Evaluation in Mexico's Federal Administrative Justice Tribunal and the Federal Judiciary Power: A Comparison', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 39-60.

[7] M. Subin Sunder Raj and C. Basak, 'Judicial Performance Index in India: Charting a New Course', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 61-73.

[8] A. Lienhard, Performance Assessment in Courts – the Swiss Case', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 74-95.

[9] V. Farysheuskaya and P. Piraino, 'Admission Algorithms for Affirmative Action in Higher Education: The South African Experience', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 96-117.

[10] A. Jakubowski, 'Quantification and Parameterization of Legal Research: The Case of Poland', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 118-136.

is providing for new quantitative tools of governance;[11] Chapters 9 on China[12] and 10 on Japan[13] navigate through the many local uses of performance-based instruments for the management and supervision of public and private conduct; Chapter 12 on the United Kingdom reports how performance-based assessments lie at the core of the human rights review carried out by the UK's Equality and Human Rights Commission.[14] Part III analyzes how legal metric is used within and across state boundaries. Chapter 12 on Africa[15] and Chapter 13 on Europe[16] explores the potential benefits and perils of mass algorithmic profiling and of reputational feedback systems in the digital economy. Chapter 14 examines the development of hard and soft-law quantitative tools of self-measurement for channeling corporate activity within and outside national boundaries,[17] while Chapter 15 focuses on the ways in which the measurement of countries' legal institutions by international organizations have influenced policy-making and regulation in national legal systems.[18]

Cutting across boundaries of national/supra-national/transnational law and of public/private domains, the volume empirically demonstrates that performance-based measures may work as a form of regulatory intervention, and its style and effects are dependent on the sector and the context in which the turn to quantification takes place. At the same time, the volume abstains from any naive enthusiasm, openly analyzing the limits and the errors that can occur (and historically happened) in the elaboration of standards.

[11] R. Gottardo, 'Algorithmic Decision- Making and Public Sector Accountability in Africa – New Challenges for Law and Policy', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 139-179.

[12] I. Cardillo, 'Governance and Quantification of Performance in China', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 180-202.

[13] T. Inatani and M. Kinoshita, 'Use and Abuse of Quantitative Methodology for Policymaking in Japan', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 203-215.

[14] D. McGrogan, 'Measuring Human Rights Performance in the UK: Liberalism, Communitarianism, and the Equality and Human Rights Commission's 'Drunkard's Search' ', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 216-242.

[15] S. Mancuso and L. Corselli, 'Profiling in Algorithm-Based Decisions: An African Perspective', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 245-265.

[16] T. Rodríguez de las Heras Ballell, 'Trust in an 'Omnimetric Society'? Reputational Systems in Platforms as Tools for Assessing Contractual Performance and Applying Remedies', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 266-283.

[17] L. Heckendorn Urscheler, 'Performance Measurements in Compliance with Corporate Social Responsibility Obligations', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 284-304.

[18] K.E. Davis, 'The Role of International Organizations in the Production of Legal Metrics', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 305-322.

Comparative Legal Metrics - Symposium

Legal Metrics: Getting the Measure of Good Governance

Roger Brownsword*

Abstract

This article draws on my analysis of the legal landscape in Law 3.0: Rules, Regulation and Technology. Given this analysis, it is suggested that, while traditional legal thinking has no place for performance indicators, legal metrics are entirely consistent with regulatory thinking and in line with the evolution of law's governance. Having identified the leading questions concerning the use of legal metrics within a regulatory paradigm, it is suggested that we also need to consider how metrics play where, instead of relying on humans, governance is undertaken by smart technologies. Aspiring to good governance, we should debate not only how legal metrics can contribute to regulatory governance but also whether and how they might figure in the context of governance by technologies.

I. Introduction

What should we make of legal and regulatory metrics? Are they a good idea? Do they work? Do they result in improved performance? Before reading *Comparative Legal Metrics*[1] my general response to these questions would have been a cautious one. Targets and performance indicators are certainly not an unqualified good – for example, they can lead to a sub-optimal use of resources (displacing personnel, equipment, time and money from an essential to a less essential use merely in order to meet a performance target), to unintended negative effects relative to the overall regulatory objectives, and to political point scoring;[2] but, at the same time, I would not have rejected metrics as an unqualified bad thing – it might be, for example, that the metrics highlight an under-performance that really is problematic and that does need to be corrected. Moreover, in assessing metrics, I would be guided by the thought that, if we are to achieve good governance, we should recognise two things: first, we should recognise that not everything that can be counted matters; and, secondly, we should appreciate that some of the things that matter most cannot be counted. In which respects, then, does the book confirm my antecedent thoughts, in which respects does it lead me to revise these thoughts, and in which respects does it bring completely new thoughts to the table?

To be sure, there is a risk of confirmation bias here but, by and large, it seems

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[1] M. Bussani et al eds, *Comparative Legal Metrics* (Leiden: Brill, 2023).

[2] See, eg, G. Sturge, *Bad Data: How governments, politicians and the rest of us get misled by numbers* (London: The Bridge Street Press, 2022).

to me that the themes highlighted by the editors as well as by the contributors are in line with my own ex ante thinking. Moreover, even without metrics to measure it, I am sure that the editors are right in asserting that legal metrics of one kind or another are 'on the rise everywhere'.[3] However, having read the book and allowed the dust to settle, what I now see are the following three new but related things.

First, the growth of reliance on legal metrics is entirely in line with the general direction of travel in modern societies. Others have variously characterised this in broad terms as a movement towards the 'audit society'[4] and as 'governance by numbers'.[5] However, I would describe this as a movement from law's traditional governance (where law is all too clearly an imperfect human enterprise), to regulatory instrumental governance (and, concomitantly, evidence-based governance) that aspires to be fit for purpose, to be efficient and effective, and now to more technical and technological forms of governance. In short, the evolution and application of legal metrics follows the evolution of governance itself, initially, from principled and doctrinal Law 1.0 to regulatory, political, and policy-orientated Law 2.0, and now to the technological governance of Law 3.0.[6]

Secondly, I now appreciate that my *ex ante* thoughts about legal metrics, although confirmed by the book, are largely locked in a Law 2.0 regulatory paradigm. Like most regulatory techniques or approaches, legal metrics have both upsides and downsides (including unintended effects) and, given the range of our experience with metrics and targets, we have a fair idea about what those upsides and downsides are. Moreover, as we are reminded by the discontinuation of the World Bank's Doing Business report (highlighted by Kevin Davis in his contribution to the book), we cannot exclude the possibility of regulatory capture.

Thirdly, we need to think urgently about the significance for, and of, legal metrics where we have a more technological approach to governance. As we transition from a Law 2.0 regulatory paradigm to a Law 3.0 technological paradigm, we will have at our disposal not only new tools to assist those who are tasked with measuring performance and profiling persons but also the means to automate governance and to extend our reliance on technologically managed environments. Quite possibly, in a Law 3.0 paradigm, it will continue to be the case that legal metrics are everywhere but that their focus will be somewhat different: for, with a reduced reliance on humans to govern and on rules to guide the governed, the Law 3.0 metrics might be about the performance of machines rather than the performance of persons.

Because each of these points draws on a particular framing of the legal landscape of governance, we need to start with a thumbnail sketch of this framing

[3] M. Bussani et al eds, n 1 above, 326.

[4] M. Power, *The Audit Society* (Oxford: Oxford University Press, 1997).

[5] A. Supiot, *Governance by Numbers* (Oxford: Hart, 2017).

[6] See R. Brownsword, *Law, Technology and Society: Re-imagining the Regulatory Environment* (Abingdon: Routledge, 2019); Id ed, *Law 3.0: Rules, Regulation and Technology* (Abingdon: Routledge, 2020) and Id ed, *Rethinking Law, Regulation and Technology* (Cheltenham: Edward Elgar, 2022).

and then we can elaborate the three points that we have highlighted.

II. The Legal Landscape: a Thumbnail Sketch

Our thumbnail sketch depicts three (currently co-existing) governance paradigms, each with its own particular regulatory modality, and each with its own distinct take on what it is to think like a lawyer. These governance paradigms are: Law 1.0 (doctrinal coherentism), Law 2.0 (rule-based regulatory), and Law 3.0 (techno-regulatory). This sketch also registers two key moments of disruption: first, when the thought occurs that traditional legal rules and institutions might not be fit for purpose, this signalling a transition from Law 1.0 to Law 2.0; and, secondly, when the thought occurs that regulatory policies might not be best served by rules and principles but by a more technological approach to governance, this signalling a transition from Law 2.0 to Law 3.0.

1. Law 1.0

In the legal landscape where Law 1.0 is dominant, new technologies are not viewed as having any particular significance or salience. The same applies to ethics that are not already doctrinally inscribed in private law concepts or doctrines (such as 'good faith' or tests of fairness and reasonableness) or public law values (such as equality, human rights, or human dignity). And, the same applies to metrics; they are not for law and lawyers. The application of legal rules and principles to new technologies is simply doctrinal business as usual; there is no need to ask whether the rules are fit for purpose; and the thought that these technologies might be applied in ways that support or replace legal rules and principles has simply not occurred.

Where Law 1.0 is the mode of engagement, the focal question is the one that lawyers ask when confronted by a particular fact situation irrespective of whether new technologies or novel applications are involved. In common law jurisdictions, that question is how the precedents and the historic principles of the law apply to, or fit with, the technology or situation. For example, we might ask how the general principles of tort law apply to defamatory content that is hosted online or to reliance on misleading content generated by ChatGPT; or how the principles of contract law might be applied to so-called 'smart contracts' or to those platforms in which the relationship between, the roles, and the responsibilities of the parties are not clear; or we might ask how the principles of patent law apply to novel products 'invented' by an Artificial Intelligence tool or how copyright law applies to remixing; or we might ask how traditional concepts of property, assignment, and novation map onto crypto assets, and so on.[7]

[7] For just a handful of examples, see Law Commission of Ontario, 'Defamation Law in the Internet Age' (Final Report, March 2020); C. Twigg-Flesner, 'The EU's Proposals for Regulating

This is not to say that practitioners of Law 1.0 are uncritical of the state of the law. To the contrary, the 'coherence' of the body of legal doctrine is a matter of intense and enduring concern. Contradictions and inconsistencies in the body of doctrine are not to be tolerated; precedents and principles should not simply be ignored; legal doctrine should not be distorted; law should be applied in a way that respects its integrity – all of this being regarded as desirable in itself. Indeed, for many lawyers, Law 1.0 reasoning speaks to the essence of the Rule of Law (the rule of rules) and it exemplifies the virtues of 'legality'. Given this culture, there is a good deal of nervousness about stretching legal principles, or about creating ad hoc exceptions in order to accommodate a hard case, or about correcting the law where it is plainly not fair, just, or reasonable. Similarly, at times of rapid economic, social and technological disruption, the concern for doctrinal coherence can inhibit major development of the law. While critics will say that the law should move with the times, judges will tend to exercise restraint and be mindful of being accused of assuming an unauthorised legislative role. Accordingly, while the courts will give an answer to the Law 1.0 question that is put to them, they do not have either the resources or the mandate for expansive lawmaking or for setting new policies. This means that the burden of responding to questions that invite a serious overhaul of the regulatory environment moves elsewhere.[8]

2. Law 2.0

The first disruption to the legal landscape occurs when it is recognised that the challenges presented by emerging technologies to traditional legal rules and principles are significant and salient. Accordingly, the paradigmatic question in a Law 2.0 mode of engagement, the kind of question that regulatory scholars and various kinds of regulatory agencies typically ask, is whether existing rules are fit for purpose, whether the rules are effective and appropriate in serving regulatory policies, and whether perhaps new rules are required. In short, the question is whether the regulatory environment is fit for purpose. This is an exercise in setting and serving policy and the reasoning (with its focus on effectiveness) is predominantly one of instrumental rationality. In practice, the engagement with this question will be in the political arena; and, in that arena, it will be politicians

B2B Relationships on Online Platforms-Transparency, Fairness and Beyond' 7 *Journal of European Consumer and Market Law*,222 (2018); P. De Filippi and A. Wright, *Blockchain and the Law* (Harvard University Press, 2018); R. Abbott, *The Reasonable Robot* (Cambridge University Press, 2020), chapters 4 and 5; S. Al-Sharieh, 'The intellectual property road to the knowledge economy: remarks on the readiness of the UAE Copyright Act to drive AI innovation' 13 *Law, Innovation and Technology*, 141 (2021); Y. Li, 'The age of remix and copyright law reform' 12 *Law, Innovation and Technology*, 113 (2020); and D. Fox, 'Tokenised Assets in Private Law' paper given at the conference on 'Law, Technology, and Disruption' held at City University Hong Kong, 19-21 March 2021.

[8] See, further, R. Brownsword, 'Private Law, Technology, and Governance', in D. Clifford et al eds, *Data Rights and Private Law* (Oxford: Hart, 2023), chapter 2; R. Brownsword ed, 'Private Law and Technology: Beyond Fighting Fires and Fanning the Flames' (forthcoming).

who lead the debates, who make the decisions, and who sign off on the regulatory deal. Although the focus of Law 2.0's governance is primarily on the fitness of the rules, the same question can be asked about the institutions and practices of law's governance; and this is where legal metrics come onto the radar.

Although much regulatory discourse is focused on finding what works, modern scholarship in law, regulation, and technology sometimes undertakes a broader critique. In this articulation of Law 2.0, it is not simply a matter of regulation being effective and efficient in serving its purposes; those purposes and the means employed must be legitimate, and there needs to be a sustainable connection between regulatory interventions and rapidly changing technologies and their applications.[9] It follows that this invites a more complex critical appraisal of the fitness of the regulatory environment. So, the law needs to make its regulatory moves at the right time (neither too early nor too late); and, even if regulation seems 'to work', there might be questions about the acceptability of the position that has been taken up in relation to a new technology.

With regard to the acceptability of the legal position, a key question is whether the regulatory environment strikes the optimal balance between providing support for beneficial innovation and providing adequate protection against the risks of harm that might be caused by an emerging technology. Currently, this question is being debated worldwide in relation to the governance of AI. For example, while, in Brussels, the European Union is legislating a risk-managing regulatory framework that some might think unduly restricts beneficial innovation, in London, the United Kingdom government has committed to a pro-innovation approach that some might think over-exposes humans to the risks of AI.[10] Accordingly, much of the regulatory theory and practice in Law 2.0 circles, is focused on avoiding both over-regulation (and stifling innovation) and under-regulation (and exposing consumers and others to unacceptable risks). If we are to avoid discontent with law's governance, we will need to rise to the challenge of getting regulation right in an age of rapid technological innovation; and, moreover, we will find that keeping it right is a case of constant regulatory work in progress.

In this landscape of Law 2.0's governance, there is an obvious place for both legal metrics and regulatory ethics. In this context, it is for legal metrics to put some numbers on the effectiveness of regulatory interventions and the efficiency of legal and regulatory institutions and practices; and, it is for ethics to inform debates and decisions about what is socially acceptable and what unacceptable (and, more demandingly, what is legitimate and what illegitimate) in proposed regulatory deals.

[9] See, further, R. Brownsword, *Rights, Regulation and the Technological Revolution* (Oxford: Oxford University Press, 2008); R. Brownsword and M. Goodwin, *Law and the Technologies of the Twenty-First Century* (Cambridge: Cambridge University Press, 2012).

[10] See, respectively, COM(2021) 206 final, Brussels, 21.04.2021 (for the proposed Regulation on AI); Department for Science, Innovation and Technology (2023): *A pro-innovation approach to AI regulation* (CP 815).

3. Law 3.0

The second disruption to the legal landscape occurs when we begin to wonder, in a characteristically Law 3.0 manner, whether new tools and technical measures might be deployed for governance purposes. The greater the potential utility of these tools as regulatory instruments, the more salient and significant they look. Where the constitutionality of using these tools is contested, then whatever the ethics that are already implicated in public law provisions, they will be relevant; this is as in Law 1.0. However, as in Law 2.0 debates, the legislative and regulatory debates of Law 3.0 that focus on the acceptability of using these tools will draw in ethical views irrespective of whether they are inscribed in legal doctrine. Moreover, with the technology industry joining the professions in promulgating their own ethical codes, we find some foreshadowing of a tension between the interest of technologists in self-governance and the protection of the public interest through public governance.[11] In this landscape, whether we view ethics from the legal or the technological perspective, it is a salient and significant feature of governance.

Where Law 3.0 is the mode of engagement, the headline questions might be whether new technologies might be used in support of the rules relied on to serve particular regulatory policies, whether technologies might be used to assist those who are undertaking legal and regulatory functions, and whether the technologies and technical measures might actually supplant the rules and the humans who make, administer, and enforce them. In all cases, though, we are looking at technologies as potential instruments of governance rather than (as in Law 2.0) tools and applications that need to be subjected to law's governance.

At the transition stage from Law 2.0 to Law 3.0, the thought is that new tools might aid and assist legal practitioners and officials in their interpretation, application and enforcement of the rules. Governance is still a distinctly human enterprise and rules are still the principal instrument of governance. However, as Law 3.0 thinking takes hold, it begins to develop two spearheads that go beyond assisting humans with rule-based governance.

The first spearhead aims to automate rule-based governance. Those who are subjected to law's governance are directed by legal rules and it might be found that governance is assisted by technologies (such as facial recognition technologies, CCTV surveillance, DNA profiling and so on) that nudge humans towards compliance. However, the ambition is to take humans out of the governance loop by employing the full range of technologies in order to automate the detection of rule-breaking, the identification of the rule-breaker, and the administration of the penalty.

The second spearhead no longer relies on rules to direct the conduct of those who are subject to governance. Instead, governance is achieved by employing

[11] Compare B. Wagner, 'Ethics as an escape from regulation. From "ethics washing" to ethics-shopping?', in E. Bayamlioğlu et al eds, *Being Profiled: Cogitas Ergo Sum. 10 Years of 'Profiling the European Citizen'* (Amsterdam: Amsterdam University Press, 2018), 84-88.

'technological management' of the places and spaces in which the governed act.[12] The focus here is on ex ante practical prevention rather than ex post reaction to a breach of a rule. This is to be advanced by designing environments, as well as products and processes, in such a way that there is no practical possibility of acting in ways which those who govern view in a negative light. That said, while technological management in this sketch is about limiting the options that are practically available, in principle, it might also be employed in a less restrictive way to remove the cause of conflict (for example, overcoming scarcity of resources by digitizing legal materials or by using nanotechnologies).

It is not altogether clear who should respond to the questions that are on the agenda in Law 3.0, nor who should be parties to the regulatory conversation.[13] Because the technological solutions will often be developed in the private sector, there seems to be a need for a public/private partnership or some form of co-regulation where public bodies set the desired regulatory objectives but leave it to industry to develop the best technological means. However, of one thing we can be quite sure: this is that, where governance is guided by Law 3.0 thinking, technical specifications and standard-setting will move from back-stage to centre-stage. Given that Law 2.0's governance promises to bring the public into the conversation, and even if we are discontent with the performance of this promise,[14] any transition to Law 3.0 governance will need to reckon with an expectation that, at minimum, the public should be consulted.

If law's governance is to fulfil expectations of inclusive engagement and even co-creation of the regulatory framework, we should not underestimate the challenges to be faced. This is not governance business as usual.[15] When the technologists are working on taking humans out of the loops of law and regulation (as with governance by machines) or rules being replaced by technological management, this is likely to be a watershed in how governance is operationalised. At minimum, where humans interface with governance technologies rather than with other humans, this will need to be 'socially acceptable'; and, over and above social acceptability, there are likely to be deeper questions about the compatibility of such forms of governance with the community's fundamental values and with the global responsibilities of those who govern.[16] To recall again the current focus on the

[12] See R. Brownsword, 'In the Year 2061: From Law to Technological Management' 7 *Law, Innovation and Technology*, 1 (2015), and R. Brownsword ed, 'Technological Management and the Rule of Law' 8 *Law, Innovation and Technology*, 100 (2016).

[13] See, further, R. Brownsword, 'AI and Fundamental Rights: the People, the Conversations, and the Governance Challenges', in D.M. Vicente et al eds, *The Legal Challenges of the Fourth Industrial Revolution* (Cham: Springer 2023), 335.

[14] See R. Brownsword, *Technology, Humans and Discontent with Law: The Quest for Better Governance* (Abingdon: Routledge, 2024).

[15] Compare M. Findlay et al, *AI and Big Data: Disruptive Regulation* (Cheltenham: Elgar, 2023).

[16] See R. Brownsword, *Technology, Governance and Respect for the Law: Pictures at an Exhibition* (Abingdon: Routledge, 2023).

governance of AI and, in particular, the EU's insistence that all AI applications should be 'human-centric', this could be read as simply picking up a continuing desire for the human touch, or it could speak to the community's particular understanding of human rights or human dignity, or it could go even deeper to demand precaution lest AI should become an existential threat.[17]

In short, Law 3.0 presents a very different legal landscape in which we can contemplate a wide spectrum of regulatory deployment – with technologies being deployed both in support of rules and in place of rules, to assist human decision-makers and to replace human decision-makers, to interface with both regulatees and with regulators, to support legal officials and to supplant them, and to supervise both regulatees and legal officials, and so on – as a result of which, in various ways, the needle shifts from governance by rules to governance by machines and technological management. The questions that now cry out for attention are: what role do legal metrics play in Law 3.0's governance, are legal metrics transformed, are they simply absorbed into an expert technical discourse or, with humans no longer performing rule-related governance tasks, are legal metrics redundant?

III. Metrics and the Evolution of Law's Governance

In his commentary on the 'Justice in Numbers' project in Brazil, Pedro Rubim Borges Fortes reminds readers about the traditional picture of adjudication. This is a 'romantic' picture of:

> A magistrate alone in his cabinet, examining the evidence of the case and consulting his legal library to prepare his opinion on a judicial procedure, based on his careful analysis of the facts and reflections on the merit of his judgment….[18]

But those days are gone: nowadays, the actuality – an actuality shaped by legal metrics – is somewhat different:

> Like clothes produced and ready for use…, judges now prepare templates of opinions for different sorts of cases and significant parts of these templates are copied and pasted into the sentences produced for different judicial processes.[19]

Justice, today, is in the nature of a production line, with judges applying a

[17] On the depth of human interests, see R. Brownsword, 'Migrants, State Responsibilities, and Human Dignity' 34 *Ratio Juris*, 6 (2021) and Id, 'Informational Wrongs and Our Deepest Interests', in M. Borghi and R. Brownsword eds, *Law, Regulation and Governance in the Information Society* (Abingdon: Routledge, 2023), 199-224.

[18] M. Bussani et al eds, n 1 above, 32.

[19] ibid

'managerial rationality' to their oversight of, and participation in, the process of keeping the cases moving through the courts. Thus:

> The managerial effort of the judiciary branch to deal with a huge volume of active judicial cases requires a quantified justice system, efficient performance of managerial functions, and legal indicators as technological tools for governance of the judiciary and regulation of judicial behaviour. Continuous challenges involve the effectiveness of law enforcement, high costs of adjudication, and qualitative measurement of judicial performance.[20]

So much for the changing picture of law's governance in Brazil; but, with legal metrics everywhere, we can expect to hear similar reports from other parts of the world. What is more, the reports that we might hear about the shift from traditional non-metric adjudication to experiments with ADR and metrics, and then to ODR and algorithmic measures is entirely in line with the bigger picture of the evolution of law's governance.

In a Law 1.0 context, law has no use for metrics. However, once our thinking becomes more regulatory and instrumental as is the nature of Law 2.0, the overriding concern is to enact rules that work relative to the specified regulatory policies and, concomitantly, we want institutions that are fit for purpose. By the 1970s, there was already a big literature highlighting the delays associated with court-based processes and uncovering an iceberg of unmet legal need. At worst, justice was being denied; and, at best, it was being delayed. This was not good enough and metrics offered one way of determining the degree of under-performance in the justice system.

Fast-forwarding to the present century, a Law 3.0 mentality invites the thought that the tools that are now available might be deployed in ways that might improve performance, rendering practice and systems more fit for purpose and fairer. So, for example, writing about university admissions in South Africa, Viyaleta Farysheuskaya and Patrizio Piraino anticipate that one of the benefits of machine learning tools might be to enable a more nuanced approach to be developed and, with that, a more effective levelling of the playing field;[21] and, with reference to the justice system, Manjeri Subin Sunder Raj and Chiradeep Basak find reasons to be hopeful about technological solutions. Thus:

> Technological advancements have been nothing short of a boon, and the impact that they have had on the justice delivery mechanisms in India is commendable. The use of ICT, automation and various electronic methods, which help speedy, effective and efficient delivery of justice, could be another

[20] M. Bussani et al eds, n 1 above, 37-38.
[21] ibid 117.

way of ensuring that judges perform impeccably.[22]

But, of course, the purpose of the eBay model of dispute resolution or other strategies spearheaded in Law 3.0 is not so much to help judges to improve their performance but to automate cases in a way that takes human judges out of the loop. If governance dispenses with human functionaries and officials, does it also dispense with legal metrics? This is a matter to which we will return.

IV. Metrics and Law 2.0: Questions of Effectiveness, Acceptability, and Legitimacy

Law 2.0 is led by politicians and shaped by political institutions. Politicians, responding to the discontent of their electorates, promise improvements. However, there are few votes in vague promises; what the electorate wants is a quantifiable improvement. But, without metrics, how do we know whether crime has been reduced, whether waiting lists for hospital treatment have been cut, whether the economy is growing, whether carbon emissions have been reduced, and so on? So, in this regulatory world of Law 2.0, metrics there must be. We want to know not only whether regulation is working but whether it is working in the way promised by the politicians.

Importantly, though, we also want regulatory interventions to be acceptable and legitimate. But, what does this mean and can legal metrics help us know whether regulation is acceptable and legitimate – or, indeed, measure the level of acceptability and legitimacy that has been achieved?

If we test the acceptability of law's governance by reference to the level of public content or discontent, and then focus regulatory interventions on the markers for discontent, we might employ metrics to measure success in moving the needle relative to these markers. For example, if there is discontent with the criminal justice system because there are too many crimes, too few prosecutions, and too few convictions, then a regulatory response will be judged successful where it results in fewer crimes, more prosecutions and more convictions. However, if the 'improved performance' is the result of changes in the way that crimes are recorded and if the increase in prosecutions and convictions involves an increase in false positives, then this might be 'acceptable' but it is hardly 'legitimate'.

So, the familiar reservation that legal metrics might focus too much on improved performance that is apparent rather than real leads to the thought that what really matters is the legitimacy of governance. However, as David McGrogan argues in his insightful analysis of the work of the UK Equality and Human Rights Commission (EHRC), where there is pressure to quantify performance but where the legitimacy of governance is difficult to quantify, there is a risk that a governing body might

[22] ibid 73.

be distracted 'from its core functions by examining only what is amenable to measurement.'[23] In the case of the EHRC, this means that instead of staying focused on the liberal mandate to correct individual cases of unfair and unequal treatment, the Commission has become 'chiefly concerned with the communitarian achievement of substantive equality of outcomes between groups'.[24] If this change of focus from a liberal to a communitarian reading of equality were the result of a public consultation and debate, that might be one thing; but, to the extent that it is the product of the pressure to quantify improved performance in conjunction with the availability of data, then this is, as McGrogan rightly says, a 'cause for further reflection'.[25] Indeed, on reflection, my ex ante view about what can and cannot be counted and what does and does not matter should be revised to recognise explicitly that, where there is pressure to count, then what is counted will be what can be counted irrespective of whether this is what really matters.

One take on what really matters is that the use of legal metrics must always respect constitutional limits (which, of course, may vary from one legal system to another). This is a point that runs through Andreas Lienhard's chapter on assessment of judicial performance in Switzerland. As Lienhard emphasises, his view is not that assessment is categorically prohibited but, rather, that the use of legal metrics 'should be organised in a fair and balanced manner in accordance with the various principles of constitutional law'.[26] Elsewhere, Raenette Gottardo draws attention to potential constitutional constraints on 'black-box' metrics[27] and Salvatore Mancuso and Livio Corselli note that the High Court of Kenya recently ruled that the National Integrated Identity Management System (using biometrics and surveillance) was unconstitutional and should not be implemented until an appropriate regulatory framework was put in place.[28]

Beyond these particular constitutional provisions, we might revisit the EU's insistence that applications of AI (including algorithmic governance) should be human-centric. Like human dignity, human-centricity might attract a plurality of understandings and fail to offer a non-contested benchmark for legitimacy. For example, our first thoughts might be that, if limited to human-centric applications, AI would not kill, injure, or otherwise harm humans; AI would not degrade, or de-centre humans; AI would align with human purposes and values; and, humans would remain in control and have the final word on AI applications. Nevertheless, if we concentrate on the deepest interests of humans, we can translate this into three imperatives for good governance. Namely: first, to protect the global commons, respecting the planetary boundaries and its resources lest human existence on

[23] M. Bussani et al eds, n 1 above, 241.
[24] ibid
[25] ibid
[26] ibid 85.
[27] ibid 148. Compare, F. Pasquale, *The Black Box Society* (Cambridge, Mass: Harvard University Press, 2016).
[28] M. Bussani et al eds, n 1 above, 261.

Earth is no longer sustainable;[29] secondly, to respect the conditions for peaceful co-existence, both between humans in a particular community and between communities; and, thirdly, to protect and respect the conditions that support human agency (as self-directed purposive action) and autonomy (as agency that operates with a prudential awareness of one's own longer term critical interests and with a sensitivity to the legitimate interests of other human agents).[30]

Ideally, humans who intend to colonise Earth would sign up to these imperatives before they have begun the process of forming their own communities and before they have invested in their own interests. However, the challenge now is much more difficult because, at all levels, too many humans have invested in current arrangements. Even so, we can find echoes of these imperatives in several of the 17 UN Sustainable Development Goals[31] – for example in Goals 13-16 (concerning, respectively, climate action, life below water, life on land, and peace, justice, and strong institutions). However, while UN support for these goals is of great practical importance, the point of principle is that it would be simply incoherent for any human to reject the imperatives. For instance, if any human were to propose that it should be permissible to deplete the global planetary resources at will and to undermine the possibility of communities forming around their own projects and developing in their own way, then this should be rejected as being so unreasonable that no reasonable human could hold such a view.

Of course, even if we sign up to these imperatives, their application to concrete cases, such as the use of legal metrics, will not always be straightforward. In some cases, the metrics that we have do seem to be designed to serve respect for the planetary boundaries as well as human agency (under the umbrella of human rights). However, if we think that metrics are being employed in ways that undermine the conditions for agency and autonomy, then we should reject such use as illegitimate even if the metrics are accepted locally (here we should pay attention to Ivan Cardillo's commentary on metrics in China and, particularly, as articulated by the social credit system).

V. Metrics and Law 3.0

Introducing her chapter on algorithmic decision-making and accountability in Africa, Raenette Gottardo sets the context in the following way:

> 'We are living in a world of rapid and dynamic change driven by accelerations in technological evolution with which we struggle to keep pace.

[29] Famously, see J. Rockström et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' 14 *Ecology and Society*,32 (2009).

[30] See, further, R. Brownsword, 'Informational Wrongs and Our Deepest Interests', in M. Borghi and R. Brownsword eds, n 17 above, 199.

[31] https://sdgs.un.org/goals.

> Law, likewise, is grappling with the rapid evolution in crafting rule of law, human rights and accountability frameworks that must shift constantly in tandem with the development of algorithms, machine learning systems and, latterly, foundation models that are turbocharging artificial intelligence'.[32]

In an ideal-typical Law 2.0 paradigm, the rapid evolution of new technologies is recognised as a major challenge but it is largely perceived as a challenge that concerns sustainable regulatory frameworks for the tools and applications that are being employed, so to speak, 'out there' in the worlds of transport, employment, health, leisure, science and innovation, and so on. From this perspective, legal metrics are a technique for measuring the performance of regulatory initiatives when the backcloth is constantly changing. With Law 3.0, though, we recognise that these tools are potentially ones to be applied for regulatory and governance purposes. Whereas in Law 2.0, legal metrics are a technique to be applied in support of an imperfect rule-based and human regulatory enterprise, in Law 3.0, metrics operate in a world of governance by technology where it is the performance of the machines that is focal. Quite how this new world of law 3.0 looks is hard to say. However, here are a couple of reflections prompted by the book.

One thought is that governance does not always evolve smoothly from Law 1.0 to Law 2.0 and then to Law 3.0. For example, there might be an attachment to Law 1.0 values that creates some resistance to the regulatory approach of Law 2.0 (for example, an attachment to personal responsibility, intent, and fault that resists regulatory regimes of strict or no-fault liability); and, when Law 3.0 shows its true technological colours, there might be resistance to the downgrading of rules and humans in the governance enterprise – quite simply, there will be pressure to keep humans in the loop and to do so in a meaningful way. In this context, the chapter by Tatsuhiko Inatani and Masahiko Kinoshita makes for interesting reading. Evidently, for many years, policymakers in Japan largely eschewed metrics in making or correcting legal measures; but, with the recent establishment of the Japanese Digital Agency, they are now taking a huge stride into the world of Law 3.0. Acting on one if its guiding principles – the digital completion and automation principle – the Agency has taken a hard look at statutes that

> 'obligate human activities where humans can be replaced by robots, AI, or other emerging technologies (eg, tasks including inspection, surveillance, and routine maintenance) …',

this resulting in the Agency recommending changes to be made to 'over 10,000 statutes and numerous regulatory rules within 2 years'.[33] If humans are to be taken out of safety inspection and the like, their performance is no longer of concern; what now matters is the performance of the technologies relied on and,

[32] M. Bussani et al eds, n 1 above, 139-140.
[33] ibid 212.

if metrics has a role to play, it must be in relation to the machines.

Another thought concerns the way in which concepts that we understand in a certain way in the context of Law 1.0 governance and still largely retain in Law 2.0 governance, are given a technological spin in Law 3.0 settings. These are concepts such as 'compliance', 'justice', 'explanation', 'autonomy', and particularly strikingly 'trust'.[34] Whereas, in human relationships, trust is paradigmatically a moral concept (and, in a secondary sense, a prudential judgment), in technological contexts humans who 'trust' technology simply signal that they are comfortable relying on it. Complementing this line of thinking, Teresa Rodriguez de las Heras Ballell brings legal metrics and quantification onto the radar of trust. Quite simply, we have difficulty in judging whether we can trust another human because the information ecosystem is toxic. Metrics and the tyranny of quantification take over:

> In an omnimetric society, the perception of credibility is associated with criteria of popularity, virality and relevance. Thus, the veracity of information is relegated if it is not supported, amplified and reinforced by indices of popularity and relevance. The perverse effect of this dominance of quantification is that popularity has come to replace veracity.[35]

Joining the dots here bears further reflection. If we can trust the metrics; and if we can trust the machines; then, in a world of technological governance where risk is technologically managed, our human-centric concept of trust and trustworthiness as moral integrity seems no longer to be relevant. Granted, we might still declare our trust in the human technicians who design and maintain the machines but this is rather different to moral trust that develops through regular interaction with fellow humans. While the EU might succeed in creating an eco-system of trust for the use of AI, or some might place their trust in the distributed organisation of the blockchain,[36] trust is not what it used to be.[37]

VI. Conclusion

According to Kevin Davis, legal metrics should be treated not only as a mode of governance but as 'technologies of governance'.[38] Where legal metrics are deployed in a context of Law 2.0 governance, I agree with Davis' summary

[34] See, further, R. Brownsword, n 14 and 16 above: A. Fabris, 'Can We Trust Machines? The Role of Trust in Technological Environments', in Id ed, *Trust* (Cham: Springer, 2020), 123-135; and J. Rochel, 'Error 404: looking for trust in international law on digital technologies' 15 *Law Innovation and Technology*, 148 (2023).

[35] M. Bussani et al eds, n 1 above, 275-276.

[36] See, P. De Filippi and A. Wright, n 7 above.

[37] Compare C. Kletzer, 'Law, Disintermediation and the Future of Trust' in L.A. DiMatteo et al eds, *The Cambridge Handbook of Lawyering in the Digital Age* (Cambridge: Cambridge University Press, 2021), 312.

[38] M. Bussani et al eds, n 1 above, 310.

assessment of such technologies of governance, namely:

> While it seems clear that legal metrics can influence legal reform and the allocation of resources, there is no guarantee those influences will be positive. Metrics that help to improve the law and allocate resources efficiently will have a positive impact. Metrics that prompt misguided reforms and misallocated resources can be enormously detrimental, to both the people who choose to rely on metrics and society as a whole.[39]

Hence, the mixed reviews of legal metrics that we find in the collection. However, this is not the full story. Given the direction of travel, not simply to more technologies of governance but to an embrace of governance by technology, governance loses its human-centric anchoring points. Humans, who are no longer centre stage, are progressively taken out of the loops of governance; and, reliance on direction by rules is replaced by technological management of places and spaces, products, and processes. Already, as Heckendorn Urscheler remarks, the EU's recent regulatory push towards reporting on sustainability is 'of an increasingly technical nature… (which can pose issues) when it comes to the legitimacy of the regulation and the oversight of the actual regulator';[40] and, one of the issues where governance becomes more technical is precisely what use we might now have for legal metrics.

Arguably, in our Law 3.0 futures, it will be the performance of the machines, not the performance of humans, that matters. To be sure, a specialist cadre of humans will continue to be very much engaged by the technical specifications of the machines and, no doubt, there will be a drive for improved performance. However, this is not legal metrics as we have known them in a Law 2.0 context; and it is not governance of a kind that gave rise to the perceived need for metrics.

In their concluding remarks, the editors rightly suggest that we need to understand more about legal metrics: thus,

> 'We need to understand more about which forms of quantitative measures are widespread, in which sectors and regions, made by whom and producing what regulatory effects'.[41]

They also suggest that we

> 'need to understand more about the existing and emerging[42] legal rules that may apply to [quantitative] measures, and the extent to which they affect the contents, style and impact of social quantification' (ibid).

[39] M. Bussani et al eds, n 1 above.
[40] ibid 303.
[41] ibid 364.
[42] J. Ellul, *The Technological Society* (New York: Vintage Books, 1964), vi.

If the book demonstrates one thing, it is that this kind of 'research is both urgent and topical' (ibid). No one would gainsay any of that. However, my dominant ex post thought is that we know quite a lot about legal metrics in a Law 2.0 regulatory context and we also know quite a lot about Law 1.0-inspired resistance to metrics, not least amongst academic lawyers who push back against bibliometrics for the assessment of the quality of their research (compare Andrzej Jakubowski's informative report on recent experience in Poland). No doubt, there is more to know but my hunch is that more research of this kind will show diminishing returns in enhancing our understanding. Rather than focus on legal metrics in Law 2.0 contexts, I suggest that we need to understand what is coming at us in Law 3.0 contexts where metrics are, indeed, tools of governance but where governance is no longer a human enterprise.

Finally, I return to my opening remarks about what really counts for the purposes of good governance. Having struggled to find regulatory techniques that work well enough; in future, we might have technical mechanisms that work too well. In this context, we should recall Robert Merton's timeless warning in his Foreword to Jacques Ellul's *The Technological Society* – namely, that we should treat with caution those civilisations and technocrats that are 'committed to the quest for continually improved means to carelessly examined ends'. In short, legal metrics and technique are not everything; good governance must also be legitimate.

Legal Metrics Extracted from Court Decisions. A Focus on Personal Injury Compensation

Christophe Quézel-Ambrunaz* and Vincent Rivollier**

Abstract

This article explores the extraction of legal metrics from court decisions, with a focus on personal injury compensation in France. It begins by discussing the challenges of accessing and structuring data from judicial decisions, highlighting legal and non-legal barriers. Despite recent legislative efforts to open up access to judicial decisions as open data, significant obstacles remain in the extraction and processing of relevant information. The article delves into the specific case of personal injury compensation, where empirical and quantitative approaches have been widely utilised due to the absence of official guidelines and the diverse nature of compensation methods. It also discusses the failure of the Datajust project, which aimed to create a tool for modeling judges' decisions on personal injury compensation but was ultimately abandoned due to technical and regulatory challenges. Looking ahead, the article discusses prospects for the future of legal metrics, including ongoing government initiatives to improve access to judicial data and harness artificial intelligence for case orientation. It also highlights the potential of reforms in civil information systems, such as the Portalis project, to provide new insights and standardise the structure of court decisions.

I. Access to Data Derived from Judicial Decisions

The book at the core of this symposium deals with 'legal metrics' in a variety of different settings. In what follows, we will complement the analysis offered in the volume with a study of the potential benefits and actual problems arising out of extracting quantitative data from judicial decisions, using personal injury compensation in France as a case study.

In order to use data derived from judicial decisions, the first step is to gain access to these decisions, and then to extract sufficiently structured data from them.[1] In France, judicial decisions are made in the name of the French people. Strictly speaking, there is no copyright on to their content. Any interested party can request a copy of a judgment from the court registry. In principle, there is nothing to prevent judicial decisions from being freely accessible in France. In practice, however, open data on judicial decisions has not been the norm,[2] and to date, such access remains

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[1] I. Sayn and V. Rivollier eds, *Justice et numérique, Quels rapports?* (Chambéry: Les cahiers de jurimétrie, Presses de l'Université Savoie Mont Blanc, 2024).

[2] A. Dunes, 'La non-publication des décisions de justice' *Revue internationale de droit comparé*,

partial.[3] There are both legal and non-legal reasons for this.

From a legal point of view, data protection now prevents information allowing the identification of parties from being freely accessible. In the past, reproductions of judgments in law journals or in computer databases have always omitted data such as addresses, but names were present and indeed used to identify landmark judgments. Now, pseudonymisation and redaction measures are carried out directly by a service of the Court of Cassation, removing names, first names, addresses, dates of birth, and dates of death.

From a non-legal perspective, the production of judicial decisions was not designed for the creation of databases.[4] There is heterogeneity in practices, both in the software used for drafting and in the conditions for storing decisions. As a result, no one, not even the Ministry of Justice, has access to all the decisions handed down in France. Thus, the computerisation of courts and tribunals does not automatically lead to open access to judicial decisions.[5]

Another element of complexity must be added: in France, two orders of jurisdiction coexist, the administrative order and the judicial order. These two orders, completely independent and separate, have different practices regarding the digitisation of their practices and the dissemination of their decisions. This article will focus on the judicial order, as it undoubtedly represents the largest pool of data to be exploited. In fact, every year the number of judicial decisions exceeds the number of administrative decisions. Furthermore, they are more diverse, both in terms of their subject matter and the data they contain. In the administrative order, a large part of the litigation concerns appeals against administrative decisions, resulting in a decision to annul or not to annul an administrative act. Therefore, data exploitation would essentially be Boolean for the administrative order, whereas more quantitative approaches would be possible in the judicial order.

It was a political will, driven in particular by legal publishers and newcomers to the legal access market, that determined the opening up of judicial decisions as open data.[6] These are public data that must be open by default, according to the provisions of the Digital Republic Act of 2016.[7] Given the sensitive nature of

757 (1986).

[3] E. Serverin, 'Plaidoyer pour l'exhaustivité des bases de données des décisions du fond (à propos de l'ouverture à la recherche de la base JuriCa)' *Recueil Dalloz*, 2882 (2009); Y. Meneceur, 'Open data des décisions de justice. Pour une distinction affirmée entre les régimes de publicité et de publication' 37 *La Semaine Juridique Édition Entreprise et affaires*, 31 (2019).

[4] A.-J. Arnaud, 'Le droit, un ensemble peu convivial' 11-12 *Droit et société*, 79 (1989).

[5] C. Bordere, 'Que reste-t-il de la première jurimétrie?' *Jurimetrics. Journal of the Measurement of Legal Phenomenon*, 27 (2022).

[6] G. Deroubaix, 'L'édition juridique et la diffusion du droit. La problématique particulière de la diffusion de la jurisprudence' *La Semaine Juridique Édition générale*, supplément au n 9, 92, 93 (2017).

[7] I. Sayn, 'L'accès aux documents issus des activités des autorités publiques dans le monde du droit et de la justice', in Id and V. Rivollier eds, n 1 above, 21; L. Cadiet ed, 'L'open data des décisions de justice - Mission d'étude et de préfiguration sur l'ouverture au public des décisions

the data contained in judicial decision, a precise framework was needed. This was provided by statute 23 March 2019 no 2019-222, and by decree 29 June 2020 no 2020-797, and decree 30 September 2021 no 2021-1276. A decree of 28 April 2021 provides the schedule for the gradual online publication of decisions. This schedule has generally been adhered to: at the time of writing this article, amongst the judicial decisions, only decisions rendered by the Court of Cassation, and those rendered by civil courts of appeal, as well as decisions of some judicial courts in civil matters, are available online. By the end of 2025, decisions in criminal matters, and all decisions of the judicial courts, should be added. The pseudonymised data are accessible either through an interface with a search engine for the general public or through an API that allows third-party applications to access the decisions.

However, obtaining decisions is only the first step; it is also necessary to know how to process them. Undoubtedly, legal science today is at a rare moment of methodological transition. It is possible to hypothesise that legal doctrine takes as its main object of study the sources it which it has access. Looking back, from the perspective of the French jurist, from the rediscovery of Roman law to the Napoleonic codification, the available material was essentially the *Corpus Juris Civilis* and the glosses made on it: it was the age of pandectism. In the 19th century, the Civil Code adopted in 1804 was the main object of study: it was the age of exegesis. The 20th century saw the dissemination, notably through the creation of the *Revue Trimestrielle de droit civil*, of the case law of the Court of Cassation: the commentary on rulings then were prevalent. In the 21st century, the mass of decisions of first instance is now available for doctrine; these decisions show the living law in its ecosystem.[8] The tools and methods are still to be perfected, but it can be wagered that this century will be that of the analysis of the mass of decisions.

This availability of litigation should not obscure the fact that a large part of compensations, particularly in cases of personal injury cases, results from transactions that are not freely available. Figures are uncertain and difficult to obtain, but it is said that 90% to 95% of personal injury cases end in a transaction. However, this would mainly involve small claims that, so that significant damages would often be decided by the judge. In fact, in the case of traffic accidents, insurers are obliged to make a statistical file available to the public, including transactions.[9] They only fulfil this obligation minimally, and the file is notoriously insufficient. Moreover, it is very difficult to exploit for statistics or legal analysis.

Returning to the issue of decisions, once they are available to researchers or

de justice', *Rapport à Mme la garde des Sceaux*, 75 (November 2017).

[8] M.-A. Frison-Roche and S. Bories, 'La jurisprudence massive' *Recueil Dalloz*, 287-290 (1993); F. Rouvière, '*Jus ex machina*: la normativité de l'intelligence artificielle' *Revue trimestrielle de droit civil*, 217-219 (2019).

[9] Loi 5 July 1985 no 85-677 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation, *Journal Officiel de la République Française* (6 July 1985).

the public, the first question to be asked is what can be done with them.[10] The primary purpose of a judicial decision is not to be an object of knowledge but rather a legal instrument intended to produce legal effects. Nevertheless, the growing importance of case law as a source of law has led to a reconsideration of its status: a judicial decision is of interest not only to the parties involved, but also to researchers or litigants, since it contains, at least potentially, a norm. It is therefore a matter of identifying and retrieving it. The interesting data then becomes what has been called the 'titling' of the decision: the identification of the jurisdiction, the chamber, the date, the subject, the key words, and possibly, through coding, certain legal concepts that have been retained or not.

This was the focus of what could be called the 'first jurimetrics'.[11] Given with the complexity of law, the challenge – which is still relevant today – was to preserve its comprehensibility. The primary task was to create files of decisions and to index them. Access to relevant decisions was an important issue, so a search system was needed. However, the trend soon moved towards extracting data from trial courts, especially appellate courts, in order to produce statistics.

In this initial phase, the university initiatives were quickly superseded by private databases – the most prominent being *Jurisdata*. For technical and methodological reasons, abstracts took precedence over full texts. Although *Legifrance*[12] popularized access to the full text, it was initially only for decisions of the Court of Cassation and a few appellate court decisions. The larger a full-text search engine traverses a significant collection of data, the more efficient it needs to be to rank results in a relevant order.

Legal publishers and legaltech companies have significantly worked to make search results more relevant and easier to navigate.[13] They have regularly improved their search engines. In addition, many have developed statistical databases in various areas of law to provide numerical information on certain damages or compensation, or even to estimate the probability of obtaining certain amounts in certain jurisdictions.[14] This second 'jurimetrics', or second generation jurimetrics, was probably more the work of private actors selling specific services to users.

The first name given to these services was '*justice prédictive*'; probably a poor translation of the English 'predictive justice'. A better French translation would have been '*justice prévisible*'. A certain anxiety gripped the legal professional,[15]

[10] I. Sayn, 'Des modes algorithmiques d'analyse des décisions de justice, pour quoi faire?' 5 *Management & Datascience* (2021), available at https://tinyurl.com/3kx83jkm (last visited 30 September 2024).

[11] C. Bordere, n 5 above.

[12] I. Sayn, 'L'accès aux documents' n 7 above.

[13] ibid

[14] G. Zambrano, 'Précédents et prédictions jurisprudentielles à l'ère des gid data: parier sur le résultat (probable) d'un procès', 6 (2015) available at https://tinyurl.com/yc44xt7w (last visited 30 September 2024).

[15] N. Roret and G. Accomando, 'Avocats et magistrats en 2050: quelle justice demain?' 2 *Revue pratique de la prospective et de l'innovation*, 5-6 (2021).

repelled by the fear or fantasy of a 'robot judge' figure, replacing judicial debate.[16] According to a recommendation from the National Bar Council, the term 'jurimetrics' should be preferred. This semantic shift is partly questionable. Indeed, it mainly concerns the use of natural language processing algorithms,[17] statistical analysis, and probability calculations. It is certainly about jurimetrics. However, if one refers to the definition of jurimetrics adopted when was created Jurimetrics, Journal of the Measurement of Legal Phenomena, jurimetrics is much broader.[18] The quantification of legislative production, linguistic research with a quantitative aspect on judicial decisions or laws, metric analysis of the quality of the law, and many other elements, undoubtedly belong to jurimetrics, but not in the restricted sense given by the National Bar Council,[19] replacing '*justice prédictive*'.[20] There is a tension here between two ways of integrating mathematical analysis into law: the one hand, the simple search for knowledge of existing law;[21] on the other hand, the search for a transformation of the production and implementation of law.[22] Legal metrics can thus be directed either towards the past or towards the future.

The volume of judicial decisions is considerable: according to the Ministry of Justice figures,[23] in 2022, 1,872,458 decisions will be rendered in civil and commercial matters (excluding criminal matters), and 281,405 cases will be settled by administrative courts. Focusing on civil matters and new cases in 2022, the figures are as follows: 15,479 decisions by the Court of Cassation. Therefore, it is reasonable to assume that a researcher or practitioner focusing on a particular type of litigation, which represents a small percentage of the total litigation, has the possibility of becoming aware of all the decisions of the Court of Cassation in their field. For appellate courts, there were 196,261 decisions. Even in a limited

[16] B. Barraud, 'Le droit en datas: comment l'intelligence artificielle redessine le monde juridique. Partie II: Les nouvelles technologies juridiques ou l'intelligence artificielle au service du droit' *Revue Lamy droit de l'immatériel*, 44-50 (décembre 2019); J.-H. Stahl, 'Le juge, le robot et la boule de cristal' 1 *Droit administratif* (août 2019), 1; C. Pavillon, 'Justice alternative et numérique: des expériences mitigées aux Pays-Bas' *La Semaine Juridique Édition générale*, 51-55 (17 décembre 2019); C. Byk, 'L'humain prédit par le droit: un chemin sinueux entre illusion et nécessité' 3 *Revue de la Recherche Juridique*, 995-1001, (2018); A. Coletta, '*La prédiction judiciaire par les algorithmes*' (Thèse de doctorat Sciences Juridiques, Université De Nîmes, 2021).

[17] F. Muhlenbach, 'Les techniques d'intelligence artificielle applicables au domaine juridique', in I. Sayn and V. Rivollier eds, n 1 above, 37.

[18] C. Quézel-Ambrunaz and V. Rivollier, 'For a reasoned study of jurimetics' 7 *Jurimetrics. Journal of the Measurement of Legal Phenomenon* (2022).

[19] Groupe de travail Legaltech, Conseil national des barreaux, *Legaltechs du domaine de la jurimétrie, préconisations d'actions*, Report 9 octobre 2020, 9.

[20] C. Quézel-Ambrunaz, 'À la recherche d'une définition de la jurimétrie' 15 *Jurimetrics. Journal of the Measurement of Legal Phenomenon* (2022).

[21] F. Colonna d'Istria, 'La possibilité d'une objectivité interne dans la connaissance du droit' 2 *Revue interdisciplinaire d'études juridiques*, 109-130 (2007).

[22] A. Supiot, '*La Gouvernance par les nombres*' (Cours au Collège de France, Fayard, collection Pluriel, 2020); S. Deakin, 'Droit et statistique: représentation mathématique des lois; méthodologie de l'analyse empirique du droit' (2019), available at https://tinyurl.com/2dftzvsf (last visited 30 September 2024).

[23] https://tinyurl.com/ypknz7e8 (last visited 30 September 2024).

field, it is unrealistic for one person to read all decisions in their field of expertise, but the analysis is still within the reach of well-structured teams. For judicial tribunals, there were 1,452,693 decisions. This mass of decisions can only be exploited with the use of artificial intelligence.[24]

One application of artificial intelligence is indeed to extract data from the mass of these decisions, or even to exploit it. This is not the only possible application: an actor uses artificial intelligence with neural networks to simulate the judge's reasoning and indicate the probabilities of success or failure of a claim based on the parameters of that claim. Returning to the use of artificial intelligence to extract and exploit decision data, several initiatives have been launched. For example, legal publishers offer, probabilities of success for certain claims or averages of amounts that can be obtained in court, depending on to the jurisdiction of the appellate court, based on the analysis of judicial decisions. These aggregated data provide plausible orders of magnitude, but they are not verifiable – they do not allow for the comparison of each judicial decision with the data extracted from it.

Indeed, extracting data from judicial decisions proves to be a perilous exercise.

II. The Difficulties of Extracting Legal Metrics from Judicial Decisions

Judicial decisions do not constitute a structured dataset that can be processed directly.[25] They are merely the outcome of a judicial process, offering only a brief, imperfect, and distorted glimpse of it.

Resolving a dispute often means accepting either the plaintiff's or the defendant's position. However, even if they have submitted pages of conclusions or pleaded at the hearing, which is increasingly rare, the judicial decision often only reflects the claims of the parties – what they want from the judge – rather than their arguments, which can have significant informative value. Stylistic clauses are often used to prevent the decisions from being censured by the Court of Cassation, but they do not provide any insight into how the court reached its decision.

Furthermore, decisions inevitably overlook unlawful or even illegal determinants.[26] For example, in divorce cases, the respective faults of the spouses during the marriage should not, in principle, influence either the compensatory allowance that the wealthier spouse owes to the other or the child support payment. Nevertheless, can we be absolutely sure that moral considerations will never influence the determination of such sums? Similarly, although it is well-known that guidelines or calculation software exist for determining these sums, and they

[24] F. Muhlenbach, n 17 above.

[25] J. Barnier et al, 'Extraire des informations fiables des décisions de justice dans une perspective prédictive: des obstacles techniques et des obstacles théoriques' 89 *Jurimetrics. Journal of the Measurement of Legal Phenomenon* (2022).

[26] P. Brunet. 'Analyse réaliste du jugement juridique' 147 *Cahiers philosophiques*, 9-25, (2016); S. Danziger et al, 'Qu'a mangé le juge à son petit-déjeuner? De l'impact des conditions de travail sur la décision de justice' 4 *Les Cahiers de la Justice*, 579-587 (2015).

are used by both plaintiff and defence lawyers as well as judges, decisions do not reference to such tools.

In France, there is no prescribed style for judgments to be followed by every judge. The way in which judgments are written and presents is unique to each judge, resulting in considerable heterogeneity in the way judgments are presented.[27] For example, the claims of the parties may be restated at the beginning of the decision but not in the reasons, or they may be predominantly developed in the reasons. It is also possible that, where several amounts are awarded to the claimant on different grounds, the *dispositif* (operative part) may either contain detailed breakdowns or only the total amount. The only commonality among all decisions is their structure, typically starting with the presentation of the parties, followed by the facts, then the reasons, and finally the *dispositif*. The existence of 'mandatory passages' – for example, the reasons and the *dispositif* are separated by the formula '*par ces motifs*' (for these reasons) – allows an expert system to structure the decisions into their main parts quite easily.[28]

The pseudonymisation and obfuscation of certain date makes it difficult, if not impossible, for even a human expert in the field to extract certain data – and is a major concern for researchers.[29] In the course of certain studies, it has been revealed that in some published decisions, it was impossible to determine the sex or age of individuals, even though this information may seem essential for extraction – not to mention the exact date of death, which is always obscured. Another difficulty related to online publication is that decisions sometimes include tables, in particular to compare the claims and offers of each party. However, the computational treatment applied does not recognise these tables, which then become a series of unintelligible figures.

These are just some difficulties that can be arise and mislead even excellent artificial intelligence systems used to extract and structure data from judicial decisions. It may be worth noting that France is only partially in the eurozone, and New Caledonia, Wallis and Futuna, and French Polynesia use the CFP franc. A further difficulty is that, in many disputes involving sums of money, the sums at issue may be only a part of the total, whereas the total is important. These may involve liability cases where the victim's fault reduces the liability of the responsible party, cases of loss of chances, cases where only one spouse's interests in community property are at issue, or cases where only one co-owner disputes the value of a right. It needs to be clarified what data should be extracted in such cases: is it the fraction of the right in dispute or the full value of that right?

[27] J.-P. Ancel, 'La rédaction de la décision de justice en France' 841 *Revue internationale de droit comparé* (1998); P. Mimin, '*Le style des jugements (Vocabulaire – construction – dialectique – formes juridiques)*' (Paris: Librairies techniques, 4th ed, 1978).

[28] Even if, in first instance, some judgements use other words to introduce the *dispositive*, see. J. Barnier, 'Extraire automatiquement des informations de décisions des juges aux affaires familiales?', in I. Sayn and V. Rivollier eds, n 1 above, 49.

[29] I. Sayn, 'L'accès aux documents' n 7 above.

Procedural rules further complicate data exploitation. Like many legal systems, French law holds that the dispute belongs to the parties, a principle known as *principe dispositive*.[30] While judges have certain powers, such as restoring a claim to its correct legal basis or requalifying a legal act, they are limited by this *principe dispositif*. In particular, they cannot rule *infra petita* or *ultra petita*; in other words, their decision must necessarily fall within the bounds set by the claim and the offer. How should be treated a decision in which a judge deems that a head of damage is not to be compensated because it is insufficiently characterized, but nevertheless awards damages to the extent of the offer made on that head? How to treat a decision that calculates compensation but allocates a lower sum to limit it to the claim? Furthermore, the parties are subject to constraints such as time limits and the concentration of resources. It is necessary to ensure that, when data is extracted, a distinction is made between a point that has been discussed on the merits and then rejected, and another that has only been rejected on the basis of a procedural exception, without having been discussed on the merits.

It is often difficult to identify the relevant data that needs to be extracted.[31] For example, in the case of penalties, the amount per day of delay is certainly more informative than the total amount of the penalty, which depends on factual elements such as the promptness with which the debtor complied, but also on the possible use of the judge's power of moderation. If the amounts can be paid either as an annuity or as a lump sum, there may be some hesitation. Sometimes, for instance in the case of *viager* transactions, the annuity appears only as a way of staggering the payment of a lump sum, and the most important variable is undoubtedly the lump sum. In other cases, such as personal injury compensation, the lump sum is only one method of payment, and the interesting data is the annuity awarded.

The procedural difficulties are also evident in other areas. Although the appealis said to have a devolutionary effect, it does not necessarily cover the entire decision rendered at first instance. Thus, when data is extracted from appellate decisions, it is possible that they are only partial, as the appellant may have been satisfied with a part of the first judge's decision and limited his appeal to certain points. Even if an appellate decision covers all the points decided at first instance, the appellate court may simply write that it upholds what the first judges decided, without repeating the substance of that decision. Thus, extracting relevant data from the appellate judgment actually requires searching for data in the first instance judgment.

Working on the basis of first instance decisions present other difficulties: there is no indication of whether a judgment has been appealed, or what the outcome of that appeal was. The only solution would be to monitor appeal decisions in order to look for references to judgments and make connections between the information, but this involves a time lag: this consolidation of data on judgments can only take

[30] Code de procédure civile, Art 5.

[31] B. Barraud, 'Le coup de data permanent: la loi des algorithmes' 35 *Revue des droits et libertés fondamentaux*, (2017) available at https://tinyurl.com/td573jna (last visited 30 September 2024).

place after several years! Therefore, using first-instance data either risks working with data invalidated on appeal or using outdated data. The same reasoning applies to appellate judgments that may be overturned by the Court of Cassation.

Even at a more macroscopic level, the transition from one level of jurisdiction to another is problematic. First and second instances courts use a classification system called the Nomenclature of Civil Affairs (NAC), which could certainly be improved, but which categorises cases according to their main area. This at least makes it possible to analyse of the importance of litigation in different areas of law and to follow this importance between the first and second levels of jurisdiction. It is thus possible to determine, for example, the areas with the highest appeal rates. However, until recently the Court of Cassation does not use this same nomenclature, making it impossible to track case volumes by litigation domain.[32]

The data that can be extracted from judicial decisions is vast; however, it is difficult to speak of big data comparable to what, for example, consumer applications or websites, or even certain connected objects, can collect from users. To predict the time it will take to drive between two cities by car, well-known application algorithms can rely on data from thousands of journeys between those cities. However, to predict the amount of alimony a spouse will be awarded in a particular appellate jurisdiction, with contextual elements such as a certain length of marriage, a certain family structure, a certain income level, a certain age, etc, it will not be possible to rely on thousands of similar decisions. In general, attempts at prediction in the legal field have been disappointing.[33]

This situation should not discourage data analysis initiatives. It seems that the main obstacle to conducting jurimetrics on data from judicial decisions is the fact that the data from these decisions is not structured. Perhaps in the future, public initiatives will encourage the courts to add more metadata to their decisions using specialised software, or even to structure them in a way that not only facilitates execution, but also enables easy data exploitation.[34]

III. What Knowledge to Draw? The Example of Compensation for Personal Injury

Compensation for personal injury is one of the areas of law where data can be

[32] B. Munoz-Perez and E. Serverin, 'Éléments pour une statistique qualitative des affaires civiles traitées par la Cour de cassation' 87 *Cour de cassation*, (2020), available at https://tinyurl.com/ywrk2bpr (last visited 30 September 2024); E. Serverin et al, 'La Nomenclature des affaires orientées dans les chambres civiles de la Cour de cassation (NAO): l'élaboration collective d'un outil de connaissance et d'action' 130 *Cour de cassation*, (2021), available at https://tinyurl.com/4ren9aze (last visited 30 September 2024).

[33] J. Barnier, 'Extraire automatiquement' n 28 above; B. Jeandidier, 'L'hétérogénéité des décisions de justice réduit leur prévisibilité', in I. Sayn and V. Rivollier eds, n 1 above, 65.

[34] M. Cottin, 'Vers la standardisation dans la rédaction des décisions de justice?', in I. Sayn and V. Rivollier eds, n 1 above, 147.

extracted from court decisions in the form of numerical and monetary values. In fact, compensation is not regulated by any official scale, and its level is only weakly controlled by the higher courts, especially regarding non-pecuniary damages. The reality of compensation can therefore only be known by analysing court decisions of the first or second instances. The large number of court decisions available requires the implementation of empirical methods and, in particular quantitative analyses.

For this reason, empirical and quantitative approaches have been particularly mobilised in research on personal injury compensation. The reasons are manifold. Firstly, the very subject of the dispute lies in the calculation of compensation, which is divided into numerous heads of damage that are assessed separately. Quantitative approaches are also possible due to the significant number of court decisions in this area and to the compensation methods used. These methods allow the objectification of the damage and the comparison of very different concrete situations: physical and psychological injuries are described in percentages or on a seven-degree scale. Nomenclatures of damages and unofficial compensation guidelines tend to standardise methods and compensation amounts. Furthermore, the determination of the compensation amount may depend on actuarial methods, particularly concerning the capitalisation of annuities. Thus, mathematical approaches to personal injury compensation and empirical quantitative methods have regularly been used. More exceptionally, qualitative methods have also been used.

Through this section, we propose an analysis of empirical studies in personal injury compensation matter in France. To do so, we will take into account all the studies that have come to our attention in this field in recent years.[35] We will describe, on the one hand the data mobilised (1) and, on the other hand, the knowledge derived from this data (2).

1. The Analysed Data

[35] E. Serverin et al, 'L'accident corporel de la circulation, entre transactionnel et juridictionnel' *Report, Ministère de la Justice* (1997); S. Porchy-Simon et al eds, 'Étude comparative des indemnisations des dommages corporels devant les juridictions judiciaires et administratives en matière d'accidents médicaux' *Rapport pour la Mission de recherche Droit & Justice* (2016); L. Carayon et al, 'Réflexions autour du préjudice sexuel. Analyse de jurisprudence sous l'angle du genre' *Recueil Dalloz*, 2257 ff (2017); C. Quézel-Ambrunaz et al, 'De la responsabilité civile à la socialisation des risques: études statistiques' *Rapport dans le cadre du projet ANR RCSR*, (2019); N. De Jong, 'L'indemnisation du dommage corporel. Les barèmes dans les décisions de justice de première instance', in I Sayn et al eds, *Les barèmes (et autres outils techniques d'aide à la décision) dans le fonctionnement de la justice* (Mission de recherche Droit & Justice, 2019), 75; C. Quézel-Ambrunaz, 'La réparation des préjudices laissés par les cicatrices. Étude statistique' *Recueil Dalloz*, 2248 ff (2020); E. Belz et al, 'Bodily Injury Claims in France: Negociation or Court?', in Id, *Économétrie des données imparfaites: méthodes et applications*, 81 ff (thèse Rennes 1, 2021); C. Quézel-Ambrunaz, 'Demandes, offres, décisions en matière de dommage corporel: étude statistique' *Report, Institut Universitaire de France*, (2021); V. Rivollier, 'Le montant de l'indemnisation du préjudice d'affection devant les cours d'appel. Essai de mesure de l'influence du montant fixé en première instance, du montant demandé et du montant offert sur l'indemnisation devant le juge d'appel' *Jurimetrics. Journal of the Measurement of Legal Phenomenon*, 107-125 (2022).

Most of the studies were based on data extracted from court decisions, but data from other areas can also be mobilised.

a) Data from Court Decisions

Until recently, access to decisions of lower courts has not been easy. Studies seeking a form of comprehensiveness have therefore been limited by the inherent limitations of existing databases. Several studies[36] have relied on two officials but non-public databases: JuriCa database, which collects decisions of civil chambers of judicial appellate courts,[37] and Ariane Archives database, which collects decisions of administrative courts.[38] While decisions of first instance courts were available in administrative matters, they were not available in judicial matters. Therefore, studies were generally limited to appellate decisions in both types of courts in order to maintain a parallelism between the two corpora.[39]

Other studies, either because they did not have access to these two databases or because they sought to study first instance court decisions, used other paths to access decisions. Court decisions could be obtained from commercial databases,[40] directly from local courts[41] or from law firm.[42] There is no exhaustivity and no guarantee of representativity, so the robustness of the results is lower, but the scarcity of such studies, especially on first instance court decisions, maintains their interest.

The provision of open data on court decisions is likely to encourage other studies based on a more complete dataset. Since the end of 2024, decisions from eight courts of first instance have been made available.

Studies based on this material suffer from several limitations. There is currently no access to decisions from criminal courts, and the open data for these decisions will be available later. However, a significant proportion of personal injuries claims are compensated in these courts.[43] There are also technical limitations: automated analysis of decisions using natural language processing techniques only allows

[36] S. Porchy-Simon et al, n 35 above; C. Quézel-Ambrunaz et al, n 35 above; and, taking up and completing the data from the previous research, V. Rivollier, n 35 above. Using a commercial database, itself fed by the JuriCa database, C. Quézel-Ambrunaz, n 35 above.

[37] E. Serverin, 'Plaidoyer' n 3 above; S. Bories, 'JuriCA: un outil de communication et de recherche' *RecueilDalloz*, 1242, (2011); X. Henry, 'Vidons les greffes de la République! De l'exhaustivité d'accès aux arrêts civils des cours d'appel' *Recueil Dalloz,* 2609 ff (2011).

[38] F. Alhama, 'Vers une plus grande accessibilité des décisions rendues par les juridictions administratives' *Revue française de droit administratif*, 695 (2019).

[39] S. Porchy-Simon et al, n 35 above; C. Quézel-Ambrunaz et al, n 35 above; V. Rivollier, n 35 above. Taking into account only the decisions of certain courts of appeal: C. Quézel-Ambrunaz, n 35 above.

[40] L. Carayon et al, n 35 above.

[41] N. De Jong, n 35 above. This is an exhaustive study of the decisions of three first instance judicial courts, over a given period and for certain categories of the civil cases.

[42] C. Quézel-Ambrunaz, n 35 above.

[43] Only one study included certain decisions on civil matters handed down by criminal courts, obtained directly from lawyers: C. Quézel-Ambrunaz, n 35 above.

for the extraction of relatively simple data. A thorough analysis must necessarily be done manually.[44]

b) Other Data from the Field

In order to overcome the limitations of access and content of court decisions, some studies have examined the field of personal injury compensation using other data. Statistical data can be used, in particular from the registry of civil cases maintained by the Ministry of Justice. However, access to this data requires the involvement of the Ministry in the study.[45]

Other data are collected and held by insurance companies, which are often involved in personal injury compensation. This data is mostly confidential. However, in the case of road traffic accidents, the *Loi Badinter*[46] has established a special regime for compensation and liability and defines a mandatory compensation offer process to promote out-of-court settlement. This Act notably provides that 'under the control of the public authority, a periodic publication reports compensations fixed by judgments and settlements'.[47] This publication is implemented by the Association for the Management of Information on Automotive Risk (*Association pour la gestion des informations sur le risque automobile* – AGIRA)[48] and takes the form of an online database.[49] The quality of the information available to the public is limited: only certain heads of damages are reported; the precise age of the victim is unknown; when the compensation is judicial, the jurisdiction that ruled is unknown; no precise description of the damage is given (only the degrees of certain medico-legal scales are presented). Even if the data are limited, they are so numerous that their use can be valuable.[50]Another study, albeit old, had access to complete insurance files on compensation for personal injuries resulting from traffic accidents. This study was thus able to analyse in depth the compensation process and the determinants of its transactional or judicial orientation.[51]

Data may also come directly from professionals working in the field of personal injury law, in particular judges and lawyers. They are then collected through questionnaires or interviews but do not allow for a quantitative approach.[52]

[44] J. Barnier et al, 'Extraire des informations' n 25 above; Id, 'Extraire automatiquement' n 28 above.

[45] E. Serverin et al, n 35 above.

[46] Loi 5 July 1985 no 85-677 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation.

[47] Art 26 loi 5 July 1985 no 85-677.

[48] On the creation of the AGIRA file, see E. Serverin et al, n 35 above, 81 ff.

[49] Available at https://formulaire.victimesindemnisees-fvi.fr/(last visited 30 September 2024).

[50] E. Belz et al, n 35 above. The author acceded more completed data than the online database.

[51] E. Serverin et al, n 35 above.

[52] I. Sayn et al, n 35 above (interviews with magistrates); C. Quézel-Ambrunaz et al, n 35 above (questionnaire with all types of professionals involved in personal injury cases, the majority of respondents being lawyers).

2. Knowledge Extracted from Data

The analysis of court decisions alone does not allow any conclusions regarding the transactional or judicial orientation of compensation. However, such knowledge can be derived from studies analysing insurers' data on traffic accidents. These studies come to a similar conclusion: the proportion of out-of-court settlements decreases with the severity of the personal injury; the more serious the injury, the less compensation is settled out of court.[53] Other determinants of the type of settlement have been identified, including the age of the victim and the geographical area. Other comparisons have been made between the two types of settlement, in particular with regard to the time between the accident and compensation (longer when the resolution is judicial) or regarding the compensation amounts (higher in courts).[54]

Other studies, based only on the analysis of court decisions, look at judicial practice in terms of the depth of compensation for personal injuries. Depending on the corpus studied, a comparison can be made between different jurisdictions and orders of jurisdiction can be made.[55]

Firstly, studies have examined the structure of compensation, ie, the division of damages into different headings, especially since the introduction of the Dintilhac nomenclature. One study noted a difference between judicial courts of appeal and administrative courts of appeal. The former largely applied the nomenclature, unlike the latter, whose practice of grouping or venting heads of damages appeared highly heterogeneous.[56] The subsequent studies had no longer observed such a difference[57] since the evolution of administrative case law led to accept the application of this nomenclature.[58]

The studies are significantly devoted to the analysis of compensation amounts and their determinants. These determinants relate firstly to the characteristics of the injuries, in particular their severity, as medically assessed by the expert and the court. However, other criteria are also considered. The age and gender of the victims influence compensation, especially because women receive less compensation than men.[59] Courts and geographical variations are also examined: in certain geographical areas, compensation appears to be higher than elsewhere,[60] and

[53] E. Serverin et al, n 35 above; E. Belz et al, n 35 above.

[54] ibid

[55] Particularly in the area of medical accidents. The judicial courts have a monopoly on actions for compensation of the consequences of traffic accidents.

[56] S. Porchy-Simon et al, n 35 above: the decisions studied in the corpus were pronounced in 2011, 2012 and 2013.

[57] C. Quézel-Ambrunaz et al, n 35 above.

[58] Conseil d'État, 16 December 2013, no 346575, reversing the 'Lagier opinion' in which the *Conseil d'État* had proposed a different nomenclature of damages (Conseil d'État, Section du contentieux, 4 June 2007, nos 303422 and 304214).

[59] L. Carayon et al, n 35 above; C. Quézel-Ambrunaz et al, n 35 above; E. Belz et al, n 35 above.

[60] E. Belz et al, n 35 above, establishes the link between higher amounts of compensation in out-of-courts settlement compensation and an highter rate of out-of-courts settlements. See

administrative courts award lower amounts than judicial courts.[61] The influence of procedural rules has also been examined; indeed, the court cannot, in principle,[62] determine the compensation amount beyond the claims of the parties. The exaggeration of the parties' claims could have a deterrent or repellent effect on the judge's behaviour.[63] However, except in extreme cases, this effect has not been found, and regardless of the parties' demands, appeal courts frequently award the same amount as that awarded at first instance.[64]

Several studies have also examined the influence of soft law instruments on the amounts awarded by courts. These tools can be either compensation guidelines or capitalisation scales.

Court decisions cannot explicitly mention the use of compensation guidelines (even though judges may use them). In order to assess the implicit use of these guidelines, several studies have therefore sought to establish a correspondence between the amount of compensation for certain heads of damage provided by courts and the amount suggested by the different guidelines. In 2016, a study, based on a corpus of decisions from 2011 to 2013, has highlighted the influence of two different guidelines: the ONIAM guidelines[65] were particularly used in decisions by administrative appeal courts, and the B. Mornet guidelines by judicial appeal courts.[66] Studies using first-instance decisions had more difficulty establishing the use of these guidelines.[67] Nevertheless, one of them was able to establish the correspondence between the compensation for various types of damages and different versions of the Mornet Guidelines.[68]

The role of capitalisation scales is easier to assess because their use is more often explicitly mentioned in court decisions. Thus, studies are successful in tracing them.[69]

The study of data extracted from court decisions certainly allows for the extraction of knowledge from the corpus of decisions studied. However, the potential of new technologies makes it possible to go beyond mere understanding

also S. Porchy-Simon et al, n 35 above, making comparisons based on the geographical areas of the three main administrative courts of appeal and the three main judicial courts of appeal.

[61] S. Porchy-Simon et al, n 35 above. Indirectly, C. Quézel-Ambrunaz et al, n 35 above.

[62] For court decisions that do not follow the rule, cf C. Quézel-Ambrunaz, n 35 above.

[63] On the 'compensation smile', see. A. Gayte-Papon de Lameigné et al, 'La modélisation de l'indemnisation du préjudice corporel. Un exemple de "justice quantitative" au service de l'équité', in F. G'sell ed, *Le big data et le droit* (Paris: Dalloz, 2020), 45; L. Belleil and J. Lévy-Véhel, 'Sur la modélisation des décisions de justice', in J.-P. Clavier ed, *L'algorithmisation de la justice* (Bruxelles: Larcier, 2020), 23 ff.

[64] V. Rivollier, n 35 above.

[65] ONIAM is a compensation funds dedicated to medical accidents and health issues. It publishes on Internet its own compensation guidelines.

[66] S. Porchy-Simon et al, n 35 above, does not establish a link concerning the 'permanent functional deficit', link only sought with the Mornet guidelines (141), but the comparison is more conclusive concerning the suffering (152) and the permanent aesthetic loss (177-178).

[67] N. De Jong, n 35 above.

[68] C. Quézel-Ambrunaz, n 35 above.

[69] N. De Jong, n 35 above; C. Quézel-Ambrunaz et al, n 35 above, V. Rivollier, n 35 above.

and attempt to predict the outcome of litigation. This is what the French Ministry of Justice has tried to do in the field of personal injury compensation through the Datajust project.

IV. Predicting the Outcome of a Dispute Through Legal Metrics? The Failure of the Datajust Project

The Datajust project, led by the Ministry of Justice between 2020 and 2022, perfectly illustrates the difficulties encountered in analysing of a large corpus of court decisions and constructing a public tool based on them. This aim of the project was to create a personal injury compensation tool based on an accessible corpus of decisions, which would be used to model judges' previous decisions.

In fact, compensation for personal injury is often based on compensation guidelines that are multiple and based on non-transparent development methods. Several compensation guidelines coexist and lead to quite different results. None of them has any official value. Their authors generally pretend that these guidelines reflect common compensation practices. Yet, it is unclear how these practices have been measured or assessed.[70] Thus, the idea of a single set of compensation guidelines emanating from the Ministry of Justice and based on transparent and reliable analysis does not seem absurd. This was indeed the initial ambition of the Datajust project when it was implemented.

The Datajust project was born through the regulatory act (decree) of 27 March 2020, establishing the automated processing of personal data called 'DataJust'.[71]

[70] B. Mornet, 'Le référentiel indicatif régional d'indemnisation du préjudice corporel', in I. Sayn ed, *Le droit mis en barèmes ?* (Paris, Dalloz, Thèmes et commentaires, 2014), 213; D. Martin, 'La politique d'indemnisation de l'ONIAM' 46 *La Gazette du Palais* (19 avril 2008).

[71] 'Décret 27 March 2020 no 2020-356 portant création d'un traitement automatisé de données à caractère personnel dénommé «DataJust»' 77-2 *Journal Officiel de la République Française* (29 mars 2020). About this decree, see. A. Bensaoun and T. Douville, 'DataJust, une contribution à la transformation numérique de la justice' *La Semaine Juridique édition générale* (2020), 907-910; R. Bigot, 'DataJust alias Thémis.I.A.: les premiers pas officiels de l'intelligence artificielle dans les salles des pas perdus' *Lexbase Avocats* (mai 2020); J. Bourdoiseau, 'Datajust ou la réforme dudroit de la responsabilité civile à la découpe?' *La lettre juridique*, *Lexbase* (avril 2020); M. Fathisalout-Bollon and V. Rivollier, 'À propos de DataJust: justesse de l'outil numérique, juste indemnisation des victimes?' *Revue Lamy de droit civil*, 6819, (2020); Y. Meneceur, 'DataJust, face aux défis de l'intelligence artificielle' *La Semaine Juridique édition générale,* 1978, (2020); S. Merabet, ' "DataJust" et l'effet papillon. À propos du décret du 27 mars 2020' *Revue pratique de la prospective et de l'innovation* (2020), 582. See also on this project, J. Bourdoiseau, 'Le recours à l'intelligence artificielle pour évaluer les préjudices. Rapport de synthèse', in O. Gout ed, *Responsabilité civile et intelligence artificielle* (Bruxelles: Bruylant, coll. du GRERCA, 2022), 635-645; S. Desmoulin, 'Le diable se cache-t-il dans les détails? Réflexions à propos du traitement automatisé de données à caractère personnel "datajust" ', in J.-P. Clavier ed, *L'algorithmisation de la justice* (Bruxelles, Larcier, 2020), 143-159; E. Petitprez and R. Bigot, 'Standard humain ou standardisation algorithmique de l'évaluation du dommage corporel?' *Lexbase Avocats* (janvier 2021); V. Rivollier and M. Viglino, 'Le recours à l'intelligence artificielle pour évaluer les préjudices. Rapport français', in O. Gout ed, *Responsabilité civile et intelligence artificielle*, 675-696; L. Viaut, 'L'évaluation des préjudices corporels par algorithmes'

The purpose of this decree was not to create a tool but to establish the regulatory conditions for its construction and experimentation. Indeed, the project required access to personal data contained in judgments collected for this purpose. The project aimed to analyse all

> 'judgments rendered on appeal between 1 January 2017, and 31 December 2019, by administrative courts of appeal and civil chambers of judicial courts of appeal in disputes concerning the compensation of personal injury.'[72]

Before creating a tool intended to propose a method for evaluating such damages, the ministry services had to undertake a vast analysis of existing practices in this area. The purpose of the decree was therefore mainly to make these analyses possible, without knowing exactly what the envisaged tool would consist of. The decree was subject to appeals for annulment, which were rejected.[73]

The techniques used for data extraction are not mentioned in the decree. Yet, algorithmic techniques for natural language processing have been implemented to extract information from the *corpus*: sequencing of parts of the judgments, identification of significant dates, identification of heads of damages whose compensation is discussed, identification of amounts proposed by the parties and decided by the courts, etc. However, the decree remains silent on these tools and only considers the algorithm as the purpose of the project. The envisaged tool has probably never been clearly defined by the Ministry's services. The data extraction work was an essential and considerable prerequisite.

While the data extraction work seems to have been at least largely completed, the construction of the envisaged tool did not materialise. In accordance with the 2020 decree authorising the use of data for two years, and in the absence of an extension, the project was abandoned in March 2022.[74] No tool for litigants, legal professionals, or lawyers emerges, but it is not even certain that the ministry's work went beyond a simple analysis of the corpus of decisions. None of these elements were made public.

We will present successively the context of the project (1), the difficulties

10 *Les Petites Affiches* (31 mai 2021); V. Rivollier, 'L'aventure Datajust: histoire d'un échec', in I. Sayn and V. Rivollier eds, n 1 above, 85.

72 Art 2 décret 27 March 2020, n 70 above.

73 Conseil d'État, 30 December 2021 no 440376, unpublished; in *Dalloz IP/IT*, 6-7 (2022), with a comment by C. Crichton; in *La Semaine Juridique édition générale*, 760 (2022), with remarks by L. Cluzel-Métayer; in *La Gazette du Palais* GPL434m6, 9 (12 avril 2022), with a comment by T. Douville.

74 On the abandonnent of the project, see L. Bloch, 'Datajust-DataJust : ni fleurs, ni couronnes' *Responsabilité civile et assurances*, mark 3 (2022); É. Marzolf, 'Le ministère de la Justice renonce à son algorithme Datajust' (14 January 2022), available at https://acteurspublics.fr (last visited 30 September 2024); S. Merabet, 'Hommage posthume à l'abandon de DataJust: des principes directeurs de la justice numérique' *Revue pratique de la prospective et de l'innovation*, 18-21 (2022); V. Rivollier et al, 'Le retrait de DataJust, ou la fausse défaite des barèmes' *Recueil Dalloz*, 467 (2022).

encountered in extracting and using legal metrics (2), and its subsequent failure (3).

1. The Datajust Project Context

Datajust aligns with the timeframe of the implementation process of open data for court decisions, initiated by the Statute of 7 October 2017 (Act for a Digital Republic) and the 2018-2022 Programming and Justice Reform Act. Formally, Datajust does not rely on decisions from open data, which were not yet available when the project was initiated. However, it uses decisions that subsequently became the first accessible in open data. Like the research projects mentioned earlier, this project relies on the exploitation of the JuriCa and Ariane Archives databases, and thus the decisions of civil chambers of judicial courts and decisions of administrative appeal courts rendered in 2017, 2018, and 2019. The exclusion of criminal judgment chambers may draw the same criticism as the aforementioned projects. The appeals filed against the decree also criticised the fact that decisions subject to appeal in cassation and possibly annulment were not excluded from the corpus. It would have compromised the accuracy principle according to personal data law. However, the Council of State rejected this point. The extent of the decision corpus has not been disclosed, but it is estimated that it comprises between 3000 and 4000 judicial decisions and between 300 and 400 administrative decisions.

Through this project, the ministry has shown its 'voluntarism': it does not just make court decisions available to the public, leaving economic operators to seize them, but seeks to develop internal uses of this data itself.

Furthermore, the Datajust project was part of the civil liability reform process, initiated in the 2000s. Indeed, in 2016 and 2017, the ministry disseminated reform projects envisaging rules and tools specific to the compensation of personal injuries.[75] Among these tools was an indicative compensation guideline for non-pecuniary damages. The guidelines were developed based on

> 'a database bringing together, under the state's control and under conditions defined by decree in the Council of State, final decisions rendered by courts of appeal in compensation for personal injury to victims of a traffic accident'.[76]

Even though the Datajust project differs slightly from the ministerial project in the scope of decisions considered, it can be seen as anticipating the implementation of a civil liability reform. Moreover, such guidelines would not need legislative reform to be adopted by regulatory means.

Moreover, the project is based on the idea that the exploitation of legal metrics derived from court decisions would enable the construction of tools facilitating recourse to out-of-court settlement. This is particularly evident in the decree of

[75] Ministère de la Justice, *Avant-projet de réforme de la responsabilité civile* (avril 2016); Ministère de la Justice, *Projet de réforme de la responsabilité civile* (mars 2017).

[76] Art 1271 projet de réforme de la responsabilité civile (2017).

27 March 2020, according to which the envisaged tool must serve

> 'the information of the parties and assistance in evaluating the amount of compensation to which victims may claim in order to promote amicable settlement of disputes'.[77]

Numerous mechanisms encouraging out-of-court compensation settlement already exist in the field of personal injury, especially in cases resulting from traffic accidents or medical accidents. Yet, no evaluation of these mechanisms has been conducted beforehand.

Furthermore, transitioning from an analysis of judicial decisions to guidelines is not straightforward. Similarly, the existence of official guidelines does not necessarily lead to increased recourse to out-of-court settlement. Indeed, identifying the empirical determinants of personal injury compensation depends on judicial decisions with heterogeneous drafting and content. Moreover, the identified determinants may not align with the legal criteria for compensation: one cannot validly base the amount of compensation solely on the gender of the victim, even if differences in compensation are identified. Furthermore, the link between the predictability of the decision, which would be reinforced by guidelines, and out-of-court resolution is not as evident as it seems. Theoretical models developed in conflict economics do not definitively answer the question. Models based on risk aversion consider that the uncertainty about the outcome of the trial encourages parties to reach an agreement. By reducing judicial uncertainty, guidelines would then be a tool reducing incentives to negotiate: the risks of being disappointed by the outcome of the legal action are reduced in the presence of such guidelines.[78]

2. The Difficulties Encountered in the Extraction and Use of Legal Metrics

As previously discussed, extracting data from legal decisions is made difficult by the variable structure of these decisions and the heterogeneous information they contain.[79] In cases of personal injury, these difficulties are multiplied: understanding the isolated court decision when it makes references to parties' submissions or expert reports, the division of compensation into multiple heads of damages, and the omission of key dates essential for understanding the decision, among other factors. Despite the development of a data extraction tool within the framework of Datajust, human analysis was still necessary. Given the long-term nature of the project, sustaining Datajust requires a dedicated team over time.

Developing an 'algorithm', as proposed in the decree, assumes regularities can

[77] Art 1 décret 27 March 2020, n 70 above.

[78] C. Bourreau-Dubois et al, 'Les barèmes, outils d'aide à la décision pour les justiciables et les juges' *Revue d'économie politique*,199-222 (2021-22).

[79] See M. Cottin, n 34 above.

be identified in the available corpus. While an algorithm can reveal or objectify the rationalities within a data *corpus*, it's uncertain whether a few thousand decisions, particularly heterogeneous ones, suffice to identify determinants in a sufficiently representative manner. Even with a hypothetical corpus of 4,400 decisions, this would be relatively small given the diversity of injuries and victims that could be included. Some heads of damages are present in only a few decisions, such as 'educational and training loss' which primarily affects young victims, making it difficult to discern regularities. Moreover, even if some damages are present in numerous decisions, the diversity of personal circumstances makes comparison challenging. For instance, how can regularities be sought in the corpus to assess the compensation for a 35-year-old woman, a mother of three, divorced, working as a nurse, and having suffered a head injury in a cycling accident? Comparable situations may be scarce, making it challenging to discern regularities, particularly if decisions vary significantly in similar circumstances. Additionally, a judge's awarded compensation only makes sense when compared to the parties' claims, which are not always reproduced in decisions.

In personal injury compensation law, neither legislation nor case-law from higher courts establishes criteria for determining compensation amounts for many non-pecuniary damages. While case law largely adopts definitions proposed by the Dintilhac report, it doesn't provide calculation methods. Furthermore, the Supreme Court's oversight is minimal, granting trial judges sovereignty not only in determining compensation amounts but also in selecting criteria. For instance, one court might consider a child's cohabitation significant in determining the compensation of his affliction due to a parent's death, while another might prioritize the child's age. Moreover, drafting rules may lead to the omission of hidden motivational elements; although judges widely use compensation guidelines, they are prohibited from mentioning this in their decisions.[80] If an algorithm simply reproduces these guidelines, its necessity may be questioned.

Given the uncertain intrinsic rationality of the studied corpus, the analyst's role appears fundamental. Since analysis criteria are not entirely predefined, analysts largely construct them. Thus, one may question to what extent the corpus's rationality is constructed by the analyst. The fact that the proposed tool pretends to observe a practice doesn't prevent a certain degree of construction by the observer. Methodological precautions, sufficient when describing litigation and existing practices, may not be adequate when the tool aims to predict dispute outcomes.

[80] Prohibiting *de facto* reference to scales in court rulings, eg in personal injury cases: Cour de cassation, deuxième chambre civile, 24 October 2019 no 18-20.818, unpublished; Cour de cassation, deuxième chambre civile, 22 November 2012 no 11-25.988, unpublished; in family cases: Cour de cassation, première chambre civile, 23 October 2013 no 12-25.301, published in the Bulletin. On this paradox, see V. Rivollier, 'L'indemnisation du dommage corporel. Les barèmes dans le discours des magistrats', in I. Sayn et al eds, *Les barèmes (et autres outils techniques d'aide à la décision) dans le fonctionnement de la justice* (Paris, Mission de Recherche Droit et Justice, 2019), 69-71.

3. Failure of the Datajust Project

Although the ministry has not officially communicated on the abandonment of the project, it results from the expiry of the two-year deadline set by the initial decree. This has also been confirmed by certain specialized media.[81] Excessive optimism regarding the extraction of data and the possibility of identifying regularities probably collided with the reality of the analysed decisions and the extreme heterogeneity of the contained information. As empirical research projects in the field of personal injury have shown, extracting knowledge from such a corpus is possible, but not (yet) using an automated data extraction method.82 Furthermore, knowing is not predicting, and the gap between knowledge and prediction is difficult to overcome.[83]

Moreover, some legal professionals demonstrated a hostility as soon as the decree of 27 March 2020 was published. Several professional associations have expressed their concerns.[84] These concerns were also raised in certain parliamentary questions.[85] These criticisms fit into a rhetoric rejecting scales and compensation guidelines in the field of personal injury, with these tools being presented as contrary to the personalisation of compensation.[86]

The discontinuation of this project also reflects a step back of public intervention. As a result, civil liability reform projects appear to have a standstill, so the soft law tools they sought to introduce are forgotten. From the perspective of exploiting open data from judicial decisions and the legal metrics that could be derived from them, no other project as ambitious as Datajust has emerged: the data is made available to private actors, with the state not going any further. Surprisingly, it does not propose any further regulation of the use of this data by legal tech companies: no certification, labelling, or quality control of the services offered is carried out. Yet several experiences abroad and in France of using massive data in the legal field have highlighted possible biases and resulting risks.[87]

[81] É. Marzolf, n 74 above.

[82] J. Barnier, 'Extraire automatiquement' n 28 above.

[83] See C. Quézel-Ambrunaz, 'À la recherche d'une définition de la jurimétrie'n 20 above.

[84] See the reaction of the National association of victims lawyers: C. Berneld and F. Bibal, 'DataJust: quand le spectre du barème surgit des brumes numériques' 17 *LaGazette du Palais*, 79 (2020); A. Coviaux, 'Sans soin ni loi: l'inquiétant projet DataJust' 17 *La Gazette du Palais*, 83 (2020); See also Conseil national des barreaux, Motion sur le décret du 27 mars 2020, Assemblée générale du 3 avril 2020; Syndicat de la magistrature, Courrier à la ministre de la Justice, 3 avril 2020.

[85] See, at the Senate, the ministry of Justice answer to the written question no 16942, J.-M. Mizzon, 'Algorithmes et justice prédictive' *Journal officiel du Sénat*, 2899 (25 June 2020); à l'Assemblée nationale, la réponse du ministère de la Justice à la question écrite no 29640, J. Corneloup, 'Mise en œuvre Datajust' *Journal officiel de l'Assemblée nationale* (18 August 2020).

[86] C. Quézel-Ambrunaz, *Le droit du dommage corporel* (Paris: Librairie générale de droit et de jurisprudence, 2nd ed, 2023), 444.

[87] The discriminatory biaises of Compas software in US are well documented. See also the biases revealed in the fraud detection software in Netherlands, Agency for Fundamental Rights, *Bias in Algorithms. Artificial Intelligence and Discrimination* (Vienne, Luxembourg: Publications Office of the European Union, 2022). The same happened in France: G. Geiger et al, 'Profilage et

The incomplete status of the Datajust project does not necessarily indicate a failure. The ministry was aware of the uncertainties associated with the project from the beginning. However, the lack of communication regarding the lessons learned from the project is concerning. Additionally, the absence of government intervention may raise concerns about potential abuses. Indeed, the corpus of mobilised court decisions is now freely accessible, and any private operator can use it to offer similar tools. Certainly, not all operators will have the same scruples as the ministry regarding the methodological difficulties involved in such a project.

V. Prospects

Legal metrics is still a relatively new field, especially when considering that rupture occurred between the early applications of computing to law and the current world, opened up by the interconnection of networks and artificial intelligence.[88]

A relatively effective application of artificial intelligence, implemented by both private and public actors, is the consolidation of legislative texts (in the broad sense). Indeed, modifying texts are drafted in the manner of 'in such article, after such word, such word is added'. Artificial intelligence automates the process of updating texts and navigating through the different versions of the texts: past, in force, and forthcoming.

In France, the government currently has mainly two less ambitious projects than some they have sketched out in the past. The first is to complete open data, ie, the provision to everyone of all court decisions rendered – without any history prior to the publication of the first decisions. The second is the use of artificial intelligence, but in a less ambitious manner than what was planned for DataJust. Two modules are currently being successfully exploited within the competent department of the Court of Cassation. The first, linked with open data, is an algorithm for pseudonymizing court decisions: the volume of decisions from the courts below requires almost human-free processing. The second is the orientation of appeals. As already mentioned, the French Court of Cassation receives a significant number of appeals each year. It is divided into chambers: 3 civil chambers, each with its own areas of competence, a social chamber, a commercial chamber, and a criminal chamber. Each appeal must therefore be directed to the appropriate chamber, which requires analysing not only the facts of the case but especially the legal question at issue, to determine the area of law in which it arises.[89] Artificial intelligence performs this orientation, however, monitored by a team of legal experts.[90]

discriminations: enquête sur les dérives de l'algorithme des caisses d'allocations familiales' *Le Monde* (4 décembre 2023), available at https://tinyurl.com/m7x82rv8 (last visited 30 September 2024).

[88] C. Bordere, 'Que reste-t-il de la première jurimétrie?' n 5 above.

[89] E. Serverin et al, 'La nomenclature des affaires' n 32 above.

[90] See H. Abdine, 'JuriBERT: un modèle linguistique pré-entrainé pour le domaine juridique français', in I. Sayn and V. Rivollier eds, n 1 above, 133.

Another initiative from the Ministry of Justice may provide access to new legal metrics. A large reform of information systems in civil matters has been initiated. This reform process named 'Portalis' is progressively developed. Its purpose is to update and merge the many out-dated information systems actually coexisting. This new system will attribute a unique number for any case, from first instance to cassation court (and even referring court), allowing to link first instance, appeal and cassation decisions on the same case. From the system, many statistical new information may be extracted and provide new knowledge.[91] And Portalis should also provide some frame or model of redaction for court decision, so the structure of court decision may be more homogeneous.[92]

As for the initiatives of private publishers, the current trend is less towards extracting data from court decisions than towards exploiting advances in generative artificial intelligence and the use of natural language models. Training datasets systematically include legal texts, but also, depending on the publishers or startups entering this market, blog articles, or all court decisions available in open data. Regarding these decisions, they are exploited as text, by language processing tools, but not as a source of quantifiable data, which limits the relevance of responses to questions calling for a numerical answer.

The fields of legal metrics are vast. If this article had been written a year ago, its content would have been entirely different. It is possible that by the time it is read, it will already be partly outdated. There is a problem to be solved: how to convert performative texts into structured data?[93] This project can mobilise computer scientists, data scientists, and legal experts.

The future of jurimetrics, in a broad sense, is promising due to the strong demand for knowledge and predictability of judicial decisions.[94]

[91] See P. Ghaleh-Marzban, 'PORTALIS: le projet de modernisation de la justice' *Dalloz IP/IT*, 152 (2018).

[92] M. Cottin, n 34 above.

[93] ibid

[94] Which is a long term seeking: N. Bernoulli: 'De usu Artis Conjectandi in jure' (Basilea: Conradus, 1709).

Comparative Legal Metrics - Symposium

The Power of Numbers and the Role of Law: On the Way to the Global Accountability of Transnational Actors?

Giorgio Resta*

Abstract

The quantification of performance has everywhere become a tool of governance, an instrument capable of influencing the behaviour of individuals and other entities, and thus a potent source of power. How does (or should) the law regulate the exercise of such power? This paper addresses this question by providing a comparative overview of recent regulatory trends. In particular, it sheds light on the thorny issue of how to ensure the accountability of transnational actors and reflects on the controversial trend towards extraterritoriality, which is well illustrated by recent EU digital regulation.

I. Legal Metrics in Comparative Law

The book, edited by Mauro Bussani, Sabino Cassese, and Marta Infantino is an invaluable contribution to a better understanding of one of the most significant phenomena shaping our societies, and namely governance by numbers.[1] Of course, this is not the first volume to deal with this topic,[2] and the editors themselves have previously written other pioneering essays and monographs focusing on indicators and quantitative methods.[3] However, 'Comparative Legal Metrics' has two features, both reflected in its title, that distinguish it from the existing literature.

First, it has a broad geographical scope, taking into account the experiences of different societies from different parts of the world. However, it is not simply a description of such experiences as isolated entities. It makes use of comparative law methodologies to provide – particularly in the first and the last chapters –

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[1] M. Bussani et al eds, *Comparative Legal Metrics: Quantification of Performances as Regulatory Technique* (Leiden-Boston: Brill, 2023).

[2] One might simply recall A. Supiot, *La gouvernance par les nombres: Cours au Collège de France (2012-2014)* (Paris: Fayard, 2015).

[3] See only M. Infantino, *Numera et impera: Gli indicatori giuridici globali e il diritto comparato* (Milano: FrancoAngeli, 2019); Id, 'Global Indicators', in S. Cassese ed, *Research Handbook on Global Administrative Law* (Cheltenham: Edward Elgar, 2017), 347-367; S. Cassese and L. Casini, 'The Regulation of Global Indicators', in K.E. Davis et al eds, *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford: Oxford University Press,2012), 465-474; M. Bussani, 'Credit Rating Agencies' Accountability: Short Notes on a Global Issue' 10 *Global Jurist*, 1 (2010).

both an in-depth analysis of local conditions and a careful assessment of differences and similarities, as well as a generalization of the findings of each national or regional report. Following the path of a consolidated tradition, it crosses not only the jurisdictional boundaries, but also disciplinary boundaries, and namely the public law/private law divide, which is meaningless in transnational settings.[4] It is therefore a comparative law book in the fullest sense of the notion.

Second, it focusses on different typologies of quantification of performance in various sectors (mainly justice, education, and market-related activities), which have in common the attitude to produce 'legal effects'. Such a notion is to be understood flexibly, beyond any formalistic assumption about what constitutes law in a particular jurisdiction. From a realist and pluralist point of view, it could include any factor that could significantly and regularly influence social behaviours. As the editors make clear in the introduction, the adjective 'legal' refers to the

> 'direct or indirect regulatory effects that the act of measurement has on the behavior of the subjects involved in the measurement process, including not only the measured, but also the measurers and those who rely on the measurements'.[5]

By looking at different societies (representing several legal traditions and political systems) and by adopting a rigorous analytical framework, the book provides a comprehensive analysis of some of the most important questions raised by of 'governance by numbers'.

These include: a) in which areas is quantification of performance most common? *b*) who are the relevant actors? *c*) who is affected? *d*) what are the main typologies of legal metrics? *e)* why has regulation by numbers become so widespread? *f)* how should legal metrics be regulated?

II. The Power of Numbers and the New Sovereigns

Chapters from 2 to 15 deal with questions from *a)* to *e)* and explore the complex morphology of legal metrics in different sectors and legal systems.

Reading these contributions, one gets the impression that quantification of performance has everywhere become a tool of governance, an instrument capable of influencing the behavior of individuals and other entities, and thus an important source of power. A power that is more insidious than the classic Weberian ideal type that underlies the traditional legal approach to the problem of authority.[6] This has essentially been limited to situations where there is a

[4] See M. Bussani et al, 'Quantification of Performance as a Regulatory Technique: A Comparative Appraisal', in Ead eds, *Comparative Legal Metrics* n 1 above, 332, fn 37.

[5] ibid 3-4.

[6] See M. Renner, 'Machtbegriffe zwischen Privatrecht und Gesellschaftstheorie', in F. Möslein ed, *Private Macht* (Tübingen: Mohr Siebeck, 2016), 505 et seq.

subject who is in a formally recognized position of supremacy, and who as such is able to impose her own will on the legal sphere of others. Paradigmatic is the relationship between the public administration and the citizens, but also in private law some exceptional forms of 'private powers' were quite early recognized, and among them the position of the employer, *vis-à-vis* the employees, and the husband, *vis-à-vis* other members of the family. Relationalism, the vertical dimension, coercion, and transparency are thus the features that characterize the 'traditional' legal conception of power and shape the remedies devised to protect the passive subject.[7]

Here, by contrast, we are faced with a power that is granular and fundamentally acephalous, opaque and often incomprehensible, persuasive rather than coercive, manifested in the dimension of fact rather than that of (formal) law, and is located in spaces that do not coincide with the physical locations of the nation-state. It is therefore the prototype of the 'new powers',[8] which fit better into a Foucauldian rather than a Weberian theoretical framework. Power relations, according to the French philosopher, are no longer placed in a linear register that identifies an active subject, generally consisting of the state and its articulations, a passive subject and a typical effect in the sense of conditioning the will through coercive or prohibitive acts.[9] From this perspective, power is not necessarily coercive, since it is itself a condition of the thinkability of the world, orienting forms of knowledge, selecting themes and patterns of argumentation. It cannot therefore be understood on the basis of what Foucault calls the juridical conception of power, characterized by a logic of command that generates resistance. It expresses itself in a plurality of places and in forms other than those typically repressive.[10] The new, Foucauldian power has a generative force that cannot be underestimated; in its most incisive and least volatile expressions

> 'it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body, much more than as a negative instance whose function is repression'.[11]

This perfectly explains the 'magic of numbers' explored in this book.
The quantification of performance is cloaked in the aura of voluntariness,

[7] See for a detailed analysis G. Resta, 'Poteri privati e regolazione', in M. Cartabia and M. Ruotolo eds, *Enciclopedia del diritto: Potere e Costituzione* (Milano: Giuffrè, 2023), 1008.

[8] M.R. Ferrarese, *Poteri nuovi: Privati, penetranti, opachi* (Bologna: il Mulino, 2022), 140.

[9] P. Franzosi, 'A Reflection on Power and Knowledge in Michel Foucault' 77 *The Political*, 135, 143 (2012).

[10] G. Turkel, 'Michel Foucault: Law, Power, and Knowledge' 17 *Journal of Law & Society*, 170 (1990).

[11] M. Foucault, 'Truth and Power', in Id ed, *Power/Knowledge: Selected Interviews and Other Writings (1972-1977)* (New York: Vintage, 1980), 119.

rationality, intelligibility. As such, it is not perceived as a force that says no, and triggers resistance, but it 'traverses and produces things (…) forms knowledge, produces discourse'.[12] It is also productive in the sense that it influences behaviours in the direction desired by those in power.

We all know – and the authors of this book rightly remind us – how the rankings work: Countries reform the regime of security interests not always because they think it is necessary, but because it helps to achieve better positions in the World Bank Doing Business Report;[13] universities strive to attract more and more international students not necessarily because the management thinks that diversity in the classes ensures a better environment for teaching and learning, but because it helps to climb the QS or THE rankings; the main concern of professors is to publish (even to the detriment of other relevant activities such as studying?), and to publish in certain series or reviews, because the allocation of funds or even the recruitment is directly or indirectly based on numerical indicators;[14] market players offer certain products or services (or stop offering certain products or services) because otherwise they could incur in a negative evaluation by the customers, which could put them out of business.

Despite the absence of a vertical relationship and a formal assertion of authority, individuals and other legal subjects are caught in a framework characterized by the exercise of a subtle, opaque, but highly effective form of power that is difficult to resist, if not for other reasons because it is not perceived as such.[15]

III. What Regulation?

Since no well-ordered society can tolerate unchecked powers, the challenge for our legal systems is how to make these new forms of power accountable. This is not an easy task, from any point of view. Bussani, Cassese, and Infantino deal specifically with this issue in the last chapter of the book.[16]

They distinguish two main situations, depending on whether a possible regulation targets domestic actors or transnational entities.

Domestic regulation is proliferating in both the public and private sectors. As several examples in the book show,[17] they can take the form of prohibitions (as in the case of Art 5 of the EU AI Act), risk management mechanisms, procedural

[12] ibid

[13] See M. Infantino, n 3 above, 145 et seq.

[14] See A. Jakubowski, 'Quantification and Parameterization of Legal Research: The Case of Poland', in M. Bussani et al eds, *Comparative Legal Metrics* n 1 above,118.

[15] See M. Bussani et al, 'A Comparative Appraisal' n 4 above, 354-358.

[16] ibid 358-362.

[17] See for instance I. Cardillo, 'Governance and Quantification of Performance in China', in M. Bussani et al eds, *Comparative Legal Metrics* n 1 above, 180 et seq; R. Gottardo, 'Algorithmic Decision-Making and Public Sector Accountability in Africa – New Challenges for Law and Policy', in M. Bussani et al eds, *Comparative Legal Metrics* n 1 above, 139.

techniques, the granting of individual rights and remedies (as in Arts 15 and 22 GDPR). However, their effectiveness remains to be seen, especially in the light of technological developments that make it extremely difficult to understand the most sophisticated systems of quantitative assessment. Looking at the latest generation of artificial intelligence (AI) systems, which are often used to analyze a wide range of data, infer consequences, and draw up rankings, there is maximum opacity both in terms of the type of data used to train the algorithms and the logic followed by the machine to reach a conclusion.[18]

Unlike early automated systems, today's AI tools are based on learning by doing, making it difficult even for skilled programmers to understand why and how a particular result was achieved.[19] As a consequence, any person affected by AI systems will find it hard to understand the logic behind a particular decision (eg the marks awarded), to present counterarguments, and, ultimately, to challenge it in court.[20] Moreover, the normative framework of intellectual property rights indirectly reinforces such technological enclosure, making opacity by design an institutional feature of the system. In particular, trade secrets and copyright are often interpreted so broadly that the information needed to understand the logic behind such decisions (and to have them reviewed) is simply not available.[21] The famous Loomis case,[22] as well as recital 63 Regulation 2016/679 (GDPR)[23] clearly illustrate this point.

When it comes to transnational actors (including international organizations, multinational corporations, NGOs, digital platforms), regulation is even more difficult. As the authors put it,

> 'the current absence of any call for an international treaty on the field, and considering the general regulatory and jurisdictional immunity enjoyed by actors in the international arena, it seems that performance-based measures produced by international organizations and alike are bound by no rule other

[18] See S. Grumbach et al, 'Autonomous Intelligent Systems: From Illusion of Control to Inescapable Delusion', available at https://tinyurl.com/3xnuc5xa (last visited 30 September 2024).

[19] J.A. Kroll, 'The Fallacy of Inscrutability' 376 *Philosophical Transactions of the Royal Society A*, 1 (2018); H. Shah, 'Algoritmic Accountability' ibid.

[20] D. Keats Citron and F. Pasquale, 'The Scored Society: Due Process for Automated Predictions' 89 *Washington Law Review*, 1 (2014).

[21] D. Levine, 'Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure' 59 *Florida Law Review*, 135 (2007).

[22] *State* v *Loomis* 881 N.W.2d 749 (2016).

[23] 'A data subject should have the right of access to personal data which have been collected concerning him or her, and to exercise that right easily and at reasonable intervals, in order to be aware of, and verify, the lawfulness of the processing (…) Every data subject should therefore have the right to know and obtain communication in particular with regard to the purposes for which the personal data are processed, where possible the period for which the personal data are processed, the recipients of the personal data, the logic involved in any automatic personal data processing and, at least when based on profiling, the consequences of such processing. (…) That right *should not adversely affect the rights or freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software*'.

than self-made ones'.[24]

According to the editors, the theory of global administrative law could provide a possible way out.[25] In particular, they argue that global administrative standards, such as transparency and accountability, could be particularly useful. Indeed, despite the absence of a formal system of enforceability, they are often complied with spontaneously by transnational actors, pressured by 'expectations and demands by interested parties and by the public'.[26]

This is a profound observation, in line with the gradual erosion of territory as the main criterion for justifying jurisdictional claims. The law of the cyberspace and more generally the regulation of digital technologies offers a privileged perspective from this point of view, which is particularly relevant for the type of issues discussed throughout the book.

The quantification of performance, at least in its most sophisticated forms, is hardly conceivable without recourse to a wide gamut of data and AI tools.[27] Consider, for example, a digital lending platform (like SoFi) that wants to rate its customers, a government (like Australia) that wants to select prospective immigrants based on a sophisticated scoring system,[28] or an employer (like Uber) that wants to algorithmically assess the performance of many employees.[29] Such decisions typically involve the collection of a significant amount of personal data, the processing of that data, the use of AI tools to build profiles and the ranking of relevant individuals according to pre-defined criteria.

The fact that we live in an interconnected world, makes it extremely common for such activities to take place across jurisdictional boundaries. Data is produced or collected in country X, simultaneously stored in servers located in countries Y, Z, instantaneously moved from one place to another, broken up into packets and routed through nodes that may be located in multiple jurisdictions.[30]AI models designed in country A and launched in country B, are deployed in country C.[31] Customers in countries X, Y and Z are evaluated by the company based in country W. The data and AI value chain has become so fragmented that one of the biggest challenges facing our legal systems is how to ensure accountability in an increasingly complex transnational environment.

[24] See M. Bussani et al, 'A Comparative Appraisal' n 4 above, 358.

[25] S. Cassese, 'Administrative Law Without the State? The Challenge of Global Regulation' 37 *New York University Journal of International Law and Politics*, 663 (2005); Id, *An Advanced Introduction to Global Administrative Law* (Cheltenham: Edward Elgar,2021).

[26] ibid

[27] See M. Bussani et al, 'An Introduction' n 5 above, 14.

[28] For some examples M. Tani, 'Using a Points System for Selecting Immigrants' 16 *ifo DICE Report*, 8 (2018).

[29] For some examples M. Hu, 'Algorithmic Jim Crow'86 *Fordham Law Review*,633 (2017).

[30] J. Daskal, 'The Un-Territoriality of Data'125 *Yale Law Journal*,326 (2015).

[31] See for instance M. Senftleben, 'AI Act and Author Remuneration – A Model for Other Regions?' available at https://tinyurl.com/4nwt9czc (last visited 30 September 2024).

We have gone through different models and approaches.

In the beginning, the logic of jurisdictional self-restraint was embedded in the libertarian idea of the Internet as a de-territorialized domain, shielded from the influence of traditional sovereigns. This was the era of unfettered freedom for providers to host content uploaded by third parties without fear of liability, of anonymity of communications as a dogma, of data localization requirements as a taboo.[32] Traumatic events such as the NSA and the Cambridge Analytica scandals suddenly revealed a different reality: the physical and electronic space previously thought to be a-territorial was in fact the object of a peculiar form of public-private colonialism; the power exercised by the digital oligopolies proved to be symbiotic with the public authority of a certain Western government and its closest allies;[33] the theoretical choice against territoriality went hand in hand with the factual assertion of extraterritorial jurisdiction through the market dominance of United States (US) -based corporations.[34]

As a result, different models gained traction.

China had initially rejected the open texture of the Western digital globalization by adopting an opposite strategy, which was reflected into the Great Firewall, the extensive data localization requirements, the strict controls on content posted online, and a ban on anonymity.[35] China was followed by Russia and other countries, occasionally influenced by the Digital Silk Road Initiative.[36]

Even the European Union (EU) has gradually tightened up its open system of digital governance. Formerly a paladin of the free flow of data and of technological neutrality, nowadays the EU now seems to have taken the opposite path, influenced by ideas of technological independence, proactive assertion of digital sovereignty, and increasing recourse to the territorial extension of EU law.[37] In particular,

[32] See generally A. Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford: Oxford University Press, 2023), 33 et seq; J.E. Cohen, *Between Truth and Power: The Legal Construction of Informational Capitalism* (Oxford: Oxford University Press, 2019).

[33] On the NSA scandal see C. Bowden, *The US Surveillance Programmes and Their Impact on EU Citizens' Fundamental Rights* (Lëtzebuerg: EUR-OP, 2013).

[34] A. Chander and H. Sun, 'Introduction: Sovereignty 2.0', in Ead eds, *Data Sovereignty: From the Digital Silk Road to the Return of the State* (Oxford: Oxford University Press, 2023), 16.

[35] Y. Wang, 'Regulating Outbound Data Transfer: The Practice of China and a Comparative Approach', in M. Timoteo et al eds, *Quo Vadis, Sovereignty? New Conceptual and Regulatory Boundaries in the Age of Digital China* (Cham: Springer, 2023), 169-180; A. Chander and H. Sun, 'Introduction' n 34 above, 8; H. Gao, 'Data Sovereignty and Trade Agreements: Three Digital Kingdoms', in A. Chander and H. Sun eds, *Data Sovereignty* n 34 above, 225 et seq.

[36] A. Chander and H. Sun, 'Introduction' n 34 above, 14 et seq; G. Greenleaf, 'Personal Data Localization and Sovereignty Along Asia's New Silk Roads', in A. Chander and H. Sun eds, *Data Sovereignty* n 34 above, 295.

[37] A. Bradford, *Digital Empires* n 32 above, 134 et seq; T. Christakis, 'European Digital Sovereignty, Data Protection, and the Push toward Data Localization', in A. Chander and H. Sun eds, *Data Sovereignty* n 34 above, 371; E. Celeste, 'Digital Sovereignty in the EU: Challenges and Future Perspectives', in F. Fabbrini et al eds, *Data Protection Beyond Borders: Transatlantic Perspectives on Extraterritoriality and Sovereignty* (Oxford: Hart, 2021), 211; E. Fahey, 'Does the EU's Digital Sovereignty Promote Localisation in Its Model Digital Trade Clauses?' 8 *European*

with regard to extraterritoriality, the EU has gradually moved from being a victim to being a '(soft) perpetrator'.[38]

IV. Transnational Actors and the Extraterritorial Reach of EU Law

Data protection law has always been regarded as one of the clearest examples of the Brussels effect.[39] EU data protection law has achieved the status of the international gold standard on the basis of a particularly flexible approach to jurisdictional criteria, leading to the much-analyzed phenomenon of the 'territorial extension' of EU law.[40]

This rests on three main pillars.[41]

First, a loose interpretation of the notion of 'place of establishment' of the data processor. This was considered by Directive 95/46/EC to be the main jurisdictional basis for data processing. In the famous *Google Spain* decision,[42] the Court opted for a broad and flexible interpretation of the notion of 'establishment' (Art 4(1)(*a)* Directive 95/46/EC), which included data processing carried out by foreign operators with servers located outside of the EU,[43] but with some economic link to local branches providing auxiliar services within the internal market.

Second, the targeting of individuals or the offering of goods or services to them has been elevated by the GDPR to an autonomous jurisdictional criterium. Art 3 explicitly codifies the criterion of 'targeting' as a factor triggering the application of the Regulation 2016/679/UE, thus laying the foundations for a significant expansion of the territorial scope of the EU data protection model.[44] This criterion was justified on the basis of the (itself not uncontroversial) 'effects doctrine' of international law, according to which states can assert jurisdiction over acts committed abroad if these acts have effects in the territory of the regulating

Papers, 503 (2023).

[38] R. Bismuth, 'The European Union Experience of Extraterritoriality: When a (Willing) Victim Has Become a (Soft) Perpetrator', in A. Parrish and C. Ryngaert eds, *Research Handbook on Extraterritoriality in International Law* (Cheltenham: Edward Elgar, 2023), 118.

[39] A. Bradford, 'The Brussels Effect'107 *Northwestern University Law Review*,1 (2012).

[40] J. Scott, 'The Global Reach of EU Law', in M. Cremona and J. Scott eds, *EULaw Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press, 2019), 21.

[41] See C. Kuner, 'Data and Extraterritoriality', in A. Parrish and C. Ryngaert eds, n 38 above, 362.

[42] Case C-131/12 *Agencia Española de Protección de Datosand Costeja Gonzalez* v *Google Spain*, Judgment of 13 May 2014, available at www.eur-lex.europa.eu; see also case C-507/17 *Google* v *CNIL*, Judgment of 24 September 2019, available at www.eur-lex.europa.eu.

[43] B. Van Alsenoy and M. Koekkoek, 'Internet and Jurisdiction after *Google Spain*: the Extraterritorial Reach of the 'Right to Be Delisted' ' 5 *International Data Privacy Law*, 105 (2015); C.G. Granmar, 'Global Applicability of the GDPR in Context' 11 *International Data Privacy Law*, 225 (2021).

[44] D. Svantesson, 'The Extraterritoriality of EU Data Privacy Law - Its Theoretical Justification and Its Practical Effect on U.S. Businesses' 50 *Stanford Journal of International Law*, 53 (2014).

state,[45] and on the basis of the case law of the CJEU on competition law.[46] The impact of this mechanism has been significant, including in the enforcement of data subjects' rights, namely the right to be delisted.

Third, the continued application of data protection law once the data has been transferred outside of the EU. In particular, Art 25 Directive 95/46/EC allowed data transfers only if the third country ensured an 'adequate level' of data protection. The general idea behind this model is that, in line with the constitutional nature of the Directive, every individual in the EU has a right to continued protection of personal data, even when transferred to third countries.[47] Such a mechanism has been transposed into the GDPR. It formed the basis for two of the landmark rulings of the EU Court of Justice, and namely the *Schrems* 1 and 2, which struck down the agreements negotiated by the EU Commission for data transfers between the US and the EU.[48]

The EU Digital Package followed the path opened up by the data protection Regulation, not only by opting for a broad territorial scope of application, but also by extending the mechanism of continuous application of EU law even when no personal data are involved.[49]

On the first point, both Art 1(2) Digital Markets Act (DMA) (Regulation 2022/1925) and Art 2(1) Digital Services Act (DSA) (Regulation 2022/2065) enshrine the 'targeting' criterion, thus laying the foundation for the territorial extension of EU law.[50] The same is done in the Data Act (Regulation 2023/2854), in Art 1(3).[51]

[45] B. Simma and A.T. Müller, 'Exercise and Limits of Jurisdiction', in J. Crawford and M. Koskenniemi eds, *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), 134, 140.

[46] J. Scott, n 40 above,36.

[47] T. Naef, *Data Protection without Data Protectionism: The Right to Protection of Personal Data and Data Transfers in EU Law and International Trade Law* (Cham: Springer, 2023), 55.

[48] Case C-362/14 *Schrems* v *Data Protection Commissioner*, Judgment of 6 October 2015, available at www.eur-lex.europa.eu; case C-311/18 *Data Protection Commissioner* v *Facebook*, Judgment of 16 July 2020, available at www.eur-lex.europa.eu.

[49] See *amplius* F. Bignami and G. Resta, 'Extraterritoriality', in G. De Gregorio et al eds, *Oxford Handbook on Digital Constitutionalism* (Oxford: Oxford University Press, 2024) (forthcoming), available at https://tinyurl.com/5cpbsrwp (last visited 30 September 2024).

[50] Art 1(2) DMA provides: 'The Regulation shall apply to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service'. Art 2(1) DSA provides that the Regulation 'shall apply to intermediary services offered to recipients of the service that have their place of establishment or are located in the Union, irrespective of where the providers of those intermediary services have their place of establishment'.

[51] Art 1(3) Data Act provides as follows: 'This Regulation applies to: (a) manufacturers of connected products placed on the market in the Union and providers of related services, irrespective of the place of establishment of those manufacturers and providers; (b) users in the Union of connected products or related services as referred to in point (a); (c) data holders, irrespective of their place of establishment, that make data available to data recipients in the Union; (d) data recipients in the Union to whom data are made available; (…) (f) providers of data processing services, irrespective of their place of establishment, providing such services to customers in the Union; (…)'.

On the second point, both the Data Governance Act (DGA) (Regulation 2022/868) and the Data Act (on data use) extend the restrictions on the outward transfer of personal data to certain categories of non-personal data, thereby introducing a soft but effective form of data localization.[52] Interestingly, even the so-called anti-FISA clause of the GDPR (Art 48) is reproduced in Art 31 Data Governance Act and Art 32(2) Data Act.[53]

The extraterritorial reach of EU law is further reinforced by the last born of the digital regulations, and namely the AI Act. With the aim of preventing any circumvention of the prohibitions and obligations laid down by the AI regulation, and namely through re-localization strategies,[54] Art 2(1) provides for an unprecedentedly broad territorial scope of application of the Regulation.[55]

This applies not only to providers who place AI systems on the market or put them into service or to providers who place general-purpose AI models in the internal market, regardless of where they are established (lett *a)*, and to 'deployers' of AI systems who are established located in the Union (lett *b*), but also to

> 'providers and deployers of AI systems that have their place of establishment or are located in a third country, where the output produced by the AI system *is used* in the Union' (lett *c*).

The jurisdictional basis set out in Art 2 is so broad, in particular its lett *c,* that

[52] In particular, Art 5(9) DGA sets out a mechanism similar to the GDPR, attributing to the Commission the power to declare that a third country affords an 'essentially equivalent' protection of trade secrets and IP rights, that such protection is being effectively enforced and applied, and that effective judicial redress is available. In the absence of such declaration, data obtained for reuse cannot be transferred unless the re-user undertakes to comply with the obligations to protect IP and trade secrets, even after the data is transferred to the third country, and to accept the jurisdiction of the relevant Member State (Art 5 (10) DGA). Also, with regard to certain non-personal data declared 'highly sensitive', the Commission is empowered to adopt delegated acts supplementing the DGA by laying down special conditions applicable for transfers to third-countries; such conditions 'may include terms applicable for the transfer or technical arrangements in this regard, limitations as regards the re-use of data in third-countries or categories of persons which are entitled to transfer such data to third countries or, in exceptional cases, restrictions as regards transfers to third-countries' (Art 5 (11) DGA). Similarly, Art 32 Data Act lays down an obligation for providers of data processing services to 'Providers of data processing services shall take all adequate technical, organizational and legal measures, including contracts, in order to prevent international and third country governmental access and transfer of non-personal data held in the Union where such transfer or access would create a conflict with Union law or with the national law of the relevant Member State'.

[53] As made clear by the Commission in the Impact Assessment Report accompanying the Data Act (European Commission, 'Impact Assessment Report accompanying the Data Act Proposal' SWD(2022) 34 final, 20-21), it is feared that foreign authorities may unlawfully access non-personal data stored in the cloud environment.

[54] See Recital 22 AI Act; A. Keane Woods, 'Digital Sovereignty + Artificial Intelligence', in A. Chander and H. Sun eds, *Data Sovereignty* n 34 above, 115.

[55] D. Bomhard and M. Merkle, 'Regulation of Artificial Intelligence: The EU Commission's Proposal of an AI Act' 10 Journal of European Consumer and Market Law, 257 (2021); D. Svantesson, 'The European Union Artificial Intelligence Act: Potential Implications for Australia' 47 *Alternative Law Journal*, 4 (2022).

the regulation has the potential to be applied to any provider or deployer of AI systems whose outcome produces effects (by being used) in the Union. But what kind of use is required by this provision? Must the AI tool be placed in the market or deployed with the intention of being used in the Union? Or can its use in the Union be a fortuitous circumstance?

Interpreting Art 2 literally, a wide range of phenomena could fall within the scope of application of the AI Act. As Dan Svantesson points out, even a song played on the radio in Europe could raise the question of how such a song was recorded.[56] Was the voice artificially altered? Was the text or the music composed by AI? And if so, should the AI Act apply to all such activities prior to broadcasting in Europe? And, to take other examples: *i*) should an online dispute resolution system based on machine learning techniques be subject to the AI Regulation simply because one of the claimants located in Europe may be positively or negatively affected by the final decision? (*ii*)will the medical assessment of a European patient by an online screening tool made available in the US fall within the scope of Art 2?

V. Accountability of Transnational Actors and Global Power Imbalance

The long arm of European digital regulation is a paradigmatic example of the contemporary tendency to reshape the role of territory as the main criterion for justifying jurisdictional claims.[57] Territory is not abandoned altogether but increasingly reimagined so as to lose its narrow geographical boundaries.[58] As Ryngaert and Parrish put it,

> '(t)erritoriality then becomes a flexible governance technique to regulate essentially extraterritorial situations, thereby blurring the dividing line between territoriality and extraterritoriality'.[59]

However, the de-territorialization of the law does not mean that the traditional principles of sovereignty and independence of the states have been overcome. While the shift towards extraterritoriality characterizes prescriptive jurisdiction, it is much more controversial in the field of enforcement jurisdiction.[60] The experience of data protection law, and namely the difficulty of enforcing it abroad, confirms this conclusion.[61] On the other hand, extraterritoriality has always been a political

[56] ibid 8.

[57] C. Ryngaert, 'International Jurisdiction Law', in A. Parrish and C. Ryngaert eds, n 38 above, 14.

[58] M. Catanzariti, *Disconnecting Sovereignty: How Data Fragmentation Reshapes the Law* (Heidelberg: Springer, 2024); C. Ryngaert and A. Parrish, 'Introduction to the Research Handbook on Extraterritoriality in International Law', in C. Ryngaert and A. Parrish eds, n 38 above, 5.

[59] ibid

[60] C. Ryngaert, 'Extraterritorial Enforcement Jurisdiction in the Cyberspace: Normative Shifts' 24 *German Law Journal*,537 (2023).

[61] European Data Protection Board, 'Study on the Enforcement of GDPR Obligations Against

notion used to support certain normative projects,[62] and in many cases it is used as a technical tool to reinforce the paradigm of digital sovereignty.

As a result of this evolution, transnational actors are increasingly caught up in a dense – and often contradictory – web of local, regional, and supranational regulations. This circumstance, together with the reputational and market pressure mentioned above, may contribute to subjecting to subjecting the new technocratic powers to at least limited forms of legal control. From this perspective, such a development may be seen as desirable, and indeed extraterritoriality has often been defended as a tool to achieve global justice projects.[63] However, one should not underestimate the downsides of the contemporary fascination with extraterritoriality.

First, there may be serious jurisdictional conflicts. Compare, for example, the US Cloud Act – which allows US authorities to obtain data stored by providers under US jurisdiction, regardless of whether the servers are located in the US or abroad – with Art 48 GDPR (and Art 32(2) Data Act) – which prevents providers from transferring personal data to authorities in third-countries even if such transfers are authorized or ordered by a decision of a foreign court, tribunal, or administrative authority.[64]

Second, it may increase the accountability of powers in one geopolitical scenario, but it may also exacerbate the already strong asymmetries in North/South relationships. It cannot be overlooked that by extending the geographical scope of domestic law, any legislation ends up significantly increasing the compliance burden for any actor within the reach of the relevant regulation, regardless of their location. Consider, for example, the obligation to appoint a representative in the EU, under Art 27 GDPR and Art 22 AI Act. This is a formality for multinational platforms but becomes a huge cost when applied to a smaller company from a developing country. From this perspective, regulation risks amplifying the already strong technological imbalance between North (or North-East) and South, by introducing digital trade barriers for developing countries.[65]

This is the criticism that is often made in terms of 'data (or digital) colonialism',[66]

Entities Established Outside the EEA but Falling under Article 3(2) GDPR', Brussels, 2021.

[62] C. Ryngaert and A. Parrish, 'Introduction' n 58 above, 6.

[63] See for instance E. Benvenisti and G. Nolte eds, *Community Interests Across International Law* (Oxford: Oxford University Press, 2018); M. Langford et al eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2012).

[64] See J. Daskal, 'The Opening Salvo: The CLOUD Act, e-Evidence Proposals, and EU-US Discussions Regarding Law Enforcement Access to Data Across Borders', in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press, 2020), 319.

[65] A. Renda, 'Beyond the Brussels Effect: Leveraging Digital Regulation for Strategic Autonomy' 14, available at https://tinyurl.com/3yvh73e9 (last visited 30 September 2024).

[66] C. Mannion, 'Data Imperialism: The GDPR's Disastrous Impact on Africa's E-Commerce Markets' 53 *Vanderbilt Journal of Transnational Law*, 685 (2020); S. Calzati, "Data Sovereignty' or 'Data Colonialism'? Exploring the Chinese involvement in Africa's ICTs: A Document Review on Kenya' 40 *Journal of Contemporary African Studies*, 270 (2022); D. Coleman, 'Digital Colonialism: The 21st Century Scramble for Africa through the Extraction and Control of User Data and the

and which is echoed in some chapters of the book.[67]

Such a critique should be seriously considered and should not obscured by the rhetoric that surrounds much of the EU's recent digital regulation, which oscillates between an emotional call for a human-centred regulation[68] and a pragmatic claim to strategic independence.[69] As Dan Svantesson convincingly argues,

> 'if we want a more level playing field between the developed and the developing countries, scalability must be a consideration when the powerful and most influential countries and regions implement new legal approaches'.[70]

Limitations of Data Protection Laws'24 *Michigan Journal of Race & Law*, 417 (2019); U. Sahbaz, 'Artificial Intelligence and the Risk of New Colonialism' (14) *Horizons: Journal of International Relations and Sustainable Development*, 58 (2019); J. Muldoon and B.A. Wu, 'Artificial Intelligence in the Colonial Matrix of Power' 36 *Philosophy and Technology*, 80 (2023).

[67] R. Gottardo, n 17 above, 174; S. Mancuso and L. Corselli, 'Profiling in Algorithm-Based Decisions: An African Perspective', in M. Bussani et al eds, *Comparative Legal Metrics* n 1 above, 249-264.

[68] See L. Floridi, 'The European Legislation on AI: A Brief Analysis of its Philosophical Approach' 34 *Philosophy and Technology*, 215, 216-217 (2021).

[69] European Commission Communication of 19 February 2020on a European Strategy for Data COM(2020) 66 final.

[70] D. Svantesson, 'The European Union Artificial Intelligence Act' n 55 above, 8.

Essays

Rule of Law: A Normative Ideal and Its Implications for the Italian Public Administration

Edoardo Chiti* and Gianluigi Palombella**

Abstract

The article discusses the relevance of the Rule of Law for the Italian public administration. It opens by observing that the Rule of Law is a more demanding notion than usually assumed in the Italian discourse, a normative ideal encapsulating a specific and challenging rationale. More precisely, the rationale of the Rule of Law as a normative ideal is to be found in the beneficial tension between two sides in the organization of legality, both to be considered as in the interest of the community and the citizens: the law produced by political institutions, on the one hand, and some 'other' law beyond the purview of the public power, on the other. Such understanding of the Rule of Law is at times echoed by the reflection of a limited number of administrative law scholars particularly sensitive to legal change. As for the legal institutes usually associated with the Rule of Law, most of them are aligned with such rationale. But it would be appropriate to establish a clear and direct link between the Rule of Law as a normative ideal and its concrete manifestations in the Italian administrative system.

I. The Rule of Law and the Italian administrative State

In the first quarter of the XXI century, the Rule of Law has increasingly gained relevance in the academic, legal and political discourse on Italian public administration. *To begin with*, part of the public law scholarship has recognized since the early 2000s that administrations are no longer subject to legislation only, as assumed by the traditional understanding of the principle of legality. Instead, they are also subject to general principles and secondary rules, as well as to principles and rules laid down by European, international and global sources: a legal development which has been interpreted as implying a redefinition of scope and requirements of the principle of legality and has led to the emergence in the Italian legal order of a wider principle of the Rule of Law (or, for others, *règle de droit*).[1] Second, administrative courts have registered the changing features of legality when taking

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[1] For a clear-cut formulation of such interpretation, S. Cassese, 'Le basi costituzionali', in Id, *Trattato di diritto amministrativo*, *Diritto amministrativo generale* (Milano: Giuffrè, 2nd ed, 2003), I, 174, 220-222; see also M. D'Alberti, *Lezioni di diritto amministrativo* (Torino: Giappichelli, 4th ed, 2019), 38.

into account the 'composite law'[2] governing administrative action, that is the plurality of sources laying down administrative provisions, and addressing the uneasy issue of their prioritization. While it is difficult to find explicit reference to the Rule of Law in administrative case-law, the notion of *Stato di diritto* may have served as a tool to connect the traditional understanding of legality to the new reality of a multiple set of domestic and European, international and global norms providing *ex ante* guidance as to the criteria for administrative action.[3] Third, the Rule of Law has become a key component of the political and institutional debate on administrative reform, for example in relation to anti-corruption strategies and the justice system, also as a result of the influence exercised by the European Union (EU),[4] which recognizes the Rule of Law as one of its founding values, common to the Member States.[5]

Unsurprisingly, such process reflects a wider trend of contemporary Western polities, where the Rule of Law is gaining the status of an overarching principle, based on widely-shared values and directly relevant to the administrative organization and action.[6] The parallel developments in the global governance,[7] as well as the initiatives promoted by several European regimes and societies, such as the Venice Commission of the Council of Europe and the International Federation for European Law,[8] confirm the success of the concept and its potential both for domestic and global administrations.

In spite of the apparently unproblematic nature of the process, however, the growing relevance of the Rule of Law for the Italian administrative State raises a number of uneasy issues. How should the Rule of Law be defined, beyond the loose statements made in the institutional discourse? How has it been operationalized in the Italian administrative system? And which assessment should be given of the current state of affairs?

Such questions are crucial if one wishes to clarify the relevance of the Rule of Law, its significance and meaning for Italian public administrations. But in answering these questions, one must essentially find that the Rule of Law is a more demanding

[2] For such concept, see G. Palombella, 'Theory, realities and promises of inter-legality. A Manifesto', in J. Klabbers and G. Palombella, *The Challenge of Inter-legality* (Cambridge: Cambridge University Press, 2019), 363.

[3] See eg F. Patroni Griffi, 'Giustizia amministrativa: evoluzione e prospettive nell'ordinamento nazionale e nel quadro europeo' 2020, available at www.giustizia-amministrativa.it

[4] Such influence is exemplified by the annual reporting cycle on the Rule of Law, coordinated by the European Commission: see European Commision Comunication COM/2023/800 of 5 July 2023, available at www.euro-lex.europa.eu.

[5] Art 2 of the Treaty on European Union [2008] OJ C115/13.

[6] G. Napolitano, 'The Rule of Law', in P. Cane et al eds, *The Oxford Handbook of Comparative Administrative Law* (Oxford: Oxford University Press, 2021), 421.

[7] M. Macchia, 'The Rule of Law and Transparency in the Global Space', in S. Cassese ed, *Research Handbook on Global Administrative Law* (Cheltenham: Elgar, 2016), 261.

[8] See eg the 'Rule of Law Checklist', adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) and FIDE, 'Mutual Trust, Mutual Recognition and the Rule of Law' (The XXX FIDE Congress in Sofia, Congress Publications, 2023), I.

notion than usually assumed in the Italian discourse, a normative ideal encapsulating a rather specific - and challenging - rationale. While most of the legal institutes usually associated to the Rule of Law are aligned with such rationale, it would be appropriate to establish a clear and direct link between the Rule of Law as a normative ideal and its concrete manifestations in the Italian administrative system.

II. The Historical Roots of a Normative Ideal

As it is known, the birth and development of the *Stato di diritto* across continental Europe in the XIX century was based, among other things, on a rather instrumental and controlled understanding of the administrative machinery. It is not by chance that the famous Weberian[9] representation of the legitimacy of such a 'State' was due to the form itself of legislation as a rational/formal production giving rise to any public power whatsoever. It provided that its branches could only act under predetermined rules of action. What makes the citizen obey the modern State is, according to Weber, the faith in the form of legislation: on one side, 'political', on the other, formalizing, authorizing and channeling public administration.[10] The very logic of the principle of legality lies at the heart of the modern State.

Such continental understanding relied on the 'legislative State', as well as on the related doctrines that had placed legislation at the top of the legal order, so that *la loi* in France or *die Herrschaft der Gesetzes* were the highest, sovereign sources endowed with the monopoly of 'law'. Rights of the individuals, if any, were the product of such sovereign will, as the positivist dogmas established it and could be withdrawn by the same will, no legal obstacle withstanding. Nothing could exist if not through legislation. The Weberian praise to such state of affairs was due to the value of the 'rule by law', which meant yet a progress beyond arbitrariness, unpredictability, uncertainty, of the exercise of public power. The rule by law mirrors very closely our known principle of legality, and of course it does give a basic, necessary ground for the administrative State, which can be anything but the justice by the Kadì,[11] and should point to avoidance of 'material' conflicts and value-polytheism, which would pave the way to arbitrary power.[12]

However, something was missing: the Rule of Law.

When wondering how continental constitutions affect the structure and operation of public administration, one should look at the ways they approximate

[9] See his masterpiece, M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, I (Berkeley: University of California Press, G. Roth and C. Wittich eds, 2013).

[10] A brief reminder and overview of Weberian influence is found in W. Drechsler, 'Good Bureaucracy: Max Weber and Public Administration Today' 20 (2) *Max Weber Studies*, 219 (2020).

[11] M. Weber, *Economy and Society* n 9 above, 139, explains that Kadì justice meant to him 'adjudication according to the judge's sense of equity or according to (…) other irrational means of law-finding'.

[12] More at length on this framing of the European continental State, G. Palombella, 'The Rule of Law as Institutional Ideal' 9 *Comparative Sociology*, 4-39 (2010).

the Rule of Law as a liberal, English, ancient ideal. Once rights and principles other than sovereignty (which includes the democratic will of the People) are enshrined in the higher law, the functioning of the public administration is asked to be subjected to the same principles, whether the sovereign will of the people is actually mirroring them or not.

The Rule of Law conveys the prospect of limiting jurisgenerative, normative power, an idea that is also visible, in its English roots, also through the insight and picture drawn by Albert Venn Dicey.[13] Its sense and scope along the line that links Henry de Bracton (and the coupling of *gubernaculum/jurisdictio*), Edward Coke (cf Bonham's case), the Federalist Papers and eventually the American 'judicial review', expose – beyond various differences – a more general unitary logic. There is a plurality of sources that concur to determine the inherent diversity of the 'law of the land'. While sovereignty is complex and is shared between the Crown, the Lords and the Commons, the law also develops through the common law and the courts.

In assuming the liberal import of the ancient English ideal as a valuable one, that we would wish to adopt, its main, core meaning lies in the idea that the State power (*gubernaculum*) does not monopolize the production of law.[14] Traced back to Bracton and elaborated upon by MacIllwain,[15] the couple *gubernaculum-jurisdictio* reflects the conviction that the sovereign (power) has a right and a duty to govern by law, but that its jurisgenerative strength has to coexist with some other law that he has no legal power to overwrite. The *jurisdictio* includes judicial achievements, judge-made law, established customs and conventions, the common law in general. On the other hand, there is the *gubernaculum* side, bringing about the ethics and the policies legitimately decided by the will of the sovereign, who has the right to honor his duty to govern. It can fairly be said that the tension between these two poles can be protected through institutional devices configuring legality in such a way as to pursue and approximate the ideal of the rule of law, demanding the non-disposability of justice (*jurisdictio*) by the rule of the sovereign. At the same time, the rule of law would prevent the opposite from occurring: it is completely misleading to think that some law of itself can rule by displacing the legitimate directive will of the sovereign (say, through an aristocracy of judges, the infringement of the essential core and scope of political sovereignty by the diktat of, say, some epistemic community). Such an image is not, per se, anything which is proper to the Rule of Law.

[13] A.V. Dicey explained the traits and properties that he deemed typically 'English': that no man can be punished for what is not forbidden by the law, that legal rights are determined by the ordinary courts, and that 'each man's individual rights are far less the result of our constitution than the basis on which that constitution is founded': A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 8th ed, 1915; Indianapolis: Liberty Classics, 1982), *Introduction*, LV.

[14] This understanding of the Rule of Law and its supporting arguments draw on G. Palombella, 'The Rule of Law at Home and Abroad' 8 *The Hague Journal on the Rule of Law*, 1-23 (2016).

[15] C.H. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1940), 85.

The normative ideal of the Rule of Law, because of its very nature, does not simply promise that some single, eight or more (famously Lon Fuller's)[16] requisites of procedure or substance, shall permanently be part and condition of law. More than that, it asks that law be upgraded as an organizational form structured to exclude the monopoly of one source, and capable of exposing an internal institutional relation as 'duality'. And many of the qualities that are often believed to capture the core of the Rule of Law, like, in the first place, non-arbitrariness, could be better placed within the legal-institutional premises of such a Rule of Law environment: outside of which they would merely prove to be miserable comforters (like it was in the pre-constitutional *Rechtsstaat* and the *Stato di diritto* referred to in the above). Our contemporary constitutional States, by enshrining commitment to rights and principles of equal legal force as the principle of sovereign rule (that is, with us, democracy), that the latter cannot legally conceal and reject, have well approximated such deeper and truer notion, which the public power of administration is today confronted with in its everyday practice.

III. The Rule of Law as Duality

The overall perspective on the Rule of Law more often echoed by the Italian public law reflection has attempted to come to terms with the changing features of the principle legality. In Italy, as in all contemporary legal systems, legality requires legislative authority for any administrative action. That is, admittedly, on the one hand, a complex statement today bearing deeper implication than in the past, and on the other the place for a platitude. Yet, a number of administrative law scholars particularly sensitive to legal change have stressed since the early 2000s that its meaning has become wider and richer over the years. The principle of legality should now be meant, on the basis of the constitutional framework and administrative case-law, as a principle requiring that legislative or secondary law provisions provide *ex ante* guidance as to the criteria for administrative action.[17] Moreover, as an effect of the opening of the Italian legal order to a multitude of regimes beyond the State, starting with the EU order, legality also implies that domestic administrations are subject to non-national norms. In such wise, legality expands the constraints on domestic administrations, which are no longer subject to national law only, but also to European, international and global norms,[18] and turns into a wider and more complex rule of (administrative) law. The need to go beyond the strict boundaries of legality and to rely on the deeper rationale of a limiting normative power lie at

[16] L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), chapter 2, lists generality, publicity, non-retroactivity, clarity, non-contradiction, constancy, and congruity as necessary for the law… to be law.

[17] See the overall reconstruction by S. Cassese, 'Le basi costituzionali' n 1 above, 216-222.

[18] ibid 221. In the non-Italian legal scholarship, see P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' 3 *Public Law*, 467 (1997).

the heart of this innovative and far-reaching reconstruction.

Admittedly, however, two different views co-exist in such framework. One is oriented to recognize the increasing protection against the exercise of public power. What matters, in this case, is administrative law's capability to structure and limit administrative discretion: in the continuous dialectic between power-establishing and power-checking historically inherent to and implied by administrative law, the rise of the Rule of Law is presented as a process of reinforcement of principles and rules aimed at keeping the exercise of administrative power under control and preventing and removing arbitrariness.[19] Another view points to the different 'formats of law'[20] on which the Rule of Law relies. In this perspective, the Rule of Law implies, on the one hand, the exploitation of the power-checking potential of administrative law, on the other hand, the recognition of different formats of law involved in power-checking, namely the law produced by national and EU political institutions and the law which does not necessarily reflect the 'governing' will of the polity but rather other less politicized, goals, like rights' protection.

On this view, the many faces of law interact and coexist that are known to us, like the law as the legal order of a State, the law as a transnational patrimony of common solutions to common problems (the *jus gentium* format that resonates in many international regimes, from human rights to the environment), the law as a multiversum of orders and disconnected sources (the false friend to the medieval organization of legalities), the law as a fabric of regulatory supranational entities, ruling the world from some kind of deracinated standpoints (the supranational and international authorities focused upon by- and labelled as- the Global Administrative Law realities).[21] The more the description of the legal worlds involved in today's legal issues is accurate, the more the Rule of Law, if meant just as a kind of connection between the principle of legality and (as the very form of) our venerable *Stato di diritto*, looks too narrow, one-sided, and all in all, devoid of the required grip on current realities. If one takes the whole scenario of legalities into account, the search for non arbitrariness in the exercise of power remains a fundamental premise. However, should the principle of legality in the domain of the 'legal State' (the notion constructed between the XIX and the XX century) be the notion to consider, then

[19] In a comparative perspective, this point is made by G. Napolitano, 'The Rule of Law' n 6 above, 427, who argues that 'the idea of the rule of law in administrative law always contains a fundamental liberal message. The common idea is that the administration (…) has to remain within the boundaries and respect the constraints established by the law'.

[20] On the concept of 'formats of law' see G. Palombella, 'Formats of Law' n 1 above, 23, stressing the diversity of legal patterns at work in the globalized legal space.

[21] B. Kingsbury, 'The Concept of "Law" in Global Administrative Law' 20 (1) *European Journal of International Law*, 23-57 (2009); Id et al, 'The Emergence of Global Administrative Law' 68 *Law and Contemporary Problems*, 15 (2005); S. Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' 37 *New York University Journal of International Law and Politics*, 663-694 (2006); M. Zurn, 'Global Governance and Legitimacy Problems', in D. Held and M. Koenig-Archibugi eds, *Global Governance and Public Accountability* (Oxford: Blackwell Publishing, 2005), 144.

we must acknowledge that in tackling administrative power, non-arbitrariness was precisely the *acquis*, the given result of that well-ordered state, where no public powers could ever exist lest the State legislation had created them and defined the clear rules of their exercise. Now, our normative target requires much more. That is because the concurrence of multiple legalities and the constitutional progress of our legal orders have led us closer to the core of the Rule of Law, which, as from the foregoing, implies a law capable of limiting the law of the sovereign, and putting forward countervailing normativities; furthermore, the Rule of law implies the shift from the (pre-constitutional) Euro continental understanding as something inherent to the organization 'of the State' (*Stato di diritto*, that is, a form of the State) toward an ideal concerning directly the organization and the 'structure of law', not 'of the State'.[22] Of course, on this conjunction, there is no question of merit, which directly engages with the dispute between formal versus substantive conceptions of the Rule of Law. The institutional organization that structures the law is at stake, not a question of which contents the 'law' has to embody, nor of which formal-procedural requirements are to be in place. although all of these are consequentially included.

With this in mind, the efforts to confine the public administration within the borders of the principle of legality are somehow misleading, since they might severely detract from the appropriate knowledge of the real state of affairs, where problems like non arbitrariness or accountability are still at the forefront, but dwell in a scenario of higher complexities, plurality of sources and orders, multilevel normative rationales, up to the point that the very notion of accountability or arbitrariness needs to be checked and measured by entirely new criteria and more than once, upon diverse levels of reference (for example, the human rights regimes, the European common market, the State constitutional obligations, the international duties, and so forth and so on).

The second of the two views co-existing in the Italian reflection on the emergence of the Rule of law, in other terms, highlights both the evolution of legality and the relevance of more than one format of law in controlling the exercise of administrative power.[23] Indeed, the rationale of the Rule of Law as a normative ideal is to be found in the oscillation, or otherwise the beneficial tension between the defense of the administrative power of the State and the 'other' law that works as a counterpoise, including its judicial[24] counter-majoritarian side, both protecting interests and rights of the citizens. The balance holds together the political issue (and

[22] It is worth mentioning here the words of the political scientist Giovanni Sartori who stressed how the difference that matters is the following: while within the *Stato di diritto*, the State is subject to a law that is its own, with the Rule of Law (as an English setting) it is confronting a law that is not its own G. Sartori, 'Nota sul rapporto tra Stato di diritto e Stato di giustizia' *Rivista internazionale di filosofia del diritto*, 310-311 (1964).

[23] See in particular S. Cassese, 'Le basi costituzionali' n 1 above, 221; M. D'Alberti, *Lezioni di diritto amministrativo* n 1 above, 38.

[24] On which see G. Palombella, 'Access to Justice: Dynamic, Foundational and Generative' *Ratio Juris*,121 (2021).

separation of powers) as well as certain rights of citizens and minorities. However, the Rule of Law controls the two cases, not only the latter. The Rule of Law is the balance, whose ideal prescribes the 'duality' of the sides, by allowing for the right of the government to rule and for 'another law, beyond the purview of the public power', that works on the side of individual protection.[25]

The idea of the duality, the logic of legal counterpoises, have some complexities, that can hardly be overestimated. In order to illustrate this point, one can refer to one among several climate litigation cases, the Italian *Giudizio Universale* case held by the Tribunal in Rome.[26] In this case, the Italian court had something to say about the limits that prevent the judicial branch from overstepping the threshold of its jurisdiction. According to the Tribunal, the action of the State when countering or, worse, omitting the necessary actions to counter climate change belongs in a political realm. Therefore (judicial) ordering something like State's action would be tantamount to infringing the separation of powers. Now, at some higher level of authority and power, there is, admittedly, a thin line between administrative and political acts, since both imply some understanding of the autonomous will of the State. Nuances are relevant here. It eventually matters whether the high administration simply implements a 'political' notion of environmental protection (and the relevant duties) in some disputable way, or it walks on its own, lacking the ends-defining legislative decision on the 'political' level. However, one can safely assume that the assessment of the measures implementing the obligations to fight climate change calls into question the administrative State, at the point where, as noted, the 'line' is blurring. Needless to say, each time the line is blurring, consistency and features of the Rule of Law are in trouble.

Again, the tussle between rights (and interests) of the citizens (including individuals, minorities, and so forth), on one side, and the exercise of power by the 'State', on the other, often sit on an uncertain border. Such circumstances generate the need for a third actor in play, that is, the judicial authority, an actor rightly conceived of as a Rule of Law vigilant custodian. This notwithstanding, the judiciary can be itself abridging the separation of powers, as the Tribunal of Rome has reminded us. Despite the rhetoric on the judiciary as the ultimate safeguard of the Rule of Law, it is true, both in principle and in practice, that the judiciary can undermine the balanced organization of law and power. The question of 'preserving the political autonomy of the sovereign State' is indeed one relevant instance.

When considering the potential or factual limitations affecting the free exercise of the autonomy of the administrative State and its sovereign decision-making, one should understand how the exercise of that 'autonomy' is legitimate and whether 'limitations' to it are themselves to be accepted or otherwise should be rejected, in so far they themselves alter and undermine the rule of law.

In the present legal scenarios, where domestic and supranational legalities

[25] See G. Palombella, 'The Rule of Law at Home and Abroad' n 14 above, 1-23.
[26] Tribunale di Roma 26 February 2024 no35542, avaible at www.dejure.it.

intertwine so deeply and steadily, the proliferation on the supranational sphere of the well-known regulatory administrative entities capable of rule-making, within the remit of global governance, impinges upon the spheres of States. It also detracts from States' political control and jeopardizes the (conditions of) traditional exercise of political sovereignty.[27] Threats to political sovereignty are flourishing in the supranational context, where the icon of the separation of powers should be of even higher concern. Considering the Rule of Law only a matter of domestic balance looks somehow outdated.

Should the separation of powers be considered, as it were, an essential component of a sound understanding of the Rule of Law ideal, then the 'political' sovereignty of the State should be legitimately valued (and protected) both in the extra-State context and in the domestic sphere. While, on the latter, the judiciary could trespass the threshold of political decision making, on the former, the supranational context, it is the external power of foreign, 'deracinated' regulatory authorities to threaten the political sovereignty of the State. One should note that these are both faces of the 'political question', so to say. The political question, be it either a shield against overwhelming external regulatory intrusion or the specious protection of an impenetrable State power is a most significant case in point.

The decision of the Rome Tribunal, regardless of its controversial technicalities, enlightens the old domestic idea with which the 'political question' resonates: in order to save the core of the *Stato di diritto*, the 'power' of the State should not be encroached upon. Where the separation of powers is held to be the case, even judicial authority could be asked to withdraw, and despite the fundamental right to climate (and to healthy environment) might be at issue. However, climate litigation has best proved that the failure of politics, the lack of appropriate policies, the missing exercise of adequate governance on one side can be legitimately addressed by the judiciary, on the other end up into inadequate or wrongful exercise of administrative power (be it through action or omissions).

Judge Aiken in the known *Juliana* case rightly described how that litigation against the 'State' was no ordinary lawsuit:

> 'Plaintiffs challenge the policies, acts, and omissions of the President of the United States, the Council on Environmental Quality, the Office of Management and Budget, the Office of Science and Technology Policy, the Department of Energy, the Department of the Interior, the Department of Transportation ('DOT'), the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of State, and the Environmental Protection Agency ('EPA')'.[28]

Clearly, one can understand that *Juliana* is a case against the government as

[27] See G. Palombella, 'Theory, realities and promises of inter-legality' n 1 above.

[28] *Juliana and others* v *United States* (2017D Or). Judge Aiken addresses as well the objection from the 'political question doctrine' and resolves against it (see the decision at p 6).

a whole, involving the entirety of its administrative responsibilities. And it is not by chance that in July 2021, it was France's highest Administrative Court (*Conseil d'État*), to rule in the *Grande-Synthe* case,[29] that the government had to take further and better suited measures to pursue effective climate mitigation.

IV. Whose Rule of Law?

Whose Rule of Law - whether the international or the domestic - is a further issue that needs to be taken into account. The *Taricco* case, involving the Italian Constitutional Court and the European Court of Justice can be useful a sample. The Italian Constitutional Court engaged in a delicate confrontation with the Court of Justice. In short, according to the latter, Italian rules on 'prescription' (time-limitation) for tax crimes concerning VAT end up facilitating the commission of such crimes to the detriment of the interests of the European Union. Therefore, where the stipulated 'prescription' limitation period 'proves in a considerable number of cases to be insufficient to repress serious fraud to the detriment of the financial interests of the Union', which depends on the failure to collect VAT in the national territory, the criminal court should proceed in the trial, omitting to apply the limitations of the prescription period.[30]

The Italian Court, wishing to avoid ruling to the contrary, preferred to raise the question for a preliminary ruling before the European Court, essentially submitting to it-but in an interrogative form-its objections, which relate to the sensitive nature of criminal law in the context of a State system.[31] Noting that in the Italian legal order, the statute of 'prescription' limitations has a substantive and not merely procedural character, the Court emphasizes that it is therefore not merely available to the discretion of a judge; therefore, in addition to offering the defendant a higher level of protection of fundamental rights, the 'prescription' remains subject to the principle of legality enshrined in Art 25, para 2, of Italian Constitution with the consequence that the relevant rules must comply with principles of certainty and clarity, and of antecedence to the act committed, whereas the European Court would leave to the judge's determinations on a case-by-case basis and on the basis of a parameter (a 'considerable number of cases') that is entirely vague and uncertain.

Therefore, the Court asked whether it should be understood that what the Court of Justice of the Union requires should apply

> 'even when' the failure to apply the prescription 'lacks a sufficiently determined legal basis'; 'even when in the system of the member State the

[29] Conseil d'Etat, 1 July 2021 no 427301, available at www.legifrance.gouv.fr.

[30] Case C-105/14 *Taricco and others*, Judgment of 8 September 2015, available at www.eur-lex.europa.eu.

[31] With the Order no 24, decided on the 23rd of November 2016, the Italian Constitutional Court raised a preliminary reference before the Court of Justice of the European Union, with regard to the interpretation of art 325, paras 1 and 2 of the *Treaty on the Functioning of the European Union*.

prescription is part of substantive criminal law and subject to the principle of legality';

'even when such failure to apply the prescription's limitation is contrary to the supreme principles of the constitutional order of the member state or to the inalienable rights of the person recognized by the constitution of the member State'.[32]

The Rule of Law here, in so far as it conveys the principle of legality as well as connected guarantees for the individual persons, is under threat because the financial administration of the European Union has to defend substantive European economic objectives which depend on associative obligations of the Member States. The Rule of Law *of the EU* might risk to conflict against the Rule of Law *in a Member* State. The answer from the Court of Justice was precisely avoiding such risk, by accepting the importance of preserving the principle of legality in a member State and the substantive idea of rights' protection (also under a due process principle, and the separation of powers).[33]

It is to be noted that not a 'political question' but a rule of law issue was raised by the Italian Court. The question concerning the European administration and the Member State was discussed, in truth, by appealing to a 'common' ideal of the Rule of Law, even if such a concept was not given any paradigmatic definition.

In this concise excursus, the issue of the Rule of Law, as from the above, does not fully fit the milestone currency in public administrative law: the principle of legality. The transformations in the view and the legal structure of the public administration lead to some different sense, other than the power of legislation under which the public administration founds its generative umbrella.

V. Operationalizing the Rule of Law

It is now appropriate to briefly discuss the way in which the normative ideal of the Rule of Law, as presented so far, is or should better be manifested and operationalized in the Italian administrative system.

A first point to make in this regard concerns the legal institutes usually associated with the Rule of Law. The Italian administrative law scholars engaged in the reflection of the changing features of legality have identified a number of principles and rules which are said to substantiate the *administrative* Rule of Law. Three of them are prominent: judicial review, the duty to give reasons and procedural fairness.[34] They are distinct but inter-connected requirements. Judicial

[32] ibid

[33] Case C-42/17 *M.A.S* and *M.B.*, Judgement of 5 December 2017, available at www.eur-lex.europa.eu.

[34] S. Cassese, *Oltre lo Stato* (Bari: Laterza, 2006), 109.

review developed in continental Europe in the XIX century and represents the first historical manifestation of the Rule of Law, based on the idea that administration must be accountable before courts.[35] In the Italian legal system, it is now formalized in Arts 24 and 113 of the Constitution. The duty to give reasons and procedural fairness were elaborated in the XX century: the former with the view both to facilitating judicial review and to ensuring that the reasons for the action have been appropriately considered by the proceeding administration; the latter to allow defence in individualized adjudications and to reach a correct outcome. In the Italian legal order, the duty to give reasons and procedural fairness have been first established by administrative courts since the early years of the XX century and then envisaged by the Italian Administrative Procedure Act (legge 7 August 1990 no 241).[36] Other reconstructions have further articulated such fundamental framework. In a comparative law perspective, for example, four main dimensions of the rule of law have been listed, namely authorization and guidance, predictability, coherence and justification, procedural fairness, independence and effectiveness of judicial review.[37]

What is important to highlight, however, is that such principles and rules are not *per se* the coherent realization of the normative ideal of the Rule of Law. Their essential rationale is rightly identified as ensuring control over administrative action. In the continuous and dynamic cycle of interaction between power-establishing and power-checking, they aim at structuring and tempering administrative discretion *beyond* the requirements stemming from the principle of legality. Yet, the expansion and reinforcement of power-checking should be considered as a manifestation of the Rule of Law only provided that principles and rules of administrative action, as well as individual rights, are recognized as envisaged not only by legal provisions produced by political institutions, but also by another kind of law *excluding the monopoly of political institutions*.

Admittedly, most of the legal institutes usually associated with the Rule of Law are aligned with its essential rationale, in so far as they are laid down by an eclectic set of legal sources, ranging from domestic and European Union (EU) legislation to non-legislative sources such as European general principles and Treaty

[35] P. Craig, 'Formal and Substantive Conceptions' n 18 above, 467.

[36] See respectively Art 3 and Arts 7-13 of the legge no 241/1990. For a reconstruction of the overall process of judicial elaboration and legislative consolidation of the duty to give reasons and procedural fairness, M. D'Alberti, *Diritto amministrativo comparato* (Bologna: il Mulino, 2nd ed, 2019), 162.

[37] G. Napolitano, 'The Rule of Law' n 6 above, 428-436. In this comparative reading, the requirement of a legal authorization for administrative action, usually grounded in constitutions and declaration of rights, is 'the most important dimension of the rule of law in administrative law' (428), while predictability, coherence and justification concern the quality of administrative norms. As for procedural fairness and judicial review, they refer, respectively, to the quality of administrative decision-making and more precisely to a fair consideration in the procedure of private actors' affected interests, and to the establishment and functioning of an independent and effective system of judicial review.

and constitutional articles. They reflect, in other terms, the duality which is at the core of the normative ideal of the Rule of Law. In the case of procedural fairness, for example, the right to be heard and the other procedural guarantees are not only envisaged by specific legislative provisions, but also derived from non-legislative sources, such as Art 47 of the Charter of Fundamental Rights of the European Union, Art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the overarching principle of the Rule of Law established by the Court of Justice in landmark judgements such as *Kadi I*.[38]

In order to establish a clear and direct link between the Rule of Law as a normative ideal and its concrete manifestations in the Italian administrative system, in any case, two moves would be appropriate. First, the Rule of Law not only should be understood as a normative ideal, but as such it entails consistent incarnations, as those that our European constitutional legal orders have afforded in the process of their further improvements between the XX and XXI centuries. The way the normative strength of the Rule of Law works can depend firstly on its generative use as a 'background principle', one that affects the organization of law in a legal order and that imbues the law-making power as well as shaping more specific principles and rules. Second, the legal institutes that have been previously recalled are to be thought and conceptualized as institutes operationalizing such background principle and normative ideal.

The EU legal system offers an useful starting point in this regard. Although the Treaties do not refer to the Rule of Law as a 'principle',[39] Art 2 TEU stipulates that the Rule of Law is both a value common to all Member States and one of the values on which the EU is founded. Moreover, the Court of Justice held since the 1980s that judicial review and its detailed principles should follow from the Rule of Law. In *Les Verts* v *Parliament*, it famously established that

> 'the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty,[40] which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions'.

This perspective was then further developed in *Kadi I*, where it was held that

> 'the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a

[38] See Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others* v *Yassin Abdullah Kadi*, Judgment of 18 July 2013, available at www.eur-lex.europa.eu.

[39] See however L. Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law'14 *Hague Journal on the Rule of Law*, 107 (2022).

[40] Case C- 294/83 *Parti écologiste "Les Verts"* v *European Parliament*, Judgement of 23 April 1986, available at www.eur-lex.europa.eu, para 23.

> community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement'.[41]

Beyond legal provisions, the internal dynamism of the Italian legal order is crucial to fill the gap between the rule of law and its manifestations. The key role is obviously that of administrative courts, which should not only enforce the existing legal provisions, but also ensuring a kind of counter-majoritarian protection of interests and rights of the citizens. This could be done by recognizing the importance of the Rule of Law as a principle of the EU legal order and the existence of a number of general principles of EU law established by the European Court of Justice and informed by the Rule of Law. In addition to this, courts should clarify the instrumental relationship existing between particular legal provisions of Italian administrative law and the general principles of administrative law, by pointing to the fact that the legislator has articulated a number of legal institutes rooted in European and national general principles, rather than expressing a purely political will.

Courts, in any case, are not the only institutional actors involved in the process of clarification of the relationship between the Rule of Law and its manifestations. Another key actor is the administration itself. The main challenge faced by domestic administrations is to recognize the Rule of Law rationale in all its richness and to take into account such rationale in a plurality of diverse policy-sectors and policy delivery techniques. Operationalizing the Rule of Law is not simply an exercise in correctly applying the existing legal provisions of administrative law, but a more complex task having two different sides: on the one hand, ensuring power-control in the exercise of concrete and particular types of administrative action, that is, adapting the rationale of power-control to the specific features of the policy and regulation at stake; on the other, substantiating the dual dimension of the Rule of Law, that is, adapting the existing legal provisions in the light of an overarching principle excluding the monopoly of law by the legislative source and rooting individual protection *vis-à-vis* public administration in a plurality of (legislative and non-legislative) sources. In the reality of administrative action, this task raises at least two uneasy issues. The first relates to the identification of the norms that are relevant for the operationalization of the Rule of Law. Such norms may be laid down by a variety of legal sources, legislative and non-legislative, internal and external to the domestic legal order. The second issue concerns the prioritization of the relevant norms, which implies a passage from a composite law to the consequent, specific, context-dependent ordering of the relevant norms.[42] Addressing these

[41] *Kadi I*, n 38 above, para 316.

[42] On the theme of operationalizing the 'composite' law fabric of the case at stake, when the Rule of Law is a matter of multi-orders sources, A. di Martino, 'The Importance of Being a Case. Collapsing of the Law upon the Case in Interlegal Situations' 7 *The Italian Law Journal*, 961 (2021); in this journal see also E. Chiti, 'Administrative Inter-Legality. A Hypothesis', 985; G.

issue has to be an important part of scholarly contribution to the practice of the public administration in the operationalization of the Rule of Law in the Italian administrative system, beyond the loose and, after all, rather inaccurate statement that public administrations are subject to law.

Palombella, 'Inter-Legality: On Interconnections and 'External' Sources', 943.

Essays

Platform Work and Trade Union Participation: European and American Perspectives

Massimiliano Delfino* and Charles Szymanski**

Abstract

This contribution analyses the role of trade unions in regulating platform work in the European Union and the United States. First, a review of the situation in the EU is provided. The proposal for a directive on platform work of 2021, whose latest version was addressed in March 2024, is examined, placing it in a broader context since the European Union is trying to contribute to regulating that type of work far beyond that proposal, as it is evident from the most recent version of the proposal for a regulation on Artificial Intelligence. More generally, an attempt is made to show that the European social partners are essential in using digitalisation as a ground, at least to maintain their space within the framework of a traditional role more akin to that played by national social actors. On a more particular level, the contribution deals with the social partners' spaces in the information and consultation procedures provided for in the draft directive, the draft regulation and the agreements signed in recent years at the European level. Next, the situation in the US is reviewed. Unions have a weaker position in the US as compared to the EU, and labor law regulation is generally less favourable. Moreover, regulation of the status of platform workers (as independent contractors or employees) is even more fragmented in the US, with regulation determined state by state, and at the federal level, even statute by statute. As a result, the focus of unions has been 1) to support litigation and lobbying efforts to change the status of platform workers to that of employees, so that they can be represented in collective bargaining, and 2) to provide support and advice to platform workers even where they are not considered to be employees. The authors conclude that unions and collective action have a critical role in improving the conditions of platform workers in both the EU and US, although their prospects are greater in the EU at least in the near to medium term.

I. Introduction

The use of Artificial Intelligence (AI) at work is capturing the attention of society. More and more employers are using AI in recruiting, screening and hiring applicants, for example, and the more unusual cases – such as workers who claimed they were interviewed by Siri – are grabbing headlines.[1] There is a sense that a

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This paper evolved from a common idea. However, Massimiliano Delfino is the author of part II, while Charles Szymanski is the author of part III. Both authors wrote parts I and IV.

[1] A. Demopoulos, 'The job applicants shut out by AI: "The interviewer sounded like Siri" ' *The Guardian*, available at https://tinyurl.com/p6v464ex (last visited 30 September 2024).

future where AI permeates every aspect of work – not only in hiring, but in day-to-day management and discipline and discharge – is not too far over the horizon. However, this future is now for platform workers. Their work is regularly affected by AI, particularly algorithmic management systems. Applications and algorithms already regulate most aspects of the typical rideshare driver or food delivery worker, from what work they receive, the pace at which they perform it, how they are evaluated, and even whether they will receive any new work. Since platform workers are often in a precarious position (new immigrants, individuals who cannot find regular employment, or who are economically vulnerable), and because of legal regimes which keep them outside of labor law, they are not able to resist the excesses of a model of work driven by AI. In this environment, trade unions have an outsized role in protecting these workers and in so doing, placing some limits on the AI for the platform workers and also for the rest of the workforce when AI takes its next step forward. What unions have done, are able to do and plan to do to help platform workers in the European Union (EU) and United States (US) therefore takes on a wider significance.

The emergence of the gig economy caught unions in both the EU and the US somewhat on their back feet. Platform work used a new technological model and was designed to operate outside of traditional labor relationships with which unions were familiar. The unions' initial reactions included the use of pre-existing legal instruments to argue these new platform workers were in fact employees, and should be subject to all the normal protections of labor law, including the right to collectively bargain. These actions were time consuming and brought mixed result on a case-by-case basis. In the meantime, the platforms grew and accumulated more power. A change in union strategy was warranted.

In the EU, the legislative environment was somewhat sympathetic, and unions leveraged their roles as social partners to push for new EU and national regulation in the field of platform work and the use of AI. Within this new regulatory framework, unions maintained an institutional role as consultative partners without losing completely their role as negotiating parties. The object was to more definitively classify platform workers as individuals with all or most of the rights of employees, and directly shield them (as well as other workers) from the abuses of management by algorithm. In the US, unions lacked a structural policymaking role, and could only influence the future of platform working conditions through collective bargaining, ie, through representing these workers and negotiating their terms and conditions of employment. As a result, their efforts were concentrated on lobbying and strategic litigation at the federal, state and local levels to enable these workers to join unions and collectively bargain. At the same time, unions also tried to develop new models of representation that could operate outside the traditional labor law framework.

This article focuses on the successes and also the difficulties European and American unions faced (and continue to face) in attempting to achieve these objectives. In this way the authors hope to present a way forward, not only for

unions, but for society, in the face of the darker aspects of AI controlling our work life. Our thesis is that only through collective action can society limit the excesses of AI, in platform work and in work in general.

II. Unions and Platform Work in the EU

1. The 2020 European Agreement on Digitalisation as a Precursor to the Proposed Directive on Platform Work In 2021

The idea behind this part of the contribution is to analyse the 9 December 2021 proposal for a directive on digital platforms, whose latest version was addressed by the Permanent Representatives Committee to the Council on 8 March 2024, even though it has not been enforced yet, by lowering it into a broader context since the European Union, among lights and shadows, is trying to contribute to regulating work on platforms far beyond that proposal. On a general level, an attempt will be made to show that the European social partners have a vital prominence as they are using digitalisation as a ground to maintain their spaces and, possibly, to win new ones; within the framework, however, of a traditional role and more similar to that played by national social actors. On a particular level, we will deal with the margins of intervention of the social partners in the information and consultation procedures, leaving out, if not for some profiles, the role they play as negotiating actors.

Leaving aside the more distant experiences when this type of work was presented in a pioneering version (the reference is to the 2002 framework agreement on telework), it is undoubtedly necessary to start from the European social partners' agreement on digitalisation of 2 June 2020. Before going into the details of its clauses, it is worth reflecting on the type of collective agreement involved. This is an autonomous collective agreement signed under Art 155 TFEU, that is, without any impetus from the European Commission.[2] Moreover, this agreement has not been transposed into a directive. It does not have a universal application but

> 'commits the members of Business Europe, SME united, CEEP and ETUC … to promote and to implement tools and measures, where necessary at national, sectoral and/or enterprise levels, in accordance with the procedures and practices specific to management and labour in the Member States'.[3]

[2] The agreement explicitly specifies that it is 'an autonomous initiative and is the result of negotiations between the European social partners in the context of the sixth multiannual work program for 2019-2021. In the framework of Art 155 of the Treaty, this autonomous European Framework Agreement commits the members of Business Europe, SMEunited, CEEP and ETUC (and the EUROCADRES/CEC Liaison Committee) to promote and implement instruments and measures, if necessary at national, sectoral and/or company level, in accordance with the specific procedures and practices of the social partners in the Member States and the countries of the European Economic Area.

[3] Thus the 2020 Framework Agreement in the part on implementation and monitoring (at 12).

This agreement covers all workers and employers in the public and private sectors and all economic activities. Concerning the contents, it is emphasised that

> 'it is critical that digital technology is introduced in timely consultation with the workforce, and their representatives, in the framework of industrial relations systems, so that trust in the process can be built'.

Thus, it is clear that the involvement of workers and social partners, through their timely consultation, is crucial to gaining workers' consent to digital technology.[4]

2. Are The *Epsu* Judgments and The Consequent 'Shocks' to the European Social Dialogue behind the Choices Made by the Proposed Directive?

As has just been seen regarding the digitisation of labour, the role of the European social partners within the autonomous social dialogue has been prominent. The same cannot be said within the induced social dialogue in which the collective agreement, once signed, is transposed into a directive. This, however, should come as no surprise. A brief digression is necessary here since it is essential for understanding the role played by the social partners. The General Court of the European Union and the Court of Justice, in 2019 and 2021,[5] respectively, provided an interpretation of Art 155 TFEU according to which, when the social partners request the transposition of the signed collective agreement into a directive, the Commission, contrary to what was believed until then in doctrine,[6] has broad discretion in whether or not to propose transposition to the Council. This jurisprudential approach, on the one hand, has negative repercussions because it lessens the powers and weakens the position of the social partners in the production of Union law. Still, on closer inspection, on the other hand, it has positive implications. In fact, on a more optimistic view, it can be assumed that the social partners have a different role, more akin to that played in the national legal systems of most member states, where, as part of the tripartite social dialogue (involving the Executive, trade unions and employers' associations), the government can transform agreements entered by the social partners into provisions or bills.[7] Ultimately, this breakthrough could be a

[4] The quote is also taken from the 2020 agreement (at 9).

[5] On the *Epsu* case see F. Dorssemont et al, 'On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case' 48 *Industrial Law Journal*, 571 (2019); S. Borelli and F. Dorssemont eds, *European Social Dialogue in the Court of Justice. An Amicus curiae workshop on the EPSU case* (Catania: Centre for the Study of European Law 'Massimo D'Antona' Collective Volumes, 10, 2020).

[6] See, for all, A. Lo Faro, *Funzioni e finzioni della contrattazione collettiva comunitaria* (Milano: Giuffrè, 1999), 204.

[7] For further discussion, please refer to M. Delfino, 'La reinterpretazione del principio di sussidiarietà orizzontale nel diritto sociale europeo' *Diritti Lavori Mercati* 1, 155 (2020). See also E. Ales, 'EU Collective Labour Law: if any, how?', in B. ter Haar and A Kun eds, *EU Collective Labour Law* (Edward Elgar Publishing, 2021), 26.

starting point for a more mature European social dialogue in which the social partners propose an agreement to the Commission. That institution can decide whether to submit to the Council a proposal for a directive that can incorporate the contents of that agreement. On the other hand, it should be remembered that, at times, the social partners, particularly employers' associations, have been concerned about entering into collective agreements that could be 'transformed' into Union law and, for that reason, have decided not to sign them, as was the case with temporary agency work.[8] Consequently, the emphasis on the Commission's discretionary power could facilitate social dialogue in the sense that the social partners act on a terrain more friendly to them where the goal is to promote the interest of the signatory parties and, in short, the collective interest and not the general interest, the promotion of which is the responsibility of the European legislature.

And then it may not be coincidental what happened concerning the proposed directive on platform work. Indeed, following Art 154 TFEU, the Commission conducted a two-stage consultation with the social partners on possible Union action to improve working conditions. In the first stage, between 24 February and 7 April 2021, the Commission consulted the social partners on the need for such an initiative and the possible direction of such an initiative.[9] In the second stage, between 15 June and 15 September 2021, the Commission consulted the social partners on the content and legal instrument of the planned proposal.10 However, the social partners did not ask to suspend the ordinary legislative process and try to regulate the matter through a collective agreement to be transposed into a directive. One wonders if this choice is not related to the outcomes of the *Epsu* judgments, both of which were known at least at the time of the second consultation.[11]

3. The Spaces for Social Partners in the Proposed Directive (and Proposed IA Regulation). In Particular, Union Participation

Before turning to the provisions of the proposed directive (and beyond) that provide for the involvement of social partners, it is necessary to emphasise the difference between the just-mentioned proposal and the proposed Artificial Intelligence Regulation 21 April 2021, most recently amended by the European Parliament on 6 March 2024, and which, as the directive on platform work, has not been enforced yet.

First, the reference is to the type of source chosen, the effects of which in domestic legal systems, as is well known, differ. Indeed, the preference for regulation as a legal act is justified by the need for uniform application of new rules, such as

[8] Once again please refer to M. Delfino, 'Interpretation and Enforcement Questions in EU Temporary Agency Work Regulation. An Italian Point of view' 2 *European Labour Law Journal*, 287, 293 (2011).

[9] Consultation paper C(2020) 1127 final.

[10] ibid 4230 final, accompanied by Commission staff working paper SWD(2021) 143 final.

[11] The Tribunal's ruling was known at the time of the first consultation while the Court of Justice's ruling is 2 September 2021.

the definition of artificial intelligence, the prohibition of certain harmful practices, and the classification of specific artificial intelligence systems. The direct applicability of regulation under Art 288 TFEU will reduce legal fragmentation and facilitate the development of a single market for artificial intelligence systems. This will be achieved in particular by introducing a harmonised set of basic requirements regarding artificial intelligence systems classified as high risk and obligations regarding providers and users (or operators, according to the latest version) of such systems, improving the protection of fundamental rights and ensuring legal certainty for both operators and consumers.

On the contrary, the directive allows the Union to set minimum standards for the working conditions of people who perform work through digital platforms first and foremost when they are classified as 'employees'.[12]

Second, the two proposals have a very different legal basis, and this is not irrelevant to the discourse being conducted. As has been pointed out,[13] the legal basis of the proposed regulation is mainly Art 114 of the Treaty on the Functioning of the European Union,[14] which provides for the adoption of measures designed to ensure the establishment and functioning of the internal market. In contrast, the proposed directive is based on Art 153(1)(b) TFEU, which gives the Union the power to support and complement the action of Member States to improve working conditions.[15]

This alone makes it clear how difficult it is to expect an unambiguous attitude of the two proposals toward the role of the social partners. Indeed, it is clear that there is more room for social actors in the proposed directive, whose legal basis is social policy, than in the proposed regulation, which is to ensure the functioning of the internal market. However, it should be remembered that the latter saw the involvement of the social partners in the public consultation before the submission of the proposal itself.[16]

[12] The Court of Justice has held that the qualification as a 'self-employed person' under national law does not preclude a person from being classified as a 'worker' under EU law if his or her independence is merely fictitious and thereby conceals an employment relationship (Cases C-256/01, *Allonby*, and C-413/13, *FNV Kunsten Informatie en Media*, available at www.eur-lex.europa.eu).

[13] See, for example, L. Tebano 'La digitalizzazione del lavoro tra intelligenza artificiale e gestione algoritmica' 24 *Ianus*,45 (2021).

[14] The proposed regulation also has its legal basis in Art 16 TFEU with regard to certain specific rules on the protection of individuals with regard to the processing of personal data.

[15] To be fair, the proposed directive is also based on Art 16, para 2, TFEU insofar as it addresses the situation of persons performing work through digital platforms in relation to the protection of their personal data processed through automated decision-making and monitoring systems. On this point, see M. Barbieri, 'Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni di lavoro nel lavoro con piattaforma' 7 *Labour & Law Issues*, 1 (2021).

[16] An online public consultation was launched on 19 February 2020, along with the publication of the White Paper on Artificial Intelligence, and lasted until 14 June 2020. The objective of this consultation was to gather views and opinions on the White Paper. This consultation was addressed to all relevant stakeholders from the public and private sectors, including governments, local authorities, commercial and noncommercial organizations, social partners, experts, academics, and citizens. After analyzing all responses received, the Commission published a summary of the

Going into the proposal's details on platforms, there is a space for social actors, though mainly through information and consultation.[17] In this regard, as has been highlighted in some recent contributions,[18] according to the version addressed by the Permanent Representatives Committee to the Council on 8 March 2024, some rules provide information and consultation procedures aimed at individual workers and others of the collective type. In all the provisions of the first type, information and consultation must be made to persons who perform work through a digital platform, regardless of their connection to the platform. In contrast, information and consultation of the collective type must be addressed to workers' representatives or, failing that, directly to workers, meaning those employed. In some cases, then, the information is made available to the persons who perform work through digital platforms and to the workers' representatives of the platforms, suggesting that if the workers are self-employed, the information must be made individually. At the same time, if there is a subordination bond, it must also be made or *only* to the workers' representatives. On the latter aspect, Art 9 distinguishes between the cases of information given to persons performing platform work who 'shall receive *concise* information about the systems and their features that directly affect them' and to workers' representatives who 'shall receive *comprehensive* and detailed information about all relevant systems and their features'.

Regarding collective information procedures, the key provisions are Arts 13 and 14 of the proposal.[19] It is understood from the first provision that the 'high

results, as well as individual responses, on its website.

[17] For an analysis of the evolution of the discipline of information and consultation in EU law, see, for all, M. Corti, 'La partecipazione dei lavoratori: avanti piano, quasi indietro', in Id ed, *Il pilastro europeo dei diritti sociali e il rilancio della politica sociale dell'UE* (Milano: Vita e Pensiero, 2021), 163.

[18] I. Purificato and I. Senatori, 'The Position of Collective Rights in the 'Platform Work' Directive Proposal: Commission v Parliament' *Hungarian Labour Law E-Journal*, 1, 14-18 (2023). On this point see also M. Otto, 'A step towards digital self &co-determination in the context of algorithmic management systems' 15 *Italian Labour Law e-Journal*, 51 (2022).

[19] '1. This Directive shall not affect Directive 89/391/EEC as regards information and consultation, or Directives 2002/14/EC and 2009/38/EC.

2. In addition to complying with the Directives referred to in para 1 of this Art, Member States shall ensure that information and consultation, as defined in Art 2, points (f) and (g), of Directive 2002/14/EC, of workers' representatives by digital labour platforms also covers decisions likely to lead to the introduction of or to substantial changes in the use of automated monitoring or decision-making systems. For the purposes of this paragraph, information and consultation of workers' representatives shall be carried out under the same modalities concerning the exercise of information and consultation rights as those laid down in Directive 2002/14/EC'.

'Without prejudice to the rights and obligations under Directive 2002/14/EC, Member States shall ensure the information and consultation of the representatives of digital platform workers or, in the absence of such representatives, of the digital platform workers concerned by digital work platforms regarding decisions that may involve the introduction of or substantial changes in the use of automated decision-making and monitoring systems referred to in Art 6(1) in accordance with this Art.

2. For the purposes of this Art, the definitions of 'information' and 'consultation' in Art 2(f) and (g) of Directive 2002/14/EC shall apply. The rules in Art 4(1), (3) and (4) and Arts 6 and 7 of

road' of information and consultation is to be taken by workers' representatives who may be assisted by an expert. While, according to Art 14, only when 'there are no representatives of platform workers, Member States shall ensure that digital labour platform directly inform the platform workers concerned' and consultation obligations cover 'decisions likely to lead to the introduction of or to substantial changes in the use of automated monitoring or decision-making systems'.[20]

In addition, there are several references in Art 14 to Directive 2002/14 on the right to information and consultation. A first point to be made is that the right recognised by the proposed directive has a broader scope because, in contrast to the 2002 directive, it is not limited, depending on the choice made by national legal systems, to companies employing at least fifty employees or to establishments employing at least twenty employees in a Member State. Art 13 of the proposed directive only, in one case, provides for a numerical limit of workers, but this refers to anything but. Once the threshold of two hundred and fit workers per platform is exceeded, the costs of the expert chosen by the workers' representatives to examine the matters subject to information and consultation are placed at the expense of the platform.

There is no problem with the definitions of information and consultation in the 2002 Directive regarding the timing of the involvement of employee representatives; there is no doubt that it must take place before decisions are made since Art 27 CFREU, which uses the expression 'in good time', applies.[21] The reference to the 2002 Directive and the presence in this proposal of rules on information and consultation allows the secondary rules to be interpreted in light of the provision of the Charter mentioned earlier, even when implementing them in domestic law.

There is also not much to say about applying Arts 6 and 7 of the 2002 Directive to platform workers, which deal with confidential information and the protection of workers' representatives, respectively.

The application to platform work of Art 4 of the 2002 directive appears to be more problematic. This provision was implemented in Italy by Art 1(2) Legislative Decree 25/2007, according to which the modalities of information and consultation shall be established by collective agreement, and by Art 4(1), also of the 2007

Directive 2002/14/EC shall apply accordingly.

3. The representatives of the digital platform workers or the digital platform workers concerned may be assisted by an expert of their choice to the extent necessary for them to examine the matter which is the subject of information and consultation and to give an opinion. If a digital work platform has more than 500 digital platform workers in a member state, the expenses for the expert shall be borne by the digital work platform, provided that they are proportionate'.

[20] For example, with regard to their access to work assignments, their earnings, their occupational health and safety, their working hours, their promotion, and their contractual status, including the restriction, suspension, or termination of their *account*. See C. Spinelli, 'La trasparenza delle decisioni algoritmiche nella proposta di Direttiva UE sul lavoro tramite piattaforma' *Lavoro Diritti Europa*, 6 (2022).

[21] In fact, the presence of Directive 2002/14 means that we find ourselves in the realm of the implementation of Union law, so that under Art 51, the Charter of Fundamental Rights is applicable to domestic systems.

Legislative Decree, according to which collective agreements shall define the venues, times, subjects, modalities and contents of information and consultation rights. Asit is well known, workers' collective bargaining on platforms is a big question, so the legislation is difficult to apply to the case at hand. Therefore, assuming the proposal is approved, to make the constraints arising from the 2002 directive operational, it would be necessary to adapt the domestic rules just mentioned by introducing provisions that either incentivise or support collective bargaining in the area of work through digital platforms or provide for a substitute role for the legislator.[22]

Synonymous with the discourse being conducted is one of the amendments in the version of the proposal for AI Regulation of 6 March 2024. The reference is to Art 26, para 7, which states that

> 'prior to putting into service or use a high-risk AI system at the workplace, deployers who are employers shall inform workers representatives and the affected workers that they will be subject to the system. This information shall be provided, where applicable, in accordance with the rules and procedures laid down in Union and national law and practice on information of workers and their representatives'.

On the contrary, in the 2023 version of the proposal, submitted by the European Parliament to the proposed Artificial Intelligence Regulation, Art 29, para 5a, provided that deployers 'shall consult workers representatives with a view to reaching an agreement in accordance with Directive 2002/14/EC and inform the affected employees'. The provisions call for information from workers' representatives and the affected workers. In contrast, only the 2023 provision contained a mention of the agreement provided for in the general directive on information and consultation, which can only be, first and foremost, governed by Art 5 of the European source of the law, ie, the agreement by which the arrangements for informing and consulting employees are defined, even in derogation of the provisions of Art 4 of the same directive.[23] This choice was by no means a foregone conclusion because the regulation could have referred generically to what is provided for by the European source, a sign that the European legislator in the field of high-risk AI systems in 2024 seemed to prefer the negotiated participatory route, considered, perhaps, more suitable for managing such systems also because it was closer to the needs of the different company realities, since, according to Art 5 of the 2002 directive, the agreement could be concluded at the appropriate level,

[22] More generally on the effects of the transposition of the proposed directive in Italy, see M. Falsone, 'What Impact Will the Proposed EU Directive on Platform Work Have on the Italian System?' 15 *Italian Labour Law e-Journal*, 99 (2022).

[23] The reference could also be to the agreement under Art 4(4)(e), Directive 2002/14, which deals with 'a view to reaching an agreement on decisions within the scope of the employer's powers.' On this point see U. Gargiulo, 'Intelligenza Artificiale e poteri datoriali: limiti normativi e ruolo dell'autonomia collettiva' 29 *federalismi.it*, 170 (2023) and L. Tebano, 'Poteri datoriali e dati biometrici nel contesto dell'AI Act' 25 *federalismi.it*, 198 (2023).

including that of the company or establishment. Suppose the regulation was approved in this version. In that case, the choice presented a similar danger to the one highlighted a moment ago concerning work through digital platforms, namely the lack of collective bargaining on the subject. However, this risk could have been mitigated by the fact that the use of artificial intelligence was increasingly widespread and across the board, so that, also given the Italian legislation transposing the 2002 directive about high-risk artificial intelligence systems, it would have been easier to conclude collective agreements of various levels that define in general the 'contours' of the right to information and consultation and provide for specific clauses.

As can be seen, Art 26, para 7, only makes a general reference to the rules and procedures concerning information laid down in Union and national law. The reference to consultation to reach an agreement has been repealed, thus weakening the role of social partners, especially because social partners no longer have a role as negotiating parties.

4. The Agreement for Social Dialogue in Central Government Administrations of 17 June 2022, in the prism of *Epsu* jurisprudence

It is worth mentioning the agreement signed on 17 June 2022, by the EU Committee for Social Dialogue in Central Government Administrations on Digitization and the national and European delegation of trade unions (Tuned) and public administration employers (Epsu).

First, this is again an autonomous agreement also signed by *Epsu*. This employer organisation had been the subject of an appeal before the EU Tribunal and the Court of Justice.

Regarding the subject matter of this paper, in addition to the fact that the involvement of the social partners is *in re ipsa* because they signed the agreement, the introductory section goes into detail by defining employee representatives as trade union representatives, elected representatives, or a combination of both, and further on by stating that in telework – defined as a form of work organisation and/or performance using information technology, in the context of an employment contract/relationship, in which work, which could also be performed on the employer's premises, is regularly performed off those premises –, central among the collective rights are the trade union rights of information, consultation and participation aimed at defining the new working environment (Art 4, para 2). There is a circularity with what is stated in the proposed directive on digitisation because there, too, as mentioned, the participatory route is preferred.

In addition, the 2022 agreement, precisely regarding telework, tries to foster effective social dialogue and union rights at the national level (Art 1) and also recognises the right to disconnect as the right of all workers to turn off their digital tools outside working hours without incurring consequences for not responding to emails, phone calls or any other communication. For what is relevant here, then, the right to disconnect must be agreed upon with unions at all relevant levels to

ensure its effectiveness (Art 4, no 12).

As anticipated, the agreement in question produces the effects of an autonomous agreement concerning only the European employers and trade union parties of the central administrations. It should be made clear, then, that it is a sectoral agreement, that is, having a scope limited to central administrations.

The EU Committee for Social Dialogue in Central Government Administrations, on 30 January 2023, officially requested to activate the procedure under Art 155(2) TFEU to have the text in question become a binding legal act at the Union level (eg, a directive). However, the Commission has indicated that it has suspended the relevant process, given that in the meantime, a cross-sectoral negotiation has opened (thus also concerning the private sector) on remote work and the right to disconnection. This negotiation impacts similar areas to those affected by the sectoral agreement in question and the 2020 agreement. In any case, if and when such an agreement is signed, there will be the question of how to link the texts mentioned. Finally, it will need to be seen whether the Commission will decide to follow up the latest agreements with the issuance of a directive or other act with binding force.

III. Unions and Platform Work in the US

1. A Fragmented Legal Regime Creates Serious Obstacles for Unions to Represent and Improve Conditions for Platform Workers

Unlike in the EU, there is no structural, consultative role on labor policy envisioned for unions in the US. Instead, unions influence labor standards and rights in two interconnected ways: primarily, by representing employees in collective bargaining, and secondarily, through lobbying efforts at the federal, state and local levels.[24] Lobbying activities related to improving employee wages and working conditions are funded by, and therefore dependent upon, the dues and fees of union members and sometimes non-member employees represented by the union in collective bargaining.[25] When there has been a high percentage of employees represented by unions, as in the 1950s and 1960s, this model proved to be effective. The standards set by collective bargaining agreements improved the lives of union-

[24] K. Andrias, 'The New Labor Law' 126 *Yale Law Journal*, 2, 6 (2016) ('Unlike legal regimes prevalent in Europe, the NLRA does not empower unions to bargain on behalf of workers generally, nor does it provide affirmative state support for collective bargaining.'); A.C. Hodges, 'Avoiding Legal Seduction: Reinvigorating the Labor Movement to Balance Corporate Power' 94 *Marquette Law Review* 889, 902 (2011) ('unions can play an important role in developing favourable law through litigation and lobbying for legislative change.').

[25] The current trend of the law is that only fees from union members can be used to support lobbying activities in the public and even private sectors. *Janus* v *Am. Fed'n of State, Cnty., &Mun. Emps.*, ––– US ––––, 138 S. Ct. 2448, 2486, 201 L.Ed.2d 924 (2018) (public sector); *United Nurses & Allied Professionals* v *National Labor Relations Board* 975 F.3d 34 (1st Cir. 2020) (private sector). Non-members represented by the union cannot be compelled to pay for lobbying.

represented employees, and also positively influenced wages and working conditions in the non-union sector. With significant funds and large memberships, unions were an important political force and were able to influence even national labor policy and legislation.[26]

In more recent times, declining rates of union penetration in the labor market has sent this model in somewhat of a death spiral. With private sector unionization rates and overall unionization rates hovering around 6% and 10%, respectively, the sheer numbers of employees covered by collective bargaining agreements have seriously declined.[27] This, in turn, has led to a drastic reduction in union revenue generated from employee dues and fees. Unfavorable court decisions and legislation have also restricted the ability of unions to collect fees from non-member employees that they represent, further reducing their income stream. These developments have reduced the capacity of unions to improve labor standards through both representation and lobbying.[28] This is not to say union influence over labor policy has been completely eviscerated, however. In certain regions and states, particularly the Northeast (New York, New Jersey) and West (California), and in large urban areas, union density remains high.[29] Consequently, in these places, unions still play a role in promoting pro-worker legislation. At the national level, too, unions have retained some influence in moving labor legislation forward, particularly when acting in concert with other left-leaning organizations (ie, minority rights and environmental groups).[30] Still, union power is not what it was even 10-20 years ago, and much less than it held 50-60 years ago.

The rise of the gig economy from the 2000s to the present time further threatened to constrict the influence of unions. Gig work, particularly in the transport sector, was premised upon two factors: the existence of a computer platform, run by certain algorithms that would efficiently connect parties needing a service (for example, riders) with parties providing a service (transport by car), and that the

[26] K. Andrias, n 24 above,5; E.K. Kim, 'Labor's Antitrust Problem: A Case For Worker Welfare' 130 *Yale Law Journal*, 428, 450 (2020) (restating the general proposition that 'nonunion wages tend to increase with union activity, in part because unions establish workplace norms that spill over to nonunionized workers.').

[27] Economic News Release, Union Membership (Annual), US Bureau of Labor Statistics, 23 January 2024, available at https://tinyurl.com/3c8j9rb9 (last visited 30 September 2024).

[28] S.W. Cudahy et al, 'Total Eclipse of the Court? Janus v. AFSCME, Council 31 in Historical, Legal, and Public Policy Contexts' 36 *Hofstra Labor & Employment Law Journal* 55, 122 (2018) ('The decline in revenue for unions, however, could likely undermine the effectiveness of labor representation at the bargaining table, in the workplace, and before legislative bodies.').

[29] L. Compa, 'Not Dead Yet: Preserving Labor Law Strengths While Exploring New Labor Law Strategies' 4 *UC Irvine Law Review*, 609, 620 (2014) ('Union density is in many ways a regional phenomenon. In New England, around the Great Lakes, on the West Coast, and in other states, union density is substantially greater than the national average…').

[30] R.T. Drury, 'Rousing the Restless Majority: The Need for a Blue-Green-Brown Alliance' 19 *Journal of Environmental Law and Litigation* 5, 18 (2004) (explaining the benefits of a blue-brown-green alliance of unions, environmentalists and minorities); E.J. Kennedy, 'Equitable, Sustainable, and Just: A Transition Framework' 64 *Arizona Law Review*, 1045, 1053 (2022).

platform and service provider would not be in an employer-employee relationship. This latter point enabled the platforms to evade social insurance contributions and other tax obligations, increasing their profitability, and to also avoid the reach of labor and employment laws. US labor law applies to employees, and not to independent businesspeople, known as independent contractors. As a result, gig workers (as independent contractors) are not subject to minimum wage and overtime rules, as well as employment antidiscrimination laws, and do not possess the right to join a labor union.[31]

If the gig economy was the future of work, and gig workers could not unionize, unions faced an existential threat.[32] Even in their weakened state, unions needed to summon whatever resources they still possessed to head off this potential catastrophe. The key would be to ensure through litigation and lobbying that gig workers would be classified as employees and thus, be able to unionize. A reserve position would be to push for state and local legislation to allow for union representation of non-employee gig workers, or, barring that, provide other services to gig workers outside the traditional collective bargaining context (ie, as would a professional association to its members).

A threshold problem for the first strategy (making gig workers employees) is the fragmented regime in the US for determining employee status.[33] Each of the 50 states technically has its own standard for determining whether a person was an employee or an independent contractor. What's more, they may use either a statutory test or a common law test. In either case, these tests are often complex and multifaceted. One such test previously used in California, for example, utilized a right of control test with a total of 13 secondary factors.[34] Unfortunately, the situation is not better at the federal level. Different federal statutes also use different tests, and so a given worker may or not be considered an employee depending on whether the legal issues involves federal tax law, wage and hour law or labor law.[35] This

[31] M. Lao, 'Workers in the 'Gig' Economy: The Case for Extending the Antitrust Labor Exemption' 51 *UC Davis Law Review*, 1543, 1551-1552 (2018); M. MacDonald, 'Risky Business: Misclassifying Gig Employees' 45 *LawPrac.* 50, 53 (2019) ('The premise of the gig economy is that workers become their own employers or are essentially independent contractors.').

[32] J. Chaisse and N. Banik, 'The Gig Workers Facing the Regulator: The Good, the Bad, and the Future' 31 *Transnational Law & Contemporary Problems* 1, 20 (2021) ('a shift in employment trends and the development of gig and platform work poses new organizational challenges to unionization.').

[33] E. Priest, 'Working Toward Break Point: Professional Tennis and the Growing Problem with Employee and Independent Contractor Misclassifications' 75 *SMU Law Review*, 943, 957 (Fall, 2022) (noting fragmentation of legal standards).

[34] *O'Connor* v *Uber*, 82 F.Supp.3d 1133, 1138-1140 (N.D. Ca. 2015). However, it is also true that many states share or utilize the same or similar tests.

[35] O. O'Callaghan, 'Independent Contractor Injustice: The Case for Amending Discriminatory Discrimination Laws' 55 *Houston Law Review*, 1187, 1196 (2018) ('The classification test which a court uses in a given case depends on the statute under which the plaintiff brings his claim.'); A.H. Miller, 'Curbing Worker Misclassification in Vermont: Proposed State Actions to Improve a National Problem' 39 *Vermont Law Review*, 207, 218 (2014) ('agencies and reviewing courts rely on a number of balancing tests to determine worker status, creating a situation in which a

fragmentation and complexity creates a number of difficulties for unions.

In a common law system such as the US, strategic litigation is often a useful means to achieve change.[36] Unions could either initiate and litigate cases on gig worker employee status themselves, or support (through advice or amicus curiae/ friend of the court briefs) existing litigation brought by other parties (often individual workers). To the extent the courts are persuaded by the unions' arguments that the gig worker(s) at issue are employees under the relevant federal or state law test, their employment status is eventually resolved judicially. No legislative change is necessary. However, there are serious impediments to the use of strategic litigation in the case of gig work. Because of the fragmentation noted above, such litigation would have to occur in a multitude of states and federal courts, taking account the different standards used in different jurisdictions and statutes. This would stretch the unions' resources.

It would also be very time consuming. Many of the cases on the status of a gig worker would be quite fact specific – the conditions of a driver at Uber may be different than those of a driver at Lyft, and these drivers' conditions may diverge from those of a food delivery driver working at another platform. Under the common law system, as these cases work their way through the appeals courts and ultimately the supreme courts, precedent on these issues is created over time. However, a decision on an Uber driver may be distinguishable on therefore not controlling on the case of a Lyft driver, resulting in the need for additional – and lengthy – litigation.

Likewise, successful legislative lobbying efforts directed at 50 states and at changing numerous federal statutes would be beyond the current capacity of the American labor movement. At best, targeted litigation and lobbying in key states where union density remains high (New York, California) and at the federal level, for a favorable interpretation or amendment of the most important statute, the National Labor Relations Act, which governs the right to unionize, is the most realistic option.

2. Union Efforts to Reclassify Platform Workers as Employees under Federal Law

The federal National Labor Relations Act (NLRA) governs the right to join a union and regulates collective bargaining in the US. It applies to private sector employees through the entire US, but it has a number of important exemptions, excluding supervisors and managers, agricultural workers, and, most relevant here,

worker could be an independent contractor for some purposes and an employee for others. Some federal laws apply different tests, creating a horizontal conflict. Additionally, some related federal and state laws apply different tests, creating a vertical conflict.').

[36] O. Razzolini, 'Self-Employed Workers and Collective Action: A Necessary Response to Increasing Income Inequality' 42 *Comparative Labor Law and Policy Journal*, 293, 299 (2021) (Observing that even in Europe, 'Strategic litigation seems to be used by unions as a tool of revitalization'); see also F. Kahraman, 'What Makes an International Institution Work for Labor Activists? Shaping International Law Through Strategic Litigation' 57 *Law & Society Review*, 61 (2023) (commenting on British and Turkish unions' strategic litigation at the international level).

independent contractors from its coverage.[37] Other employment statutes, such as the Fair Labor Standards Act (FLSA), which covers minimum wage and overtime, also only cover employees, and not independent contractors.[38] The platforms, such as Uber, contend that their workers are independent contractors, and therefore do not have the right to join and form trade unions under the NLRA, nor do they possess other employment rights under various other federal statutes such as the FLSA.[39] For unions, it is essential to either obtain a legal determination that gig workers are employees within the meaning of the NLRA, or to lobby for a reinterpretation or an amendment of the NLRA to include gig workers within the scope of its coverage, so that such workers may join unions and enjoy the benefits of collective bargaining.

Unions litigated the issue of whether gig workers were employees or independent contractors under the NLRA. The NLRA is enforced by an administrative agency, the National Labor Relations Board (NLRB).[40] Unions, employees and employers all may file unfair labor practice (ULP) complaints alleging a violation of certain provisions of the NLRA.[41] Unions may also file representation petitions with the NLRB, in order for the NLRB to direct a representation election in a certain unit of employees of a given employer.[42] A potential defense to either an ULP charge or a representation petition is that the workers at issue are not employees within the meaning of the NLRA. In resolving this question, the NLRB has used a traditional 10 part common law test, where no one factor would predominate. The factors include:

> '(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employee disengaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; d) the skill required in the particular occupation; e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether

[37] 29 U.S.C. § Section 152(3).

[38] 29 U.S.C. § 203(r)(1).

[39] K.L. Griffith, 'The Fair Labor Standards Act at 80: Everything Old is New Again' 104 *Cornell Law Review*, 557 (2019) (discussing the problem of gig worker misclassification as independent contractors under the FLSA).

[40] 29 U.S.C. § 153.

[41] 29 U.S.C. § 160(b).

[42] 29 U.S.C. § 159.

the principal is or is not in business.'[43]

This test was modified in 2019, when the NLRB decided to place a special emphasis on the opportunity of the worker to achieve entrepreneurial gain.[44]

In 2015 and 2016, various ULP charges were filed with the NLRB alleging that Uber violated the NLRA by its conduct towards its drivers. In defense, Uber argued that its drivers were not employees and therefore were not protected by the NLRA. In an advice memorandum issued in 2019, the NLRB's Office of General Counsel (OGC) agreed. The OGC found that, while various elements in the 10 factor test favored independent contractor status, and others suggested employee status, the fact that the drivers had substantial opportunity for entrepreneurial gain was decisive in finding they were not employees. The drivers had substantial control over when and how much they would work, and could even work for competing ridesharing platforms.[45]

In light of the OGC's determination, unions then pursued extensive lobbying efforts to amend the NLRA's definition of employee so as to include platform workers such as uber drivers. The resulting draft legislation, known as the PRO Act and supported by many Democratic congresspersons and senators, addressed the union's concerns. The PRO Act provided for numerous amendments of the NLRA that would benefit labor unions.[46] One of these would amend the definition of employee to incorporate the 'ABC' test used by various jurisdictions.[47] Under the ABC test, individuals performing work for an employer were presumed to be employees, unless all three of the following factors were met:

> '(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed'.[48]

The effect of the ABC test would be to make the vast majority of gig workers employees. Providing transportation services or delivering meals is a core part of

[43] *The Atlanta Opera, Inc.* 372 NLRB No. 95, *3 (2023); J.F. Grella, 'From Corporate Express to Fedex Home Delivery: A New Hurdle for Employees Seeking the Protections of the National Labor Relations Act in the D.C. Circuit' 18 *American University Journal of Gender, Social Policy & the Law*, 877, 882-883 (2010).

[44] *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019).

[45] *Uber Technologies, Inc.*, 2019 WL 12521431 (N.L.R.B.G.C.).

[46] J.F. Harris and D. Holmes, 'The 'Protecting the Right to Organize' Act and the Radical Roots of Labor Law Reform'49 *Human Rights*, 26 (2023) (providing an overview of the PRO Act).

[47] J. Jones, 'The Pas De Deux Between Unionization and Federal Arts Funding: Why Congress Must Address Its Overcorrection that Impeded the Freelance Dance Industry' 30 *UCLA Entertainment Law Review* 95, 115-116 (2023).

[48] ibid 116, quoting § 101(b)(A)-(C) of the PRO Act legislation.

ridesharing or food delivery platforms, and drivers or delivery people used by the platforms are not performing work outside the scope of this business, within the meaning of part B of the ABC test.[49]

The PRO Act was introduced in 2020, when the Democratic Party controlled the Presidency and both chamber of Congress (the House of Representatives and the Senate). However, the Democrats' majority in the Senate was razor thin, 50 out of a 100 senators, plus the tie-breaking vote of the Democratic Vice-President, Kamala Harris. Under the Filibuster rule in the Senate, a 60 vote majority was necessary to advance legislation. As a result, the Republicans, who are generally pro-business, were able to block any further consideration of this legislation. Subsequently, in 2022, the Republicans regained control of the House of Representatives, putting the passage of the PRO Act even further out of reach. As of 2024, it is difficult to imagine a scenario where the Democrats regain control of the House, retain the Presidency (so as to avoid a veto of the PRO Act by a Republican President), and obtain a supermajority of 60+ senators to forestall any filibuster, all of which would have to occur for the PRO Act to have any chance of becoming law.[50] Historically speaking, it has been extremely difficult for either party to amend the NLRA.[51] The last substantive amendments to the NLRA dealt with strikes and collective bargaining in the healthcare sector, and were enacted in 1974 – 50 years ago.[52]

A more realistic and therefore more fruitful focus for unions has been to use their resources to support the election of a Democratic president. The NLRA is enforced by a federal administrative agency, the NLRB, and as such it is under the sway of the executive branch of government. The president appoints the General Counsel of the NLRB and also the majority of the members of its 5 person administrative decision-making body (also called the NLRB).[53] When most of the NLRB's members have been appointed by a Democratic president, the NLRB's decisions have been more favorable to unions, and vice-versa when the members were appointed by a Republican president.[54] These practices are quite relevant

[49] ibid 116-117 ('If the PRO Act were passed, section (B) of the 'ABC' test is anticipated to have a tremendous impact on independent contractors.').

[50] J.F. Harris and D. Holmes, n 46 above,27 ('But almost all agree that the chances of the act's passage are slim.').

[51] K. Bigley, 'Between Public and Private: Care Workers, Fissuring, and Labor Law' 132 *Yale Law Journal* 250, 315, fn 328 (2022) (labor law reform through amending the NLRA is notoriously difficult to achieve).

[52] G. Forté, 'Rethinking America's Approach to Workplace Safety: A Model for Advancing Safety Issues in the Chemical Industry' 53 *Cleveland State Law Review*, 513, 524-525 (2005-06) ('In 1974, Congress passed healthcare industry amendments to the NLRA that extended its reach to non profit healthcare institutions. Since the amendments, Congress has passed no other legislation aimed at the NLRA.').

[53] 29 U.S.C. § 153(a). Board members are appointed by the president for 5 year staggered terms, making it very likely that a given president can appoint a majority of the Board over the course of one or two terms of office.

[54] R. Turner, 'Ideological Voting on the National Labor Relations Board' 8 *University of Pennsylvania Journal of Labor and Employment Law*, 707 (2006).

to the status of gig workers. Led by members appointed by President Barack Obama, the NLRB found that certain drivers working for FedEx were employees rather than independent contractors;[55] at the time, this augured well for the NLRB making a similar finding that platform drivers likewise should be considered employees. However, Republican Donald Trump was elected President in 2016, and he made his own appointments to the NLRB. By 2019, the NLRB overruled its prior FedEx decision and replaced it with a new standard more amenable to finding that platform workers were independent contractors.[56] It was only after applying this new standard did the (Trump-era) OGC find that Uber drivers were not employees.[57]

Under Democratic President Biden, the NLRB shifted back to a relatively pro-labor orientation.[58] In 2023, the Biden-appointed NLRB restored the previous FedEx standard for determining employee status, overruling the 2019 decision of the Trump-appointed NLRB.[59] To the extent that organized labor can help President Biden win re-election in 2024, there would be at least a reasonable prospect that the NLRB might continue to apply this standard and reverse the OGC's Trump-era opinion that Uber drivers are not employees.[60]

3. Union Efforts to Reclassify Platform Workers as Employees under State and Local Law

At the national level, unions influence over the status of platform workers has been limited by the NLRB's determination that they are not employees and therefore do not have the right to unionize. Until and unless the NLRB reverses this decision (perhaps helped in this process by union support in the re-election campaign of President Joe Biden), unions must focus their efforts to reclassify gig workers as employees at the state and local level. Such a state/local strategy, as opposed to a national one, is not as limited as it first may appear. It is true that unions have been in decline for decades in the US and therefore lack resources to mount a campaign to change the status of gig workers in all 50 states. However, the states and cities in which they still retain some influence – in the West, the Northeast and major urban areas – are precisely the places where the platforms' services are most popular – particularly the use of ridesharing and food delivery services. Therefore, from a strategic point of view, the unions are not losing much by neglecting most of the Southern and rural Mountain states, which are in any

[55] *FedEx Home Delivery*, 361 NLRB 610 (2014) ('FedEx II').

[56] *SuperShuttle DFW, Inc.* n 44 above.

[57] *Uber Technologies, Inc.*, 2019 WL 12521431 (N.L.R.B.G.C.).

[58] L.C.S. Newberry, 'The ABCs of Gaming: Activision, Biden, and Covid-19 Set the Stage for Labor Unionization in the Video Game Industry' *Wisconsin Law Review*, 1027, 1056-1057 (2022) ('As predicted, President Biden's liberal administration ensured that pro-union Democrats regained the NLRB majority.').

[59] *The Atlanta Opera, Inc.* n 43 above.

[60] K. Andrias, 'Constitutional Clash: Labor, Capital, and Democracy', 118 *Northwestern University Law Review* 985, 1033 (2024).

case both hostile to unions and lack a concentration of platform services. A focus on local legislation in major, pro-union urban areas would give unions some tactical advantages and could achieve positive results in a shorter period of time.[61] At the same time, any gains might be overridden by contradictory state legislation. In the event, unions proceeded at both levels.

The unions' efforts would have two goals: to be able to represent gig workers locally, or to disrupt the platforms' business model by forcing them to pay normal employment and social insurance taxes for their workers once they were properly classified as employees, removing their competitive advantage *vis-à-vis* other employers. The first goal – union representation at the local or state level – has a number of serious legal obstacles. The NLRA covers most private sector employees at the national level, but excludes independent contractors (which the NLRB determined included platform drivers). Unions would therefore need to lobby for state or local legislation (or court rulings) that either classified platform workers as employees for state/local purposes, or state/local legislation that gave platform workers, as independent contractors, the right to join unions and collectively bargain. Critically, such a strategy very likely conflicts with federal antitrust law, which as a general proposition forecloses collective, coordinated action by independent contractors (in effect small businesses) to increase or fix their income.[62] Another problem is a potential conflict with the NLRA, which excludes independent contractors from its coverage. Under constitutional supremacy principles, federal antitrust law and labor law would pre-empt any inconsistent state law.

The conflict with antitrust law is especially problematic, from the unions perspective. While employee collective action is exempt from the scope of antitrust law, that of independent contractors is not. Consequently, even if a state or city were to give collective bargaining rights to independent contractors, it would only be permitted if this action fell into a recognized exception to antitrust law. Two possible exceptions might apply. First, under certain conditions, the state action exception allows states to promulgate laws that permit anticompetitive behavior, without running afoul of federal antitrust law. State legislation may allow municipalities, for example, to regulate billboard advertising in such a way that permits some anticompetitive behavior-preexisting billboards may get a preference over new ones, in the interest of setting zoning standards. However, the exception is construed narrowly, and the state legislation must clearly intend to allow certain anticompetitive conduct, and, where it is a municipality that is acting, the state must exercise supervisory control over the law's implementation.[63]

[61] See generally, S.L. Cummings and A. Elmore, 'Mobilizable Labor Law' 99 *Indiana Law Journal*, 127 (2023), and A. Elmore, 'Labor's New Localism' 95 *Southern California Law Review*, 253 (2021), both outlining benefits of unions focusing on a local strategy.

[62] E.J. Kennedy, 'Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors" ' 26 *Berkeley Journal of Employment and Labor Law*, 146, 169 (2005).

[63] C. Estlund and W.B. Liebman, 'Collective Bargaining Beyond Employment in the United States' 42 *Comparative Labor Law and Policy Journal*, 371, 383-387 (2021) (explaining the state

The City of Seattle, with the support of unions, enacted an ordinance that would provide platform drivers in the city the right to collectively bargain.[64] Uber challenged this law on the grounds that it ran afoul of federal antitrust law and that it was pre-empted by the NLRA. Seattle argued that the ordinance fell within the scope of the state action exception to antitrust law – the ordinance was enacted pursuant to state law that allowed municipalities to regulate local transportation issues. On appeal, the Federal Court of Appeals rejected this argument, noting that there was no specific state intention in that state law to grant bargaining rights to independent contractor drivers (normally anticompetitive behavior). Moreover, the court noted that in any case the state did not have a sufficient supervisory role in the implementation of this local ordinance for the state action exception to apply. The court did reject Uber's NLRA pre-emption argument. While the NLRA did exempt certain categories of workers from its coverage, such as independent contractors, public employees and agricultural employees, this did not mean states were prohibited from giving them collective bargaining rights. Indeed, state had granted public employees and agricultural workers such rights for decades after the passage of the NLRA without objection.[65]

Moving forward, unions in sympathetic states or cities must work with local authorities to create laws that allow platform workers the right to collectively bargain that more clearly fit into the state action antitrust exception than the one in Seattle. State enabling legislation needs to specifically contemplate that platform workers may be given collective bargaining rights, and the state should be involved in enforcing and implementing such legislation. One such example is a law proposed by the state of New York, which permits sectoral bargaining between platforms and platform workers in the transportation and delivery sectors. Bargaining would take place in the context of newly created 'industry councils.' After negotiations, these Councils then prepare recommendations, which are either accepted or rejected by the State. This law was drafted with antitrust considerations and the state action exception in mind: the law specifically permits collective bargaining for these categories of platform workers, and the state has a direct role in the law's implementation. Connecticut and Massachusetts also have considered similar legislation.[66]

A second antitrust exception involves the application of the broader labor exemption in certain circumstances involving independent contractors. Traditionally, this was quite limited, and involved conduct by independent contractors that impacted the wages of employees performing similar work.[67] However, a recent

action exception).

[64] R.C. Brown, 'Ride-Hailing Drivers as Autonomous Independent Contractors: Let Them Bargain!' 29 *Washington International Law Journal*, 533, 545-549 (2020) (describing the Seattle ordinance in detail).

[65] *Chamber of Com. of the US* v *City of Seattle*, 890 F.3d 769 (9th Cir. 2018).

[66] J. Jacob, 'Avenues for Gig Worker Collective Action after Jinetes' 123 *Columbia Law Review*, 208, 225-226 (2023).

[67] D. Lee, 'Bundling 'Alt-Labor': How Policy Reform Can Facilitate Political Organization in

Federal Court of Appeals decision potentially expanded the scope of this exception, applying it to independent contractors (in that case, horse racing jockeys) who went on strike to improve their wages.[68] The Court ruled that since the sole issue was worker compensation, the jockeys' action fell into the labor exemption, irrespective of their independent contractor status. There are still doubts about the scope of this decision and its impact on platform worker collective action. It may only apply where the collective dispute is solely about wages or income for work. The jockeys did not own their horses or their equipment; they only offered their labor. Transport platform workers, on the other hand, typically use their own cars and so their relationship with the platforms does not purely revolve around income for work. Still, unions may try to exploit this exception, trying to expand it through further strategic litigation and taking advantage of it by supporting platform worker collective action, such as strikes, where the dispute only involves wages for labor.[69]

Apart from obtaining collective bargaining rights for platform workers, unions may also try to achieve other benefits of employee status for them. Most notably, employee status under state law would make the platforms responsible for payroll taxes, including social insurance contributions, and the platform workers would receive the right to the state minimum wage and overtime. They would also receive protection from employment discrimination under state employment laws. In addition to benefiting the workers, this strategy targets the core business model of the platforms. A key pillar for gig work is the platform workers' status as an independent contractor. This frees the platforms from significant tax and regulatory burdens that come with having actual employees, as well as from potential minimum wage and overtime payments that very well might be necessary.[70] If the platforms became responsible for these payments and compliance requirements, they may well be forced either into bankruptcy, quit the local market or to radically change their business model (ie, charging higher prices for consumers or relying on fewer platform workers, but paying them more).[71] Probably either result would suit the

Emerging Worker Movements'51 *Harvard Civil Rights-Civil Liberties Law Review*, 509, 530 (2016) ('Independent contractors cannot form NLRA-governed labor unions and can only join or coordinate with labor unions if they: (1) perform the same work as and (2) compete with bona fide employees in the industry.').

[68] *Confederación Hípica de Puerto Rico, Inc.* v *Confederación de Jinetes Puertorriqueñs, Inc.*, 30 F.4th 306 (1st Cir.2022).

[69] J. Jacob, n 66 above, 216-224. The Democrat appointed Federal Trade Commission members have promised not interfere with any attempted collective activities initiated by gig workers on antitrust grounds. D. Papscun and K. Atkinson, 'Antitrust Shield for Independent Worker Action Gains Momentum' *Bloomsberg News*, available at https://tinyurl.com/et8t7jsh (last visited 30 September 2024). However, this announcement is more symbolic than practical - clearly the platforms themselves would raise an antitrust defense in these situations.

[70] A. Rizzo, 'The Changing Landscape of Worker Rights in the 21st Century Workplace' 79 *NYU Annual Survey of American Law*, 221, 229-230 (2023).

[71] For example, Uber and Lyft recently quit the Minneapolis market after the local council substantially raised the minimum wage for platform drivers. J. Valinsky, 'Lyft and Uber to cease operations in Minneapolis after new minimum wage law', available at https://tinyurl.com/234vywpv

unions. The platforms might be replaced by more traditional employers that were actually possible to unionize, or would themselves morph into a regular employer.

While this strategy avoids the obstacle of antitrust law, it is also not so simple. The unions tried to do this in California, now a core Democratic party stronghold and a generally progressive state. In part due to union lobbying, the Democratic controlled legislature passed legislation that would make most platform workers employees under California law by codifying the ABC test.[72] The major transportation and delivery platforms did not give up easily, however. They spent hundreds of millions of dollars to initiate a popular referendum on the status of platform workers, pursuant to the referendum provisions of the California constitution. The proposed language in the referendum would override the aforementioned legislation, but also give the platform drivers some additional rights, such as insurance benefits and a minimum payment guarantee.[73] Again, Uber and similar platforms spent tremendous amounts of money on advertising convincing the public that keeping platform drivers independent contractors would result in lower consumer prices for rideshare services.[74] In the end, the platforms' campaign was successful, and the referendum proposal passed. After a subsequent court challenge to the referendum backed by the unions largely failed, platform drivers in California are securely independent contractors.

In one sense, the outcome in California shows the imbalance in power between the platforms and labor unions, even upon favorable ground for the unions. At the same time, most states do not have a constitutional provision allowing the public to overrule unpopular legislation through a referendum; this is somewhat unique to California. Consequently unions have and will continue to pursue a legislative strategy to change the status of platform workers in other union-friendly states, such as those in the Northeast.

4. Assistance Provided by Unions to Platform Workers Outside of the Employment Context

Existing NLRB precedent and federal antitrust law, taken together, are formidable barriers for unions seeking to obtain any type of formal voice or collective bargaining role in support of platform workers. Most of these difficulties

(last visited 30 September 2024).

[72] D. Gobel, 'Proposition 22 and the Fight to Prevent Platform Workers from Misclassification and Exploitation' 31 *Southern California Interdisciplinary Law Journal*, 143, 158 (2021); M.A. Cherry, 'Employee Status for "Essential Workers": The Case for Gig Worker Parity' 55 *Loyola of Los Angeles Law Review* 683, 707-708 (2022).

[73] D. Gobel, n 72 above, 161-162 (outlining the various additional benefits that the referendum proposition would give platform drivers).

[74] M.A. Cherry, n 72 above,709-710 ('Gig economy companies contributed over $200 million to exempt on-demand companies from AB5 and to keep gig workers as independent contractors. While unions and groups of gig workers strongly opposed these efforts in grassroots campaigns, they were outspent by more than twenty to one in the leadup to the November election season.').

revolve around the platform workers' legal status as independent contractors. Under such conditions, a potential fallback position would be for union to simply provide certain services to platform workers outside the collective bargaining context.[75] Various trade and professional associations have long provided services to their small business or sole proprietor members, and unions could do something similar for platform workers.

The model used by the Screen Actors Guild (SAG) may be the most useful, as it comes the closest to providing a service that actually might improve an independent contractor's working conditions. Various social media influencers have come to realize that their work on internet platforms can be quite precarious. Facebook, X (Twitter) and even Only Fans may have the right to remove users from their services, or abruptly change the terms and conditions of the use of their platforms, in such a manner that restricts their use. Influencers, whose income depends on their access to these platforms, may find themselves booted off the platforms with little notice and little recourse to reverse the platform's decision.[76] Since influencers are most often deemed independent contractors, they are unable to formally join unions and negotiate a protective collective bargaining agreement.

The solution offered by SAG offers an end run around this problem. Influencers may join SAG, and for a fee, they receive support from SAG in reaching an individual agreement with the advertisers whose products are being promoted. Moreover, SAG helpfully has provided a model agreement for influencers which may serve as the basis for an individual agreement. These are not collective bargaining activities, but rather a form of consulting services, as well as a vehicle for the influencer to obtain union healthcare and pension benefits (as provided in the model SAG agreement).[77] Of course, the SAG model works best with high skill platform workers (influencers) who – with the benefit of SAG expertise – have the negotiating power to actually change their working conditions at an individual level. This model may not be easily transferable to food delivery platform workers. Still, even with lower skill platform workers, unions could set up professional associations and give workers advice and individual legal representation in order to improve their working conditions.

[75] A. Curl, 'Turning the Channel: Why Online Content Creators Can and Should Unionize Under the NLRA' 36 *ABA Journal of Labor & Employment Law* 517, 537-540 (2022) (providing options for influencers in lieu of collective bargaining).

[76] S.A. O'Brien, 'Sex workers helped popularize Only Fans. Now their future on the platform is uncertain' *CNN*, available at https://tinyurl.com/2ktuabwn (last visited 30 September 2024).

[77] A. Curl, n 75 above, 539-540 (summarizing SAG's influencer agreement, but stressing that the agreement is between the influencer and an advertiser, and not the influencer and the platform); B.R. Mulcahy and G.R. Ilardi, 'Engaging Influencers' 43 *MAY Los Angeles Law*, 24 (2020); S. Shiffman, 'The Tik Tok Union: Unionization in the age of new media' 34 *Loyola Consumer Law Review*, 155 (2022).

IV. Conclusions

Trade unions in both the European Union and the US have a vital role to play in the ongoing and future regulation of platform work and AI. In the European Union, as has been pointed out, the role of social actors in the measures being approved and in the agreements that have been concluded (and perhaps in those in the process of being signed) is prominent. Institutional and social actors in the Union are aware that, without union involvement in the broad sense of the expression, it is impossible to regulate the growing phenomenon of the digitisation of work.

Concerning the European social dialogue plan, the social partners have always been involved not only, of course, in the drafting of all the agreements but also the binding proposals launched so far. However, they have opted not to exercise the prerogatives recognised to them by the Treaty on the Functioning of the European Union and, therefore, have decided to play mainly the role, consistently recognized the primary source, of recipients of information and consultations (as in the proposal for a directive on platform work and the proposal for a regulation on Artificial Intelligence) rather than trying to negotiate agreements in those matters. In other cases (in 2020 and 2022), they concluded agreements at the European level. Still, they decided not to require their transposition into binding Union acts, probably also due to the shocks to social dialogue following the *Epsu* decisions.

As far as the participatory profile in the strict sense is concerned, the European legislator has envisaged the involvement of workers, but above all, of trade unions, which are tasked with affecting non-secondary profiles of the new regulations. This involvement will be effective when certain conditions are met, that is: 1) if the proposals are passed in the versions currently known, 2) if the new regulations are linked with other European regulations in force, 3) and if they are adapted to the various national contexts, intervening at that level even if the implementation process is not formally required, as in the case of the regulation on AI.

The situation in the United States is somewhat more problematic for trade unions. Unlike in Europe, there is no institutional role for unions in the form of tripartite (government-employer-union) consultations or social dialogue. Unions may influence social policy affecting workers directly through the representation of employees in the collective bargaining process and by ultimately concluding collective bargaining agreements with employers. Secondarily, and often tied to collective bargaining, unions may lobby at the national, state, and local levels for favourable legislation protecting the rights of unions and employees. Depending on the political climate, this may involve lobbying for positive, pro-worker legislation or to stop more draconian pro-business labor law legislation from coming into effect. Since the US has a common law legal system, where the courts exercise considerable influence in the construction and interpretation of labor law, unions also have pursued strategic litigation to judicially expand the rights of unions and workers.

In modern times, union penetration in the American labor market has reached

historic lows, and new legal restrictions have compromised unions' ability to raise funds from the workers they represent. These developments have restricted unions' room for manoeuvre. At this same moment, with the emergence of the gig economy and the rise of platform work, a grave threat has been posed to the American labor movement. Gig or platform workers are considered independent contractors under federal labor law, and as a result do not possess the right to join or form labor unions and collectively bargain. Thus, the greater the expansion and reach of the platforms, the smaller the pool of employees American labor unions have to represent. Consequently, despite their diminished state, unions have focused their efforts on securing legislative changes through lobbying and legal changes through litigation that would allow platform workers to collectively bargain.

At the national level, unions have advocated for the passage of the PRO Act, which would amend the NLRA to encompass most platform workers, and thus make them eligible to collectively bargain. However, the filibuster rule in the US Senate, which requires a supermajority of 60 votes for most legislation to be advanced, makes it almost impossible to enact the PRO Act. Pro-union Democrats barely hold 50 seats in the Senate, and it is inconceivable that they could win 60 or more votes in the foreseeable future. A more fruitful path would be for unions to help secure the re-election of Democratic President Joe Biden; in a tight election, even a weakened labor movement may exercise outsized influence. The President of the US controls the appointments to key positions in various administrative bodies in the federal government, including the NLRB. A pro-labor NLRB may well reverse its decision from the era of President Trump that platform workers are independent contractors.

At the state and local level, unions have tried to promote creative legislation that would permit platform workers to collectively bargain. Federal antitrust law creates a very high barrier here, unfortunately. Unions are left with trying to navigate various minor exceptions in antitrust law by which state and local legislation, or innovative judicial decisions, may sneak through and permit some level of representation of these workers. In the worst case, unions have begun preparing to offer professional services to certain high skill platform workers (such as influencers), which, although falling short of representation through collective bargaining, may help improve their wages and working conditions.

Clearly, the sheer magnitude and scope of changes wrought by AI in the labor market, especially – thus far – through platform work, have made it increasingly difficult for workers to protect their own interests at an individual level. Only a collective response will offer them solace. European and American unions will continue to fight for a place at the policymaking table to ensure the workers' interests are protected, notwithstanding some recent reverses.

Essays

Build to Suit Real Estate Transactions Facing Legal Issues in Italy

Ciro Di Palma*

Abstract

The paper examines certain salient legal issues relating to 'build-to-suit' real estate transactions, whereby a professional developer purchases a plot of land from a seller and, contextually, agrees to lease the asset to be developed on said plot to one or more tenants. Although the agreements are interrelated per se (BTS transactions squarely fall within the definition of 'operazione economica') a set of conditions precedent or subsequent is the most effective contractual tool to ensure that (a) each agreement is finalized and/or terminates (as the case may be) along with the others, and (b) the risk borne by the developer is minimized (namely, prejudicial due diligence findings, failed or delayed issuance of building permits and failure to find a satisfactory lease arrangement). Some conditions, however, must be structured in compliance with specific Italian legal provisions. The approach suggested in this paper also aims to reduce the steps and documents needed to complete the transaction: the purchaser-developer should be able to immediately bind the seller of the plot and, upon signing, proceed with due diligence, the application for building permits and the negotiation of the lease. The final sections illustrate some of the peculiarities of the lease agreements in BTS transactions and suggests contractual arrangements to prevent the developer-lessor from incurring liabilities that are usually borne by contractors.

I. The Transaction

This paper outlines the main features of the real estate transaction internationally known as '*build-to-suit*' ('BTS') and examines certain salient legal issues stemming from the practice of such arrangements in Italy. The foremost aim of the paper is to ensure that none of the contractual arrangements sought by the parties conflicts with mandatory Italian legal provisions and that the transaction gives rise to no liability beyond those taken into account and accepted by the parties. While the analysis is performed from the purchaser-developer angle, the paper also investigates how, in certain cases, it is possible to accommodate the converging or conflicting needs of other parties.

A BTS transaction is an arrangement among, at least: (a) the owner-seller of an area eligible for development or re-development (green-field or brown-field); (b) a purchaser-developer, generally an enterprise engaged in the development of

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real estate premises for logistic or industrial use;[1] and (c) a prospective tenant seeking a turnkey real estate asset with customized features.[2] If the developer does not carry out the construction works directly (as in the case of mere financial investors, such as real estate funds) one or more contractors will be involved - typically a general contractor which, in turn, handles the relationship with a group of sub-contractors. Contractors are, usually, involved later in the transaction when the other three parties have agreed upon all the commercial and other conditions by means of binding contracts.[3]

The scope of the transaction encompasses: (a) the sale of a plot of land by the owner to the developer, (b) the development of new premises on such plot of land (mostly logistic or industrial real estate assets) by the developer, in its capacity as new owner of the land, and (c) the lease of the newly developed premises to the tenant. In most cases, the prospective tenant sets out some construction and development requirements and may even instruct the developer to purchase a specific buildable area. In other cases (so called speculative BTS transactions), the developer has already found a plot of land that is eligible for development and agrees with the tenant (its customer) upon the specification of the construction.[4]

Build-to-suit schemes were first introduced at the beginning of the second half of the 20th century in the United States,[5] and spread into Europe over the last three decades. They have proved to be particularly successful in the last few years due to the rapid growth of the demand for logistic platforms, as a result of the booming e-commerce market. The lack of buildable areas (especially greenfield plots) and the increase in construction-related costs (including those connected with building permits procedures, which in Italy can be rather uncertain and time-consuming and often require the assistance of several consultants) significantly contributed to the trend by prompting developers to focus on those investments

[1] The paper focuses on issues and technicalities that are common in logistic and industrial developments. However, BTS schemes are used also in other sectors, such as commercial-retail, offices etc. See, among others, G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' 29(3) *Probate and Property*, 32-41 (2015); G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' 33 *GP Solo*, 62 (2016).

[2] Normally tenants in BTS transactions require specialized buildings that are not readily available on the market. For instance, Amazon requires its landlords to design and build facilities in accordance with an 'extremely specific set of specifications designed for maximum efficiency and Amazon's particular business needs'. See G.P. Bernhardt and J.E. Goodrich, 'Build to Suit Leases' n 1 above, 33.

[3] See further details in G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 32-41; Ead, 'Build-to-Suit Leases' n 1 above, 62; L.M. Kelly, 'Build-to-Suit Leases: Pre-Construction and Construction Issues' 32 *Practical Real Estate Lawyer*, 29-52 (January 2016).

[4] The latter scheme is more feasible when the characteristics of the plot (location, surrounding infrastructures such as roadways etc.) are likely to meet the demand of potential tenants, thereby giving the developer reason to expect the asset to be promptly leased out. In certain cases, the developer starts the development and only at a later stage makes an agreement with the potential tenant upon the customization and finalization of the semi-built premises.

[5] See M.W.J. Thompson, 'Challenges of construction in emerging economies' 3 *Journal of Corporate Real Estate*, 250 (2000).

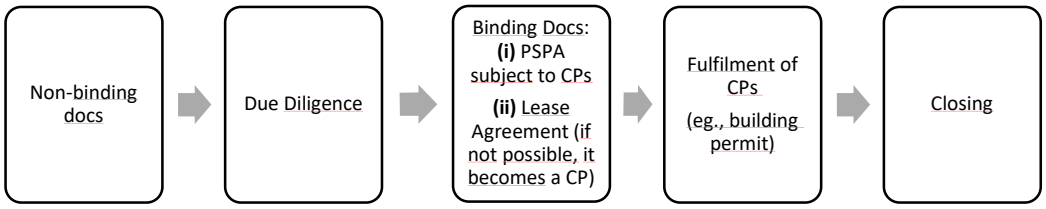
generating immediate and certain returns from the leases thus minimizing the risk of holding portfolio assets that are not income-producing immediately upon completion of the construction.

II. Main Steps and Contractual Documents of a BTS Transaction

The main steps in a BTS transaction might not materially differ from the common practice in business acquisitions, whether equity or asset deals: the process starts with the execution of non-binding documents (first step) and continues with a due diligence exercise performed by the developer (second step).[6] If none of the due diligence findings prevent the developer from moving forward,[7] the parties sign contractually binding documents (third step) and, upon fulfillment of the conditions set out therein, such as the issuance of building permits and, subject to the remarks below, execution of a lease agreement (fourth step), eventually reaching the closing of the transaction (fifth and final step).

[6] In some cases the tenant may perform preliminary due diligence, which will be confirmed by the developer (confirmatory due diligence). See L.M. Kelly, n 3 above, 34. For instance, in cases where the tenant has done its own site search (see G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 33). In this scenario the developer will conceivably ask the tenant to give certain representations and warranties in the lease agreement. Moreover, in all cases where the purchaser is going to request a loan, the financing bank will double check the due diligence performed by purchaser's advisers. Finally, in a case where the parties wish to cover the risks connected with breach of seller's reps and warranties by means of title insurance and/or a warranty & indemnity insurance, the insurer will also double check the due diligence performed by the purchaser.

[7] The scope of the due diligence in a build-to-suit transaction can vary on a case-by-case basis. Normally, for the sake of efficiency, the developer tends to limit the due diligence to the areas that actually need to be covered. The due diligence exercise should be driven by the final intended destination of the plot, as planned by the developer. The aspects that are normally investigated are the identity, capacity and good standing of the seller; the title of the seller on the plot, the absence of encumbrances (and whether the purchase price suffices to pay off all liens, if any), the town planning framework/building permits, including possible issues with infrastructures and utilities and, last but not least, the environmental issues. See for further inputs R. Kymn Harp, 'Give Them Their Due: Due Diligence in Commercial Real Estate Transactions' 25 *Probate & Property*, 40-49 (2011). For more details on zoning due diligence see also D.B. Kolev and M.K. Collins, 'The Importance of the Due Diligence' 84 *New York State Bar Association Journal*, 22-29 (March/April2021); A.N. Jacobson, 'A Narrative Real Estate Acquisitions Due Diligence Checklist' 17 *Practical Real Estate Lawyer*, 7-18 (November 2001). As for environmental due diligence, in many cases the purchaser starts with a document-based legal review, which looks into (I) all documents and correspondence concerning environmental issues received during a relevant timeframe, including those received from and sent to authorities, (ii) all documentation relating to any environmental impact assessment, audit or any other similar report conducted during a relevant time frame, and (iii) all details of any criminal convictions or any environment-related charges during the relevant timeframe. Thereafter, the purchaser performs an on-site analysis, which can include several phases. For some general information on environmental due diligence (also in M&A transactions) see G.E. Wall, 'Permits and Acquisitions Environmental Due Diligence' 36-37 *Annual Institute on Mineral Law*, 43-68 (albeit focused on purchase of oil and gas producing premises); D. Williams, 'Due Diligence Investigations and Environmental Audits' 3 *Juta's Business Law*, 43 (1995); J. Civins and M. Mendoza, *Transactional Environmental Due Diligence: What Diligence is Due*, 20 *Natural Resources & Environment*, 22-26 (Winter 2006).



BTSs, therefore, are business transactions (*operazioni economiche*)[8] that require the execution of several contractual documents including, at least, a preliminary sale and purchase agreement (PSPA), a lease agreement and, in most cases, one or more construction agreements. Notably, each of the agreements reflects a contractual framework expressly regulated under Italian law.[9]

Although the process typically begins with the exchange of non-binding documents, such as letters of intent, memoranda of understanding or term-sheets, this section focuses on the binding contracts entered into at the second and third steps. At signing (a) the owner and the developer enter into a preliminary sale and purchase agreement of the plot of land, respectively as promissory seller and promissory purchaser, and (b) the developer and the tenant enter into a lease agreement in respect of the premises to be built on the plot of land.[10] It should be noted that, at times, the developer may not be ready to execute the lease agreement at signing (for instance, because it is still searching for a suitable tenant or is still entangled in lease negotiations): in such cases, as explained below, the parties envisage the execution of a lease agreement as a condition precedent ('CP') to closing.

In the preliminary sale and purchase agreement, the owner-promissory seller undertakes to sell a plot of land to the developer-promissory purchaser, who undertakes to purchase.[11] Normally the obligation of the purchaser to close the

[8] References to the category of 'economic transaction' are recurrent in the Italian literature. See E. Gabrielli, 'Il contratto e l'operazione economica' *Rivista di diritto civile*, 91 (2003); G. Gitti, 'La 'tenuta' del tipo contrattuale e il giudizio di compatibilità' *Rivista di diritto civile*, 491 (2008); G.B. Ferri, 'Operazioni negoziali «complesse» e la causa come funzione economico-individuale del negozio giuridico' *Diritto e giurisprudenza*, 318 (2008); E. Gabrielli, '*Contratto e operazione economica*' *Digesto delle discipline privatistiche* (Torino: UTET, 2011), 243 ; Id, 'Autonomia privata, collegamento negoziale e struttura formale dell'operazione economica' *Giustizia civile*, 445 (2020).

[9] The expression '*contratto tipico*' (typical contract) is used by the Italian authorities to refer to a contractual scheme which is expressly named and regulated by the legislature, as opposed to '*contratto atipico*' (atypical contract), *ie*, an agreement whose scheme is not expressly regulated by law, even though such a scheme is sometimes widespread in practice.

[10] The agreement with the contractors (most likely the general contractor) might be entered into at signing or at a later stage of the transaction, unless there is a specific need to bind a specific general contractor. For instance, the seller of the plot of land might happen to be a contractor and might wish to sell the plot upon the condition that the purchaser chooses to engage the seller as contractor in respect of the development (or part thereof).

[11] The preliminary agreement is expressly contemplated in a few provisions of the Italian Civil Code. Among others, Art 1350 sets out that the preliminary agreement is void if not executed in the same form mandated for the relevant final agreement. A real estate preliminary sale and purchase agreement might or might not be executed in a notarial form and recorded with the

transaction by means of the execution of the final deed of transfer and payment of the purchase price is subject to several conditions precedent[12] or, less frequently, terminates upon the occurrence of certain conditions subsequent.[13] Customary conditions are those related to the issuance of the building permits needed to complete the development of the plot but, as further detailed below, the list of conditions may be longer and include the successful outcome of the due diligence and/or the execution of a lease agreement in terms deemed satisfactory by the lessor. According to best practice, the conditions precedent or subsequent are coupled with the parties' undertakings within the period between signing and closing. Among others, the promissory purchaser undertakes to prepare the documentation (including projects) and carry out all the filings with the authorities in connection with the needed building permits and promissory seller undertakes to grant any authorization or proxy in this respect. The conditions enable the purchaser to minimize the risk of failed or delayed issuance of the building permits, of the due diligence revealing material issues or of the developed asset not being readily leased out. It is worth mentioning that, while the conditions are ordinarily set out in the sole interest of the purchaser, the seller may take advantage of them too. In fact, while the owner-seller bears the risk of unfulfilled conditions (*eg*, failed or delayed issuance of the building permit, material issues arising from the due diligence, failed execution of a satisfactory lease agreement), the seller may benefit from a higher purchase price where the buyer is willing to pay a premium in return for the reassurance granted by the conditions precedent (especially regarding the plot's eligibility for development).

Lease agreements in BTS transactions are complex and differ from basic leases in that the leased asset does not exist at the time of signing[14] and will be in

Land Registry. Pursuant to Art 2645-*bis* of the Civil Code if the parties record a preliminary real estate sale and purchase agreement in the Land Registry either of them will be able to enforce the agreement toward third parties. A duly recorded agreement, therefore, will prevail over a sale agreement of the same asset entered with another purchaser and recorded afterwards. The effects of the recording last for 1 year after expiration of the term provided for execution of the final transfer deed or in any case after 3 years from the recording. Pursuant to Art 2657 only agreements executed in a notarized form can be recorded in the Land Registry. For a thorough analysis of the issues related to the recording of agreements in the Land Registry under Italian law see F. Gazzoni, in E. Gabrielli and F. Gazzoni, *Trattato della trascrizione,* 1, I, (Torino: UTET, 2012).

[12] In BTS transactions the conditions are set out for the interest of one party only (the developer-purchaser) who can therefore waive the conditions and proceed with closing. The case falls into the doctrine known as 'unilateral condition'. For a thorough analysis see P. Maggi, *Condizione unilaterale* (Napoli: Edizioni scientifiche italiane, 2008).

[13] The difference is not significant since the preliminary purchase agreement does not transfer the title to the purchaser: even where conditions subsequent apply, therefore, the title does not need to shift back to the seller.

[14] Art 1348 of the Civil Code sets out the general principle that enables contracting parties to contemplate by prior agreement what they intend to do in relation to property that does not yet exist, without prejudice to specific prohibitions under applicable law. In addition to this general provision that should apply to all agreements, Art 1472 (included in the section concerning sale and purchase agreements) sets forth that in the sale and purchase agreements of future goods

place only upon completion of the construction works. Moreover, the lease might be subject to several conditions precedent or subsequent,[15] namely issuance of the needed building permits and positive outcome of the due diligence (in case the lease is executed while the due diligence is still ongoing).[16]

It may be argued that also the conditions that characterize lease agreements in BTS transactions are set out in the interest of the lessor, since they are meant to minimize the risks he may incur in the transaction. However, tenants too can take advantage of the same peculiarities: they will have the chance to request a customization of the asset under development that may be unfeasible in the case of a fully developed asset. Moreover, a longer period between signing of the lease and delivery of the built premises may be beneficial for those tenants handling the relocation of their premises (eg, termination notices set out in the previous lease).

As pointed out above, the agreement(s) with the contractor(s) are part of the transaction but not necessarily entered into at signing. In certain cases, however, either party may be interested in having a binding construction agreement already in place at signing. For instance, the developer may wish to bind a specific contractor or the seller may be available to sell the plot only upon the condition that the same seller (or an affiliated company) is appointed as contractor. In such cases the parties enter into the construction agreements simultaneously with, or before, the preliminary sale and purchase agreement.

III. Whether the Agreements Entered Within a Build-To-Suit Transaction Fall into the Doctrine of 'Linked Agreements' (*Contratti Collegati*)

Having outlined the transaction process and the relevant contractual documents, this section considers whether they fall into the category known in Italian legal doctrine as 'linked contracts' (*contratti collegati*)[17] and, if so, whether and to

the title shifts to the purchaser as soon as the good comes to existence.

[15] G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 34.

[16] As more fully explained in para 3 and n 33 below, even if the agreements are linked, according to Italian case law the condition precedent or subsequent contemplated therein may not necessarily interact to the other agreement(s) if the parties did not expressly include such condition in all the agreements. Therefore, it is worth replicating the same conditions contemplated in the PSPA and vice versa. Moreover, in most cases the lease agreement mirrors the conditions precedent/subsequent contemplated in the PSPA (see n 51 below).

[17] The Italian literature on 'linked contracts' is almost endless and an exhaustive list of references cannot be included here. Among various contributions see: M. Giorgianni, 'Negozi giuridici collegati' *Rivista Italiana per le Scienze Giuridiche,* 327 (1937); F. Di Sabato, 'Unità e pluralità di negozi (contributo alla dottrina del collegamento negoziale)' *Rivista diritto civile*, I, 412 (1959); C. Di Nanni, 'Collegamento negoziale e funzione complessa' *Rivista diritto commerciale*, 279 (1977);G. Ferrando, 'I contratti collegati' *Nuova giurisprudenza civile commentata*, 1986, II, 256 ;E. Zucconi Galli Fonseca, 'Collegamento negoziale e efficacia della clausola compromissoria: il leasing e altre storie' *Rivista trimestrale diritto e procedura civile*, 827, 1085 (2000); V. Barba, 'La connessione tra i negozi e il collegamento negoziale' *Rivista trimestrale diritto e procedura civile*, 1167 (2008); R. Costi, 'I patti parasociali e il collegamento negoziale' *Giurisprudenza commerciale*, 200 (2004);

what extent this impacts on the transaction and/or on the relevant agreements.

In some cases, parties carry out a business transaction by means of several agreements: from a purely formal standpoint, each agreement has its own subject and scope and is governed by the legal provisions of the relevant contractual framework.[18] However, an holistic analysis of each of the agreements collectively, which takes into consideration the transaction as a whole, must show that they are linked to each other: therefore, all the agreements in question necessarily come into existence and cease to exist together. In other words, if, for any reason, anyone of the agreements terminates or expires, every other agreement also terminates or

A. D'Adda, 'Collegamento negoziale e inadempimento del venditore nei contratti di credito al consumo' *Europa e diritto privato*, 725 (2011); E. Zucconi Galli Fonseca, 'La clausola compromissoria nei contratti fra parti diverse' *Rivista trimestrale diritto e procedura civile*, 826 and 1169 (2019); E. Gabrielli, 'Autonomia privata' n 4 above, 445. Prominent scholars (R. Sacco and G. De Nova, *Il contratto* (Torino: UTET, 4th ed, 2016, 80) have disputed the feasibility of the category, claiming that the 'linked agreements' are actually pieces of the same contractual arrangement. This interpretation unlocks easier solutions, for instance in identifying the competent court in case of disputes concerning all the linked agreements. Sacco and De Nova also deem that this conclusion is not undermined where not all parties enter into all agreements or where only certain of the linked agreements require notarial form. The existence of group of agreements defined as 'interdependent' or interrelated' is also well known in jurisdictions other than Italy. In France the concept of interdependent contracts has always been retrieved from Art 1186 of the French Civil Code (see, among others, Cour de Cassation, Mixed Chamber, 17 May 2013, no 11-22768; Cour de Cassation, Commercial Chamber, 12 July 2017 nos 15-277703 and 15-23552) and, by virtue of the Ordinance dated 10 February 2016 for the reform of contract law, has been codified, so that para 2 of the current Art 1186 sets forth that 'Where the performance of several contracts is necessary for the putting into effect of one and the same transaction and one of them disappears, those contracts whose performance is rendered impossible by this disappearance lapse, as do those for which the performance of the contract which has disappeared was a decisive condition of the consent of one of its parties'. On this topic see also M. Mekki, 'France-The French Reform of Contract Law: The Art of Redoing Without Undoing' 10 *Journal of Civil Law Studies* (2017); V. Jentsch, 'Contractual Performance, Breach of Contract and Contractual Obligations in Times of Crisis: On the Need for Unification and Codification' 29 *European Review of Private Law*, 880 (2021). For a wider perspective on European Law, see also G. Orga-Dumitru, 'Reception of Contract Group Theory in European Contract Law' 2 *International Investment Law Journal*, Societatea de Stiinte Juridice si Administrative (Society of Juridical and Administrative Sciences), 46-68 (February 2022). Interrelated agreements are relevant in common law systems too. The topic is mentioned in some remote case law, such as *Measures Bros Ltd* v *Measures*, 1910, 2 Ch. 248 (11 May 1910) where the appointment of a director was deemed not interdependent to a non-competition arrangement. Albeit an exhaustive overview is not possible, see: US Court of Appeals, Seventh Circuit: *Davis Companies* v *Emerald Casino f/k/a HP, Inc., et al.,* 6 GLR 57 (2002) - where the existence of interdependent agreements was crucial to decide whether a party must be joined as a necessary party to a litigation; In South Wales see *Meetfresh Franchising Pty Ltd* v *Ivanman Pty Ltd*, 2020, NSWCA 27 (26 February 2020) (Macfarlan JA), where the court held that a license agreement and a franchise agreement were interdependent and, consequently, the appellant was precluded from recovering amounts due under the license agreement when it did not fulfil obligations under the franchise agreement.

[18] A. Cataudella, *I contratti. Parte generale* (Torino: UTET, 2014), 221; R. Sacco and G. De Nova, n 17 above, 79; Corte di Cassazione 3 May 2017 no 10722, 26 *Guida al diritto*, 82 (2017); Corte di Cassazione 22 September 2016 no 18585, *Giustizia Civile Massimario*, 2016; Corte di Cassazione 18 July 2003 no 11240, *Giurisprudenza italiana*, 738 (2004); Corte di Cassazione 8 February 2012 no 1875, available at www.dejure.it; Corte di Cassazione 22 March 2013 no 7255, available at www.dejure.it; Corte di Cassazione 10 October 2014 no 21417, *Diritto e Giustizia*, 13 (2014).

expires (*simul stabunt simul cadent*).[19] This means that the validity and legal effects of each agreement influences and depends upon the validity and effects of the other agreement(s), as they're all are entered into by the parties to pursue the same final scope,[20] regardless of whether each agreement is entered into by a separate document[21] or whether all the persons involved are parties to all agreements.[22]

There is no academic consensus on the minimum requirements for linked contracts: some[23] put more attention on the objective link and argue that the fact that all agreements are entered into to pursue the same final scope suffices to establish a connection; others[24] postulate that, to ascertain an actual connection among the contracts, there must be an intention on the part of the parties to that effect. Italian courts seem to take into account both the objective, functional connection between contracts as well as the intention of the parties.[25] Italian scholars note that, in some cases, the agreements can be linked through the scope of the whole transaction, even if parties do not include any specific provision in that respect in the agreement ('necessary connection').[26] This happens for instance when parties enter into a guarantee to secure fulfilment of the obligation arising

[19] C.M. Bianca, *Diritto civile*, *3. Il contratto* (Milano: Giuffrè, 4th ed, 2000), 481. Corte di Cassazione 12 December 1980 no 1007 *Giurisprudenza italiana*, I, 1, 1537 (1981); Corte di Cassazione 10 October 2014 no 21417, n 10 above, 13; Corte di Cassazione 26 March 2010 no 7305,19 *Guida al diritto*, 38 (2010); Corte di Cassazione 25 July 1984 no 4350, *Rivista notariato*, 162 (1985). Some scholars would rather use the sentence '*utile per inutile non vitiatur*', meaning that, once one of the connected agreements is deemed void, the others are useless. See, among others, V. Barba, n 17 above, 1169;

[20] F. Gazzoni, *Manuale di diritto privato* (Napoli: Edizioni scientifiche italiane, 17th ed, 2015), 826. C.M. Bianca, n 19 above, 482; P. Gallo, *Trattato del contratto*, I, *La formazione* (Torino: UTET, 2010), 180.

[21] In the opinion of C.M. Bianca (n 19 above, 482, fn 120) the case does not fall into the category of the contractual connection.

[22] Corte di Cassazione 19 July 2012 no 12454, available at www.dejure.it; Corte di Cassazione 12 October 2012 no 17405, available at in www.dejure.it; Corte di Cassazione 25 September 2014 no 20294, available at www.dejure.it; C.M. Bianca, *Diritto civile*, *3. Il contratto*, note 11 above, 483.P. Gallo, n 20 above, 188; R. Sacco and G. De Nova, n 17 above, 79.

[23] C.M. Bianca, n 19 above, 482;

[24] M. Giorgianni, note 17 above, 327;

[25] Corte di Cassazione 23 March 2022 no 9475, *Guida al diritto*, 20 (2022); Corte di Cassazione 5 March 2019 no 6323, 17 *Guida al diritto* 53 (2019); Corte di Cassazione no 20634, 2018 *Giustizia Civile Massimario* (2018); Corte di Cassazione 31 October 2014 no 23177, 10 *Guida al diritto*, 59 (2015); Corte di Cassazione 17 May 2010 no 11974, *Giustizia Civile Massimario*, 5, 761 (2010); Corte di Cassazione-Sezioni Unite 14 June 2007 no 13894, 34 *Guida al diritto*, 52 (2007); Corte di Cassazione 21 July 2004 no 13580, *Giustizia Civile*, I, 685 (2005); Corte di Cassazione 8 July 2004 no 12567, *Giustizia Civile Massimario*, 7-8 (2004); Corte di Cassazione, 23 June no 9970, *Giustizia Civile Massimario*, 6 (2003); Tribunale di Firenze 30 March 2022 no 905, available at www.dejure.it; Tribunale di Pavia 3 February 2022, no 137, available at www.dejure.it; Tribunale di Pisa 20 February 2020 no 207, available at www.dejure.it; Tribunale di Roma 15 June 2011 no 12996, available at www.dejure.it; Tribunale di Bari 22 October 2009 no 3152, available at www.giurisprudenzabarese.it (2009); Corte d'Appello di Venezia 27 January 2020 no 230, available at www.dejure.it; Corte d'Appello di Napoli, 16 April 2018 no 1686, available at www.dejure.it.

[26] V. Barba, n 17 above, 791; Corte di Cassazione 28 June 2001 no 8844, *Giurisprudenza italiana*, 1618 (2002).

from another agreement, entered between the same parties.[27] In other cases, the link depends on the parties' agreement in this respect ('voluntary connection') and, accordingly, the agreements would not be linked but for the parties' decision to make each agreement (or any of them) dependent upon the other.[28] For instance, the owner of a business located in a building might sell the going concern without the building or vice versa.[29] The two sale and purchase agreements are not necessarily connected. The parties, however, can choose to establish a connection between the two sales, so that neither can be perfected without the other. Where the link between the agreements is the result of the parties' choosing, the interpreter should focus on the parties' intentions (even when not all the parties have entered into all of the agreements)[30] resulting from the contractual provisions (not elsewhere).[31] Needless to say that the analysis is easier when the agreement is sophisticated enough to include specific clauses that show the parties' intention of tying one agreement to another. For instance, in some cases, the parties expressly exclude the right to terminate one of the agreements unless the other agreement(s) is/are also terminated.[32]

According to scholars, the link between the agreements can be mutual or unilateral. The latter occurs when only one of the agreements is dependent upon the other(s).[33] This happens when the parties enter into a guarantee to secure fulfilment of the obligations arising from another agreement:[34] indeed, termination

[27] P. Gallo, n 20 above, 181. Further examples can be easily found: the agreement between a contractor and a sub-contractor is necessarily dependent upon the agreement between the contractor and the principal, regardless of whether the parties expressly acknowledged it in the contract. Likewise, the mandate agreement between the principal and the agent this required to enable the latter to enter into a sale and purchase agreement on behalf of the principal.

[28] F. Gazzoni, *Manuale* n 20 above, 827. The scope of the transaction should be shared by all parties involved and not by only some of them. See, among others, Corte di Cassazione 4 September 1996 no 8070; Corte di Cassazione 6 February 2013 no 2839; Tribunale di Perugia, 12 June 2020, all available at www.dejure.it;

[29] Corte di Cassazione 10 October 2014 no 21417, *Giustizia Civile Massimario* (2014).

[30] Corte di Cassazione 16 September 2004 no 18655, *Giustizia Civile*, I, 1251 (2005); Corte di Cassazione 28 July 2004 no 14244, *Giurisprudenza italiana*, 1825 (2005).

[31] M. Giorgianni, n 17 above, 327; F. Gazzoni, *Manuale* n 20 above, 827. However for C.M. Bianca, n 19 above, 483 a subjective intention of the parties is not needed and the link can originate from the objective connection between the agreements. For another example see also R. Costi, n 17 above, 200, who investigates the connection between the articles of association (*patti sociali*) and the shareholders agreements (*patti parasociali*). Further examples can be found in the business transactions known as financial leasing, swap, catering, leveraged buyout etc. See V. Barba, n 17 above, 791. For a more thorough analysis of the financial leasing as group of connected agreements see E. Zucconi Galli Fonseca, 'Collegamento negoziale' n 17 above, 827.

[32] F. Gazzoni, *Manuale* n 20 above, 828. Corte di Cassazione 27 February 1976 no 638, *Rivista del notariato*, 957 (1977).

[33] F. Gazzoni, *Manuale* n 20 above, 827. R. Sacco and G. De Nova, n 17 above, 81; Corte di Cassazione, 4 March 2010 no 5195, 14 *Guida al diritto*, 61 (2010); Cassazione 8 October 2008 no 24792, *Giustizia Civile Massimario*, 1449 (2008); Corte di Cassazione 5 June 2007 no 13164, *Il civilista*, 5, 95 (2008).

[34] C.M. Bianca, n 19 above, 483.

of the guarantee does not give rise to termination of the secured agreement. Vice versa, termination of the secured agreement should trigger the termination of the guarantee. Another aspect highlighted in the academic literature is that the link can influence the effect of the interrelated agreements (at the moment they are entered into) or the expiration/termination thereof (in a time frame that follows execution).[35]

Thanks to the doctrine of the linked agreements the courts have been able to bring about solutions that reflect the actual scope of the parties and that would have been unachievable if each contract had been considered on a standalone basis. One of the conclusions drawn by the courts is that, if one of the agreements is terminated for any reason, the others are also deemed to have terminated automatically.[36] Similarly, where a party is in material breach of agreement Alfa, another party can refuse to fulfil its obligations under the connected agreement Beta, provided that Beta is linked to Alfa, pursuant to Art 1460 of the Civil Code.[37] Scholars also argue that agreement Beta might be terminated under Art 1464 of the Civil Code if the main obligations contemplated in agreement Alfa (connected with Beta) become impossible.[38] In the case of linked agreements, the condition precedent or subsequent contemplated therein may be referred also to the other agreement(s), even though the parties did not expressly include such condition.[39] Moreover, the avoidance (either *annullabilità* or *nullità*) of one of the linked agreement

[35] ibid; Corte di Cassazione 16 May 2003 no 7640, *Giustizia Civile Massimario*, 5 (2003).

[36] Tribunale di Treviso, 24 January 2019, available atwww.dejure.it; whereby the parties voluntarily agreed upon the termination of a supply agreement and the courts deemed that also the loan, entered into only for the purposes of the supply, was to be considered automatically terminated; similarly Tribunale di Brescia, 17 February 2018, available atwww.dejure.it, where in a case of the purchase of real estate and connected assumption of the mortgage debt by the purchaser the court deemed that since the purchase had been terminated the assumption of the mortgage should be terminated too. But in Tribunale di Milano, 2 December 2014 no. 14378, available atwww.dejure.it the court stated otherwise and deemed that the loan connected to the purchase would continue following the termination of the purchase.

[37] Corte di Cassazione 28 June 2019 no 17148, *Giustizia Civile massimario* (2019) (relating to the termination of a construction agreement due to the breach in a connected sale and purchase of shares); Corte di Cassazione 11 March 1981 no 1389, *Giurisprudenza italiana*, I, 1, 378 (1982); Corte di Cassazione 19 December 2003 no 19556 *Foro italiano*, I, 718 (2004); Corte di Cassazione 10 July 2008 no 1884, available at www.dejure.it; C.M. Bianca, n 19 above, 484.

[38] F. Gazzoni, *Manuale* n 20 above, 828. C.M. Bianca, n 19 above, 484; Corte di Cassazione 23 May 2012 no 8101, *Giustizia Civile Massimario*, 5, 654 (2012). But see also A. Cataudella, n 18 above, 225, for a different opinion that denies an impact on linked contract in case the link is voluntarily established by the parties.

[39] Corte di Cassazione 3 February no 1333, *Foro italiano*, I, 3085 (1993); R. Sacco and G. De Nova, n 17 above, 80; Tribunale di Savona, 17 November 2020, available at www.dejure.it where the court ordered cancellation of an insurance policy and return to the insured of the premium due to the fact that the policy was entered exclusively in connection with a loan, which did not go through; Tribunale di Crotone, 6 May 2020 no 390, available at www.dejure.it, whereby the court allowed the defendant (purchaser of a car and borrower in the relevant loan, provided by the same company) to raise the same objection used for the sale and purchase agreement also for the loan.

should give rise to the avoidance of the others.[40] Last but not least, Art 1363 requires that the interpretation of the contract as a whole will apply not only in respect of one agreement but in respect of all the connected agreements.[41]

Let us return to the initial issue - ie, whether the agreements that are part of a BTS transaction qualify as 'connected contracts' under the above discussed doctrine.

It is undisputable that there is a link between (at least) the PSPA and the lease agreement, regardless of whether the parties expressly acknowledged such connection by means of express provisions. In many cases the lease agreement and the construction contract can also be seen as two related transactions. This link is clear if we look at the transaction from the standpoint of the developer, who enters into the sale and purchase agreement on the basis of an expectation to lease the developed land while entering into the lease agreement on the assumption of completing the acquisition of the plot.[42] Undoubtedly, the developer would not sign the sale and purchase agreement without an arrangement on the lease of the premises and, vice versa, would not enter into the lease agreement without a seller's commitment to sell the developable area. However, the connection is not as obvious for the other parties nor it is meant to protect their interest. The owner-seller only wishes to sell its land and receive the purchase price, all while not even aware of the lease agreement. Likewise, the tenant expects delivery of the built premises and might not be aware of the fact that, at signing, the developer has not acquired title over the plot yet. While the connection is rather obvious if we look at the actual scope of the overall transaction for the developer, the other parties might be unaware of it without proper express provisions in the contractual documentation. There is, therefore, a possible information asymmetry between the developer, on the one hand, and the seller and the tenant, on the other hand, with substantial consequences in terms of contractual liability: for instance, the tenant may deem the developer liable for breach of the lease even if the latter's inability to perform is due to a breach by the seller (causing, in turn, the developer's inability to complete the purchase). In such cases, the developer could raise the

[40] V. Barba, n 17 above, 791; F. Gazzoni, *Manuale* n 20 above, 828.P. Gallo, *n* 20 above, 188. Corte di Cassazione 6 July 2015 no 13888, *Giustizia Civile Massimario*, 2015; Tribunale di Palermo, 7 July 2022 no 3012, available atwww.dejure.it, whereby a loan agreement was entered into for the sole purpose of handling a bank account with a negative balance, which was the result of a void bank account agreement. Therefore, the Tribunal deemed also the loan null and void. Corte d'Appello di Napoli, 22 July 2022 no 3452, available at www.dejure.it; Corte d'Appello di Milano, 8 January 2020 no 40, available at www.dejure.it; Corte d'Appello di Napoli, 10 May 2019 no 2564, available at www.dejure.it; Corte d'Appello di Trento, 5 March 2009 no 46, available at www.dejure.it.

[41] R. Sacco and G. De Nova, n 17 above, 80. The Italian legislature has recognized the doctrine of linked agreements since, in the consumer contracts regulations, the abusive nature of certain provisions must be evaluated taking into consideration all of the clauses of the agreement and of any connected agreements.

[42] As mentioned by C.J. Circo, 'Construction Law Apologetics, in Symposium: Construction Law in the Legal Academy' 75 *Arkansas Law Review*, 343 (2002), typically developers/project owners for the operation of their business enter into a 'network of bilateral agreement' that creates a 'complex web or interdependent contracts'.

contractual link between the sale and purchase agreement and the lease agreement as a defense against the tenant's claim[43] - however, the burden of proof would be on the developer to demonstrate that the tenant was aware of the causal connection between the lease and the purchase. It is, therefore, important to consider how information asymmetry can be corrected, ensure that the developer is exempted from liability and does not have to bear the burden of proof concerning the other parties' awareness of the contractual connection. Italian case law clarifies that, especially in cases where not all the persons involved are parties to all the connected agreements and where the connection is only in the interest of certain parties, it is necessary that the party who has an interest in the connection includes clauses in the agreements that expressly confirm the existence of the connection, so that all the other parties can acknowledge and accept that all the agreements are entered into to pursue the same final scope.[44] Both the preliminary sale and purchase agreement and the lease agreement should clearly state that the undertaking to purchase, as well as the obligation to lease, are linked to each other and that, accordingly, the developer will be released from its undertaking to close the purchase in case the lease agreement is not executed. Similarly, the lease agreement should clearly set out that the obligation to lease the developed premises is dependent upon the completion of the purchase. In other words, in light of the fact that the contractual connection may not be entirely clear for some of the parties, it is advisable that the information gap be filled by means of express provisions to be included in both the PSPA and the lease agreement. The same would apply to the construction agreement, in case it is entered into before closing. There are different types of contractual provisions to that end and we might wonder which is the most effective. Both the sale and purchase and the lease agreement might be conditional upon the execution of the other: neither would be binding unless and until the other is executed. Should the condition not occur, none of the parties (including, of course, the developer) would be liable for breach.[45] The condition can protect the interest of the developer and also represent a fair arrangement for the other parties: the occurrence or non-occurrence of the condition is, in fact, beyond the control of the developer, who cannot arbitrarily walk away from the transaction. Another relevant provision is the termination right (*recesso*), whereby the developer can terminate either agreement where the other is not executed by a certain date. In such cases, the agreements would be binding and effective as soon as they are

[43] Corte di Cassazione 10 September 2015 no 17899, *Giustizia Civile Massimario* (2015), clarifies that the contractual connection can be ascertained by the judge (regardless of the claims and the defenses of the parties) and can be also raised as a defense by the defendant.

[44] Corte di Cassazione 24 March 2014 no 6879,27 *Guida al diritto*, 78 (2014); Corte di Cassazione 6 February 2013 no 2839,15 *Guida al diritto*, 43 (2013); Corte di Cassazione 16 February 2007 no 3645, *Obbligazioni e contratti*, 7, 648 (2007); Tribunale di Trani, 15 September 2022 no 1318, available at www.dejure.it; Corte d'Appello di Milano, 8 June 2017 no. 2545, available at www.dejure.it.

[45] But notably this should not undermine the duty of good faith of all the parties before the satisfaction of the conditions, pursuant to Art 1358 of the Civil Code. See also para 4.3 below.

executed. A termination right at-will would, however, expose the other parties to the discretionary decision of the developer, whose position would be similar to the holder of an option right. In the case of termination rights that are subject to a justified cause, the other parties would not be exposed to arbitrary decisions of the developer but there would be a risk of a dispute as to whether the termination right is sufficiently justified. In light of the above, it can be argued that, while a termination right at-will is the best option for the developer, the condition is a more fair option and acceptable for the other parties. It is worth mentioning that the conditions (either precedent or subsequent) would operate regardless of whether the agreements are connected.[46] This should exempt the interpreter from investigating the connection. The inclusion of clear conditions in the agreement facilitates the contract's interpretation: the interpreter does not need to investigate the actual scope of the agreements to understand whether they are connected to each other or not. The Italian High Court has clarified that conditions can be included to ensure that – *(a)* the effectiveness or the termination of the agreements is subject to a circumstance that would otherwise be irrelevant (or beyond the contractual arrangement), or *(b)* the contractual arrangement reflects the actual and final scope pursued by the parties.[47] The latter scenario occurs when the developer uses the condition to compel the other parties to acknowledge the actual scope of the transaction from his perspective and, therefore, avoid any disputes (along with the relevant burden of proof)[48] as to whether the other parties were aware of the link between the agreements.

IV. Customary Conditions Precedent or Subsequent: Satisfactory Completion of Due Diligence; the Issuance of the Permits Needed to Build the Premises; and Confirmation that the Impact Fees Due to the Municipality Do Not Exceed a Given Threshold

Real estate developments entail risks and costs that can be assessed only at an advanced stage of the process, and in many cases this will be only once the due diligence analysis has been completed, the authorities have issued the building permit and have determined the impact fees (or at least have notified a preliminary

[46] The conditions are accessory to the main contractual arrangement (they may be or may not be part of it) and need to be expressly included in the agreement. If a condition precedent or a condition subsequent has not been satisfied, this does not give rise to any liability for breach of the agreement, without prejudice to the duty of good faith while the conditions are pending. Among others, see Corte di Cassazione 18 March 2002 no 3942, *Contratti*, 443 (2003); Corte di Cassazione 4 September no 9388, 1999 and Corte di Cassazione 13 December 1979 no 6505, both available at www.dejure.it. Moreover, while a condition precedent is pending the agreement does not have any legal effect (see P. Gallo, n 20 above, 181).

[47] Corte di Cassazione 3 February no 1333 n 39 above.

[48] According to Corte d'Appello di Milano 8 June 2017 no 2545 n 39 above, the link between the agreements must be certain.

positive opinion thereon) and the tenant has signed a binding and final lease agreement.

Due diligence findings, the issuance of the building permits and the amount of the related impact fees, as well as the negotiation and execution of a satisfactory lease agreement are inherent hazards that can be minimized[49] by means of a set of conditions precedent or, less frequently, conditions subsequent[50] in the PSPA[51] so that the developer is obliged to close, or can walk away from the transaction, as the case may be, only upon the occurrence of certain circumstances.[52]

Notably the conditions are drafted so as not to affect the effectiveness of the entire preliminary purchase agreement but only the obligation to proceed with the closing of the transaction. Accordingly, the other contractual provisions (interim management, confidentiality, etc) are immediately binding between the parties upon signing of the PSPA.[53]

The issuance of a building permit (or similar administrative measures) can be easily governed by means of a condition precedent or subsequent.[54] The condition

[49] It is generally accepted that the conditions precedent or subsequent are a contractual tool to manage the risks connected to the agreement. Among others, see A.C. Nazzaro, 'La condizione nel contratto tra 'atto' e 'attività', in F. Alcaro ed, *La condizione nel contratto* (Padova: CEDAM, 2008), 376.

[50] The choice between a condition as precedent or subsequent is not a substantial matter when the condition is included in a preliminary purchase agreement, since the execution of the agreement does not cause title to transfer from the seller to purchaser. In both cases the agreement does not transfer the title to the purchaser. The choice becomes more relevant when the condition is part of a final transfer agreement since, in the case of a condition subsequent, the execution of the agreement would entail transfer of the title to the purchaser and subsequent termination would require another transfer of the title back to the purchaser. See, among others, Corte di Cassazione 4 November 1994 no 9062, available atwww.dejure.it. On the other hand, a final sale and purchase agreement subject to a condition precedent would not cause any shift in the title to the purchaser unless and until the condition occurs. See Corte di Cassazione 20 January 1983 no 573, and Corte di Cassazione 11 July 1981 no 4507, both available atwww.dejure.it.

[51] G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 32 and 37. The authors of this work also point out that all the provisions of the construction contract that allow delayed completion of the works should mirror the clauses of the lease agreement, so that the landlord does not incur any liabilities that depend upon the contractor or are otherwise beyond his control (*eg*, force majeure). See also L.M. Kelly, n 3 above, 38.

[52] It is generally accepted that while (most of) the due diligence findings can be handled through representations, warranties and indemnities in the agreements, the risks concerning the signing of a lease agreement and the issuance of building permits can only be minimized through conditions precedent to closing.

[53] See also para 3 of Art 1354 of the Civil Code, which refers to cases where an illegal or impossible condition has been stipulated in respect of single clauses or arrangements and not in relation to the entire contract. E. Giacobbe, *La condizione*, in N. Lipari and P. Rescigno eds, *Diritto civile*, III, *Obbligazioni*, II, *Il contratto in generale* (Milano: Giuffrè, 2009), 427.

[54] The prevailing case law confirms that parties can make the effectiveness or the termination of the preliminary sale and purchase agreement subject to the execution of a town planning agreement, the issuance of a building permit or the completion of similar administrative procedures. Among others, see Corte di Cassazione 30 October 1992 no 11816, available at www.dejure.it, Corte di Cassazione 2 October 2014 no 20854, available at www.dejure.it, Corte di Cassazione 18 April 2018 no 9550, *Guida al diritto*, 69 (2018), Corte di Cassazione 16 June 2008 no 1781, 50 *Guida al diritto*, 109 (2008). See also Corte di Cassazione 20 December 1980 no 5757 and 5 June 2008

can also capture the amount of the impact fees,[55] ie the parties expressly agree that the condition is not deemed to have been satisfied if the amount of the impact fee exceeds a given threshold. In other cases, the purchaser does not want to withdraw from the transaction where the impact fees are higher than expected and, therefore, would rather negotiate a price adjustment mechanism that kicks in if there is an increase in the administrative fees connected with the development.

While the issuance of building permits or other authorizations does not give rise to specific concerns in terms of enforceability of the relevant condition, the other customary conditions, such as outcome of the due diligence and the execution of a satisfactory lease agreement demand additional remarks in respect of their compliance with, and enforceability under, Italian law.

1. Whether the Closing of a BTS Transaction Can Be Conditional on the Satisfactory Outcome of Due Diligence

It is not uncommon to include a provision in the PSPA stipulating that the obligation of the purchaser to close the transaction is conditional upon the satisfactory outcome of due diligence. Developers often also include it in the lease agreement.[56] Such provisions are normally set out as conditions precedent or subsequent and it should be considered whether this conflicts with mandatory provisions of Italian law.

A first issue is whether the condition is compliant with Art 1353 of the Civil Code, which sets out that an agreement (or the termination thereof, in the case of a condition subsequent) can be subject to the occurrence of uncertain *and future* event(s). Indeed, the due diligence process is meant to analyze circumstances and issues already in place at signing, albeit unknown to the purchaser: in those cases, the developer appoints its advisors to perform an analysis of the position and to uncover any issues that already exist at signing, even though the parties (or at least the party in the interests of whom the condition has been inserted) are unaware of them.[57]

Certain sources of authority[58] stick to the wording of Art 1353 and confirm

no 14938, available atwww.dejure.it.

[55] This is the case unless the amount of the impact fee can be quantified at signing, for instance when there is already a town planning agreement in place and there are no uncertainties concerning the amount of the impact fees due by the developer in connection with the project.

[56] See n 52 above.

[57] A rather similar example occurs when parties agree upon the sale and purchase of a piece of land subject to the condition that the land is (*and will not be*) included in the parceling plan of the Municipality. Indeed, the plan is already in place but the parties would rather reach an agreement and assess at a later stage whether the land is included in the plan or not. See M.C. Bianca, n 19 above, 544.

[58] Corte di Cassazione 29 September 2007 no 20591, *Nuova Giurisprudenza Civile Commentata*, I, 450 (2008), which however refers to a circumstance that was known to the relevant contractual party (a bank, which was supposed to know whether part of a mortgage loan had been repaid). See also Corte di Cassazione 2 April 2009 no 7994, and Corte di Cassazione 22 November 1974

that a condition can only be validly established if the event set out therein is future and uncertain. The underlying rationale for this interpretation is that an event that has already happened when the parties sign the agreement cannot be uncertain and, therefore, the parties have no legitimate interests in justifying the condition.[59]

Others[60] argue that, even in cases where the circumstances set out in the condition are already in place, they can be interpreted (or otherwise treated) as conditions to the agreement as long as the relevant circumstance was not known by the contractual party/parties (ie, if it comes to the knowledge of a relevant party only at a later stage, such as upon conclusion of the due diligence). The parties indeed might be interested in entering into a binding agreement and, thereafter, performing an assessment of the circumstances that are already existing. In such cases, regardless of the classification as a condition, the provision can be subject to the norms arising under 1353 et seq of the Civil Code.

In BTS transactions the interpretation of the agreement should lead to the second solution, as it is well known that certain due diligence findings require a deep and time-consuming level of analysis that is normally beyond the capability and knowledge of the purchaser (who, in fact, chooses to appoint specialized advisors to perform the necessary investigations). The interests of the purchaser, who wants to bind the seller to sell before appointing the advisors in charge of the due diligence and before incurring any relevant costs, seems to deserve protection by means of a binding agreement subject to conditions. Moreover, irrespective of the legal doctrine one may be inclined to support, lawyers should be wise enough to draft the conditions concerning outcome of the due diligence so as to resist all objections concerning the fact that the event set out therein is already in place and could have been ascertained before signing. For instance, an ideal contractual clause should include an acknowledgment that the due diligence will investigate circumstances that are not known to the buyer, that the knowledge of such circumstances is not readily available and requires substantial time for work and analysis. Moreover, the text of the clause might wisely refer not to current circumstances that have already occurred but rather to the delivery, by the

no 3783, both available at www.dejure.it. E. Calice, 'Condizione dell'estinzione del mutuo ed obbligo di cancellazione dell'ipoteca iscritta' *Nuova Giurisprudenza Civile Commentata*, 10450 (2008). Among the authors, see P. Rescigno, 'Condizione' *Enciclopedia del diritto* (Milano: Giuffrè, 1961), VIII, 787.

[59] P. Gallo, n 20 above, 1188.

[60] R. Sacco and G. De Nova, n 17 above, 1081, who refers to all cases where the condition has already occurred but its happening has been ignored by the parties, when the event has already happened but is not known by the parties and those circumstances when the event has already happened but is not known by one of the parties (presumably the party in whose interest the condition is included in the agreement); P. Gallo, n 20 above, 1189; A. Cataudella, n 18 above, 117; C. M. Bianca, n 19 above, 544. Notably the project 'European Code of Contracts' (available at https://tinyurl.com/ys65twvn (last visited 30 September 2024)) clarifies in Art 55 that the parties can include in the agreement a condition referring to a past or present event provided that the parties ignore whether such event has happened. For the case law see Corte di Cassazione 10 April 2017 no 9186 and Corte di Cassazione 10 January 1991 no 187, both available at www.dejure.it.

appointed advisors to the purchaser, of due diligence reports that do not outline substantial issues (ie, a future event).

A further concern stems from Art 1355 of the Civil Code, which states that any agreement is null and void where it assigns a right or imposes an obligation subject to a condition (precedent)[61] and the occurrence of that condition depends on the discretion of the seller or the debtor. The provision is meant to prevent the parties from binding themselves to a fictitiously binding agreement where one of them is bound but the other is not and who can unilaterally opt for the effectiveness or termination thereof (*ie*, 'I will sell if I wish' or 'I will pay if I wish' etc).[62] It can be argued that the condition also falls within the category contemplated by Art 1355 of the Civil Code on the basis that the obligation to close the transaction depends solely on the positive opinion of the purchaser on the outcome of the due diligence (*ie*, 'I will purchase if I am satisfied with the due diligence report'). The purchaser is in the position to unilaterally decide whether the outcome of the due diligence is 'satisfactory' or 'positive'. This should suffice to prevent lawyers from drafting or accepting generic clauses that do not refer to the ascertainment of specific circumstances within the scope of the due diligence. It is, therefore, advisable for lawyers to identify the scope of the due diligence and the issues on which the investor expects to receive a clear green light from its advisors.[63] For instance, the relevant clause might envisage a due diligence report confirming at least that – *(a)* the soil has not revealed pollutants exceeding the acceptable thresholds provided under applicable law,[64] *(b)* the area is not encumbered with

[61] See C.M. Bianca, n 19 above, 550, who points out that the provision of the Civil Code exclusively refers to conditions precedent and not subsequent. For A. Cataudella, n 18 above, 150 a condition subsequent which gives one party the discretionary right to walk away from the agreement should be interpreted as a withdrawal right. A similar opinion is expressed by P. Gallo, n 20 above, 1185. For some references to this in the case law see Corte di Cassazione 20 November 2019 no 30143, available at www.dejure.it, where the Supreme Court confirms that the condition is merely discretionary where the occurrence or non-occurrence of the event is not connected with any interest of the relevant party other than the decision whether to proceed or not with the arrangement. Same position results from Cassazione 30 September 2008 no 24235, *Guida al diritto*, 47, 76 (2008).

[62] C.M. Bianca, n 19 above, 550, specifies that in such cases the parties should enter into an option agreement to better reflect the real intention of the parties. Prof. Bianca further explains that the interpreter should look into the clauses to understand whether the intention of the parties was to set up an option arrangement or one of the parties intended to create a unilateral way out from the agreement, which is the case contemplated by Art 1355 of the Civil Code. A. Cataudella, n 18 above, 149.

[63] See also L. Renna, *Compravendita di partecipazioni sociali* (Bologna: Zanichelli, 2015), 82, who seems to agree upon the opportunity to identify specific issues that will be addressed by the due diligence.

[64] According to D. Williams, 'Due Diligence Investigations and Environmental Audits' 3*Juta's Business Law*, 43 (1995), as regards the environmental issues the condition precedent should be fulfilled when the relevant report confirms that 'the property complies with all conditions, limitations, obligations, prohibitions and requirements contained in any environmental legislation and that there are no facts or circumstances apparent to such auditor which may lead to any breach of any environmental legislation or to any liability (both civil and criminal) arising from activities which

easements or other liens that would prevent or have an adverse impact on the development project, *(c)* the town planning framework of the area does not prevent development of the area in line with the project of the purchaser, etc. This specific drafting should prevent the seller from objecting that the occurrence of the condition entirely relied upon the discretionary judgment of the purchaser. Moreover, this should also enable the party who wants to avail itself of the condition to reject all objections concerning the genericity of the event contemplated by the condition.[65]

The delineated approach ensures that the outcome of due diligence can be included in the agreement as a condition precedent, so that in case of any 'red flag' issues the purchaser can step away from the transaction. This also suggests that purchasers replace the sequence seen in para 2, above, with a more effective one whereby the parties enter directly into a binding contractual document, typically a PSPA, which includes a full set of conditions precedent, including the outcome of the due diligence. Once the due diligence is completed and the other conditions are fulfilled (eg, building permit and lease agreement) the parties can proceed to closing and enter into a final sale and purchase agreement (see the scheme discussed in para 4.2 below).

2. Can the Closing of a BTS Transaction Be Conditional on the Execution of a Satisfactory Lease Agreement?

A further, rather frequent condition to closing in BTS transactions is the execution of a lease agreement between the promissory purchaser and a third party prospective tenant, which, at this stage, may still be unidentified:

> 'I will close the purchase upon the condition that I find a suitable tenant of the premises and with whom to agree upon a lease including satisfactory

cause pollution or which have other detrimental effects on the environment'. A different approach is envisaged by E.F. Braunreiter, 'Getting to Clean: Post-Closing Remediation' 10(1) *Probate and Property*, 38-43 (1996), where the author refers to a scenario where the seller undertakes to carry out remediation works post-closing and accordingly is entitled to access rights (whether through an easement or personal right) as long as the remediation works are ongoing.

[65] It is generally accepted that the event contemplated in the condition should be not only future, uncertain (pursuant to Art 1353 of the Civil Code), possible, non-illegal (pursuant to Art 1354of the Civil Code) but also sufficiently determined. Among others, Corte di Cassazione 9 February 1995 no 1453 (available at www.dejure.it) confirms that the event contemplated in the condition precedent or subsequent should be determined and specific. In addition, an *obiter dictum* in Tribunale di Brescia, 21 April 2021, *Contratti*, 180 (2022), deems that a generic reference to the 'completion of the sale process' (without any further details of the asset on sale, a deadline, etc) does not suffice to allow the relevant contracting party (a realtor) to walk away from an agreement with an architect and refuse to pay the last instalment of its remuneration. The issue of generic conditions is often connected with a unilateral condition since the relevant party might speculate on the genericity of the condition in order to arbitrarily decide that the condition in the agreement has been satisfied or to enable it to walk away from the bargain due to the alleged non-occurrence of the (generic) condition. See also the comment on the decision by G. Corradi, 'Brevi note in materia di condizione meramente potestativa' *Contratti*, 186 (2022).

terms and conditions'.

In principle, the execution of an agreement between one of the contractual parties and a third party does not amount to a 'mere discretionary condition' under Art 1355 of the Civil Code, provided that the event therein contemplated (eg, execution of an agreement, including the lease agreement between the developer and tenant) does not depend upon the unilateral discretion of the purchaser. In the above example, the purchaser has a substantial interest in the execution of the lease agreement[66] and execution depends not only on the conduct of the purchaser-lessor but also on the conduct of the other party (the prospective tenant).[67]

Nonetheless, it can be argued that if the condition includes a generic reference to the lease agreement having to be deemed 'satisfactory' by the purchaser (or similar expressions), the purchaser could easily exploit it to walk away from the transaction: the purchaser could arbitrarily treat a lease agreement that is consistent with market practice as being unsatisfactory and this would suffice to enable it to withdraw from the deal. The parties may obviate this concern by drafting conditions that clearly identify the main terms and conditions of the lease agreement, including, for instance, the rent per square meter, the minimum term, the termination rights, etc.

In the case of an ongoing negotiation at the time of signing, the parties can refer to such negotiation. Ideally, the condition will refer to a non-binding proposal for a term sheet that the purchaser already executed with the potential lessee. The proposed draft should also enable the purchaser to easily reject any objection concerning their good faith while the condition was pending. If the basic conditions of the lease agreement are clearly identified in the PSPA, the purchaser will be able to show that the negotiation led to terms and conditions that were worse than those contemplated in the condition.[68] Furthermore, where the terms and conditions

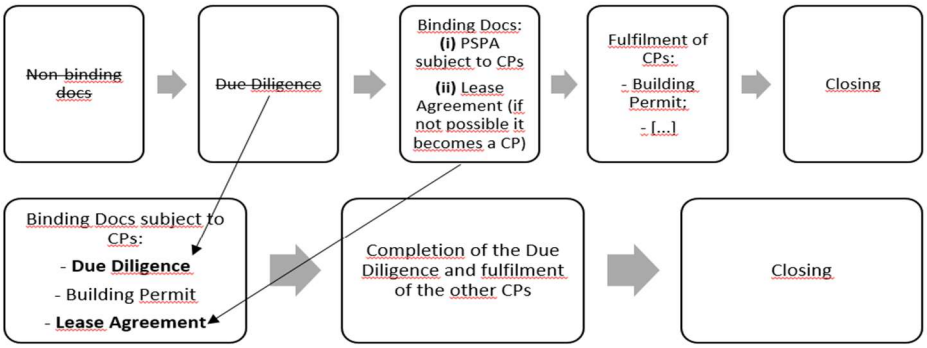
[66] Indeed, it is generally understood that a condition precedent or subsequent may depend on the will of a contracting party provided that it is linked to objective or subjective criteria that have an impact on such will. In other words, the relevant party should have an interest that goes beyond the mere convenience of extinction of the contractual obligation. A. Cataudella, n 18 above, 150 effectively argues that, unlike in cases contemplated in Art 1355, the non-occurrence of the condition is not without costs for the interested party. Likewise, C.M. Bianca, n 19 above, 550, clarifies that the relevant party interested in the condition, reserves the right to decide on the occurrence of the event set out as a condition and not directly on the effect of the agreement. See also Corte di Cassazione 26 May 2022 no 17158, available at www.dejure.it; Corte di Cassazione 20 November 2019 no 30143, Corte di Cassazione 26 August 2014 no 18239, Corte di Cassazione 21 May 2007 no 11774 and Corte di Cassazione 20 June 2000 no 8390, all available at www.dejure.it.

[67] The conditions are classified as, *inter alia* – (i) accidental, ie, depending on events or third party acts, (ii) potestative, ie, depending on the conduct of one of the contracting parties, or (iii) mixed, where the occurrence of the condition depends on a combination of (i) and (ii). When the fulfilment of the condition depends not only upon the intention of the party but also upon additional circumstances (in the example in question, the conduct of the prospective tenant) the condition is considered 'mixed'. See P. Gallo, n 20 above, 1182.

[68] It must be noted that a condition is deemed to have occurred when, on the basis of a practical assessment, the event that actually occurred is consistent with the event set out in the agreement. See C.M. Bianca, n 19 above, 557.

of a 'satisfactory' lease agreement are not clearly identified, the conduct of the purchaser might be judged in light of the good faith principle under Art 1359 (but on this aspect, see the para below).

The above considerations - enabling the developer to address the risks connected to the transaction by means of properly drafted conditions concerning the due diligence and the achievement of a satisfactory lease agreement - suggest that the purchaser is replacing the sequence seen in para 2 with a more effective one. This entails the parties entering directly into a binding contractual document, typically a PSPA, comprising a full set of conditions precedent, including the outcome of the due diligence and the execution of a lease agreement in terms acceptable to the lessor. Once the due diligence is completed, the lease is executed and the other conditions are fulfilled (eg, building permits) the parties can proceed to closing and enter into a final sale and purchase agreement.



The new sequence reduces the number of steps from five to three, as well as the necessary contractual documents, and enables the purchaser to immediately bind the seller and proceed with the filing of the application for a building permit immediately thereafter, while it is performing the due diligence. This reshaped sequence can be recommended especially in cases where due diligence is expected to be rather standard and there are no issues to be verified on a preliminary basis.

3. Conduct of the parties while the conditions are pending

The solutions proposed above must be coordinated with the principle under Art 1358 of the Civil Code, whereby, as long as the condition is pending, each contracting party[69] behaves in good faith to protect the other party's interest in the agreement. The rule is a corollary of the wider good faith principle in contract law under Arts 1175 and 1375 of the Civil Code,[70] which covers the period starting

[69] The Civil Code proviso applies to any party that assumes an obligation or assigns a right subject to the condition precedent or any party that acquires a right subject to condition subsequent; the rule is widely held to express a general principle that applies to all contracting parties where the agreement is subject to condition(s).

[70] Corte di Cassazione 13 July 1984 no 4118, available at www.dejure.it; Corte di Cassazione

from the execution of the agreement and ends whenever the condition occurs (or does not occur, in the case of conditions subsequent).[71] The conduct of each party should be consistent with the general duty of care in contractual relationships, requiring each party to protect, within reason, the counterparty's expectation for the condition to occur: the relevant party, therefore, should not perform (or omit to perform) activities that undermine or prevent the occurrence of the condition.[72] The principle is broad enough to cover both acts and omissions, whether attributable to willful misconduct or negligence, as long as there is –

(a) a causal relationship between such acts or omissions and the non-occurrence of the condition, and

(b) provided that they affect the interest of the other contractual party in the agreement.[73]

The underlying rationale is that any such act or omission would alter the parties' understanding of the risks connected with the condition.

It is worth noting how the good faith principle does not give rise to an obligation to procure the fulfilment of the condition and, accordingly, any non-compliance with it does not give rise to any liability for breach of the contract.[74]

As a consequence of the good faith principle (Art 1359 of the Civil Code), if a party prevents – whether wilfully or not[75]– the occurrence of the condition, then it is deemed to have occurred (or not occurred, in the case of a condition subsequent). Moreover, the rule is intended to prevent a party from behaving unfairly with the aim of altering the risks that have been agreed upon in the condition.[76] Furthermore, this provision may not apply to certain conditions whose occurrence depends upon the decision of one party (eg, 'I will hire you if I open

10 March 1992 no 2875, available at www.dejure.it; Corte di Cassazione 2 June 1992 no 6676, *Giustizia Civile Massimario*, 6 (1992); Corte di Cassazione 3 April 1996 no 3084 *Giustizia Civile*, I, 2259 (1996); Corte di Cassazione 27 February 1998 no 2168, *Contratti*, 553 (1998); Corte di Cassazione 22 March 2001 no 4110, available at www.dejure.it; Corte di Cassazione 18 March 2022 no 3942, *Contratti* 443 (2003); Corte di Cassazione 12 February 2013 no 3207, available at www.dejure.it; Corte di Cassazione 19 June 2014 no 14006, 36 *Guida al diritto*, 56 (2014); Corte di Cassazione 22 August 2022 no 25085, *Giustizia Civile Massimario*, 2022, Corte di Cassazione 2 July 2002 no 9568, *Rivista Notariato*, 483 (2003); Cassazione 28 December 2020 no 29641, available at www.dejure.it, Cassazione 2 January 2014 no 12, available at www.dejure.it. C.M. Bianca, n 19 above, 553. For a wider analysis of the good faith principle in Italian contract law see A. Albanese, 'Buona fede contratto legge' *Europa e diritto privato*, 31 (2021). For specific references to the general principle of good faith in the case law see, among others, Tribunale di Catania, 24 April 2020 no 1421, available at www.dejure.it.

[71] P. Gallo, n 20 above, 1197.

[72] ibid 1198.

[73] ibid 1205.

[74] C.M. Bianca, n 19 above, 554. Where a party fails to comply with the good faith principle while the conditions are pending the other cannot claim for damages including the loss of profit that would have arisen from the transaction.

[75] Among others, A. Cataudella, n 18 above, 146 as well as R. Sacco and G. De Nova, n 17 above, 1090, deem that the provision applies regardless of the negligence.

[76] R. Sacco and G. De Nova, n 17 above, 1091.

an office in town', or 'I will sell my apartment if I decide to move out', etc).[77] If the parties expressly envisaged that the occurrence of the condition depended on the choice of one of them, then it is fair that the relevant party is free to choose the occurrence of the event. However, after an analysis of the relevant case law it must be noted that the principle still applies when (i) the agreement expressly includes parties' undertaking in connection with the occurrence of the conditions (eg, a party undertakes to request a loan from a bank, to file an application with the Municipality for a building permit, etc)[78] and (ii) when the nature of the condition fairly implies a party's duty to cooperate in order to ensure the occurrence of the condition.[79] Hence, if the obligation to close is conditional upon the issuance of the building permit, it is implied that the parties intended to manage the risks connected with the failed or delayed issuance of the building permit and not the risks connected with the failed or delayed filing of the application with the Municipality. Likewise, in cases where the parties agree that the closing of the transaction will be subject to positive due diligence, it is implied that due diligence needs to be performed (the relevant party has no option but to procure performance of the diligence). Similarly, where the closing is subject to the execution of a lease agreement, it is implied that the purchaser needs to look for a potential tenant and/or negotiate the terms of the lease in good faith (and perhaps allow the other party to cooperate in the search).

V. The Ambiguous Role of the Developer: Lessor or Contractor?

As outlined above, the lease agreement between the developer and the tenant is entered into at an early stage in the process, in many cases when the former has

[77] Corte di Cassazione 27 February 1980 no 1379, available at www.dejure.it; Corte di Cassazione 6 March 1996 no 5343, available at www.dejure.it; P. Gallo, n 20 above, 1206; A. Cataudella, n 18 above, 145 e P. Rescigno, 'Condizione' n 58 above, 796.

[78] But in this case the non-compliance would amount to breach of the agreement. See Corte di Cassazione 18 November 1996 no 10074; Corte di Cassazione 22 April 2003 no 6423, *Contratti* 1096 (2003); Corte di Cassazione 28 July 2004 no 14198, *Giustizia Civile*, 2559 (2004); Corte di Cassazione 24 November 2010 no 23824, Corte di Cassazione 14 December 2012 no 23014, Cassazione 11 September 2018 no 22046, all available at www.dejure.it; Corte di Cassazione 11 September 2018 no 22046, *Foro italiano*, 1, I, 258 (2019); Tribunale Milano 19 February 2019 no 1567, available in www.dejure.it; Tribunale di Modena 7 June 2019 no 900, available at www.dejure.it; Cassazione 28 August 2020 no 18031, *Guida al diritto* 43, 48 (2020); Corte d'Appello di Torino 7 December 2020 no 1209, available at www.dejure.it; Corte di Cassazione 31 May 2022 no 17571, *Guida al diritto*, 31-32 (2022).

[79] Corte di Cassazione 22 April 2003 no 6423, *Giustizia Civile*, I, 2793 (2004); Corte di Cassazione 19 August 2004 no 19000, *Giustizia Civile*, I, 1247 (2005); Corte di Cassazione-Sezioni Unite 19 September 2005 no 18450 *Giurisprudenza italiana*, 6, 1141 (2006) Corte di Cassazione 10 August 2007 no 17647, *Giustizia Civile* 10, I, 2204 (2008); Corte di Cassazione 14 December 2012 no 23014, n 78 above; Corte di Cassazione 28 March 2014 no 7405, available at www.dejure.it; Corte di Cassazione 31 March 2014 no 7509, available at www.dejure.it; Corte d'Appello di Palermo16 June 2017 no 1157, available at www.dejure.it; Corte di Cassazione 28 December 2020 no 29641, available at www.dejure.it; Corte d'Appello di Milano 22 June 2021 no 1938, available at www.dejure.it; Corte d'Appello di Messina, 31 March 2022 no 208, available at www.dejure.it.

not yet acquired full title over the plot (although a party to a preliminary purchase agreement) and the development of the premises that are supposed to be leased has not begun. Unlike standard leases, here the leased asset does not exist at the time of the signing and will be in place only after significant construction works. For this reason, part of the agreement includes an array of contractual provisions dedicated to the activities to be performed before delivery of the leased premises, which are not found in plain 'vanilla' leases, such as the:

- lessor's obligations and deadlines concerning the completion of the development (landlords are normally responsible for the design and construction, with the exception of certain late-stage fittings that are carried out by the tenant),[80]

- tenant's right of early access and inspection of the premises before delivery,

- customization details required by the tenant,[81]

- final inspection and delivery of the premises (including punch list, if any),[82] and

- last but not least, power of the tenant to request changes to the design initially agreed.[83]

Such provisions might lead interpreters of the agreement (including judicial courts) to treat it (also) as a construction contract instead and not (only) as a lease,

[80] L. M. Kelly, n 3 above, 43. The targeted completion date is essential to both the landlord and the tenant. The former will be entitled to the rents upon delivery of the completed building, while the latter will need to relocate by a certain date or face holdover rent. See G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 32.

[81] No one wants to bear the cost of the design and specification if the deal is not completed; therefore, at the signing of the lease agreement, it is usually the case that the parties are not ready to include a comprehensive design in the agreement. Hence they normally attach a masterplan and a list of specifications to the agreement. See L. M. Kelly, n 3 above, 29-52. For G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 32, construction terms are normally included in the body of the lease agreement. The authors also point out that the lessee's requirements 'can range from adding minor finish items to a full design and construction of a new building'. See also Id, 'Build-to-Suit Leases' n 1 above, 62.

[82] G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 38-39. In some cases, tenants will have to carry out additional works after substantial completion of the premises by the landlord (shelfs, security systems etc). If such works cannot be performed before delivery the parties may agree upon a free rent period.

[83] Tenants are normally entitled to request change orders as long as they are feasible. However, if the change order gives rise to additional costs the tenant should bear them, normally by means of an increase in the rent that amortizes the rate over the term of the lease (given the fact that the landlord is normally liable for cost overruns). Moreover, where the change causes a delay in substantial completion, the landlord may consider adding wording to the agreement that states that, if a tenant change order delays the completion beyond the targeted completion date, the rent commencement date shall nonetheless be the date it would have been had the change order not been accepted. See G.P. Bernhardt and J. E. Goodrich, 'Build-to-Suit Leases' n 1 above, 33, according to which, in the American experience, tenants are responsible for all repairs and maintenance and in return often ask the ability to freely alter or expand the building and to assign the lease. On the contrary, in Italy, maintenance is normally handled by the lessor, which charges the tenant back for the relevant costs. Moreover, normally the tenant can ask for a deviation from the original project only as long as the construction is ongoing but is not entitled to alter or modify the building once it is delivered, nor is it entitled to assign the lease without the landlord's consent. See also L.M. Kelly, n 3 above, 36.

so that the laws concerning construction agreements are also deemed to apply, including additional rights of the tenant (which may be considered as the principal), obligations and responsibilities of the lessor (which may run the risk of being considered as a contractor). It is worth considering, therefore, whether the ambiguities that lead the interpreter to include the laws governing construction agreements can be removed, so that lessors do not qualify also as contractors and are not exposed to a number of additional claims from, and responsibilities towards, the lessee.[84]

If taken individually, leases and constructions agreements do not have much in common. Leases provide for one party (the landlord) to deliver to the other party (the tenant) a specific asset and to allow the tenant to use it, in return for the payment of a specified rent for a period of time (Art 1571 of the Civil Code); on the other hand, in construction agreements, the contractor, undertakes to carry out the construction of a building or to provide services, using his own company and management, at his own risk, in return for the payment of a fee as consideration (Art 1665 of the Civil Code).[85] The purpose of each agreement is different: in the lease agreement, the tenant pays the rent to use the asset for a given term, while in the case of a construction agreement the principal pays the fee as consideration to the contractor in return for the completion of the works, regardless of the usage of the asset. However, the two contractual arrangements show more similarities when the asset to be leased is not yet developed,[86] since the lease includes technical details about the asset, a deadline for its completion and delivery, given that the rent could change based on variations to the construction as needed or agreed upon between the parties.[87] These aspects might lead the judge to classify the agreement as one of construction rather than lease, significantly impacting the lessor, *eg*:

- the power of the principal to request changes to the project;[88]

[84] Remarkably, American practitioners tend to classify the lease entered into as part of a build-to-suit transaction as a 'Synthetic Lease', ie, 'both a construction contract and a lease combined into one document'. See G.P. Bernhardt and J. E. Goodrich, 'Build-to-Suit Leases' n 1 above, 32-41; Ead, 'Build-to-Suit Leases' n 1 above,62. See also S.J. Adelkoff, 'Documenting a Synthetic Lease Transaction' 15(4) *Practical Real Estate Lawyer*, 9-24 (July 1999).

[85] G.B. Campobasso, *Diritto Commerciale*, 3, *Contratti titoli di credito procedure concorsuali* (Torino: UTET 2014), 37; G. Zuddas, in A. Luminoso ed, *Codice dell'appalto privato* (Milano: Giuffrè, 2016), 3; V.D. Cutugno, *La negoziazione degli appalti privati* (Milano: Giuffrè, 2018), 7; L.V. Moscarini, *Il contratto di appalto e le figure affini*, in V. Cuffaro ed, *I contratti di appalto privato* (Torino: UTET, 2011), 5.

[86] The legality of an agreement with a non-existent asset has not been debated in Italian law. The Civil Code includes express rules on the sale of a 'future asset' (an asset that has not yet come into existence at the signing of the agreement) but it is undisputed that other contractual arrangements, such as leases, can also have a future asset as their object (and/or even an asset that is not yet the ownership of the lessor at the moment of signing).

[87] A. Luminoso, n 85 above, 61.

[88] The Civil Code includes three Articles dedicated to project modifications. Those agreed between the parties are set out in Art 1659 of the Civil Code. Changes that characterize the regulation of the construction agreements are those necessary (Art 1660) and those ordered by the principal (Art 1661). In the case of changes needed to comply with the applicable law or to address defects in the project, the contractor is obliged to proceed (and be remunerated for the additional work) - unless

- the right to request a review of the consideration;[89]

- the power of the principal to perform extensive checks on the construction works while they are still ongoing and to request the termination of the agreement where any non-compliance is not fixed within a reasonable period of time;[90]

- the warranties that the contractor is required to give pursuant to Art 1667, which are more extensive than those required from the lessor under Art 1578 of the Civil Code,[91] and those due to collapse, risk of collapse or material defects of real estate assets under Art 1669 of the Civil Code;[92] and,

- last but not least, the withdrawal right of the principal while construction is continuing, pursuant to Art 1671 of the Civil Code.[93]

Italian scholars and courts have made considerable efforts to investigate contractual arrangements that include elements belonging to different types of agreement; the analysis brought to the creation of the category of the 'mixed contract', whose main issue is determining which laws should apply to the agreement - in

the increase in costs is greater than 1/6, in which case he can withdraw from the agreement. Likewise, if the changes are material, the principal can also withdraw from the agreement. The principal can order modifications to the project unless the additional works do not exceed 1/6 of the overall works or otherwise entail substantial changes in the nature of the works or the workforce that needs to be deployed. See M. Gambini, '*L'esecuzione del contratto*', in V. Cuffaro ed, n 85 above, 215; V.D. Cutugno, n 70 above, 64.

[89] G.B. Campobasso, n 85 above, 38 and 44. Pursuant to Art 1664 either party can request a review of the consideration in the case of any variation that is higher than 10% of the cost of the raw material; M. Pennasilico, 'Il corrispettivo', in V. Cuffaro ed, *I contratti* n 85 above, 150.

[90] See Art 1662 of the Civil Code, in terms of which the principal also has the right to check the works before completion and, in instances of non-compliance, request that the contractor comply within a deadline and, where any non-compliances is not settled timely, the agreement is terminated and the principal has a right to compensation in damages. For further analysis, see E. Lucchini Guastalla, '*L'Appalto*', in G. Visentini ed, *Trattato della responsabilità contrattuale* II, *I singoli contratti*, 2009, 260, who points out that the regulation derogates *in peius* the general termination rules under Art 1453 of the Civil Code since the obligation is still being fulfilled. See also M. Gambini, 'L'esecuzione del contratto', in V. Cuffaro ed, n 85 above, 200;

[91] While Art 1578 provides that the tenant can request the termination of the lease or a reduction of the rent in case the leased premises show defects materially impacting the use of the asset, the contractor must warrant that the construction does not have any inconsistency nor defect (without any qualification in terms of materiality). E. Lucchini Guastalla, n 90 above, 266 points out that the warranty under Art 1667 of the Civil Code covers both defects and any lack of quality. Hence it is wider than the seller's warranty under the Civil Code. Furthermore, the contractor is responsible for the collapse of, risk of collapse of, or any material defects in the building for 10 years after completion of the works. See G.B. Campobasso, n 85 above, 42 and 43.

[92] Art 1669 of the Civil Code introduces a warranty given by the contractor to the principal and to its successors and assignees in the case of the construction of real estate assets when the asset collapses, there is a risk or collapse due to the ground or due to a defect in the construction or there is a material defect. See E. Lucchini Guastalla, n 90 above, 274; G. Chiappetta, 'La responsabilità per rovina o gravi difetti di immobili', in G. Visentini ed, n 90 above, 285.

[93] Pursuant to Art 1671 of the Civil Code, the principal is entitled to unilaterally terminate the contract – at will - while the construction is undergoing, also without cause, provided that the principal makes the contractor whole and indemnifies him against expenses incurred and loss of profit. See E. Battelli, '*La disciplina del recesso*', in V. Cuffaro ed, n 85 above, 245; F.M. Bandiera, in A. Luminoso ed, *Codice dell'appalto privato* (Milano: Giuffrè, 2016), 764; G.B. Campobasso, n 85 above, 46.

our case, whether the contract should be subject to the laws of the lease agreement, the laws of the construction agreements or both.[94] The prevailing consensus is that in each case the main contractual type should prevail over the others.[95] In other words, the applicable legal provisions should be identified on the basis of the contractual scheme whose element are prevailing (so called prevalence or absorption theory).[96] Accordingly, in our example, the question should be whether the elements of the lease or those belonging to the construction are prevailing. In particular,

[94] The European Court of Justice took a position that seems substantially in line with the Italian authorities. In the judgment issued in the case C-213/13, EU:C:2014:2067 (available at https://tinyurl.com/2xun8ace (last visited 30 September 2024)), the issue was whether 'a contracabovet [between the Municipality of Bari and the Italian construction company 'Pizzarotti'] containing an undertaking to let buildings which have not yet been constructed constitutes a public works contract despite having elements characteristic of a lease, and is not, therefore, covered by the exclusion referred to in Article 1(a)(iii) of Directive 92/50'. In the relevant judgment the ECG pointed out that 'where a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is necessary to refer to the main object of that contract in order to determine its legal classification and the EU rules applicable (see, to that effect, the judgments in *Auroux and Others*, C-220/05, EU:C:2007:31, para 37; *Commission* v *Italy*, C-412/04, EU:C:2008:102, para 47; and Commission v Germany, EU:C:2009:664, para 57)'. In the case at stake the ECG deemed that 'the main object of the contract is the creation of that complex, which the subsequent letting of the complex necessarily presupposes' and added that 'execution of the planned work corresponds to the requirements specified by the contracting authority' since 'that authority has taken measures to define the characteristics of the work or, at the very least, has had a decisive influence on its design'. The opposing argument that the amount of the rents was by far higher than the value of the works to be carried out by 'Pizzarotti' was not considered conclusive by the Court: 'it is true that, as the referring court notes, the draft 'undertaking to let' also includes certain elements characteristic of a lease. Before this Court, emphasis has been placed on the fact that the financial consideration to be paid by the authorities corresponds, under Art 5 of that draft, to an 'annual rent' of EUR 3.5 million, to be paid over the 18 years of the contractual term. According to the information provided by Pizzarotti and the Italian Government, this overall consideration, amounting to EUR 63 million, is far lower than the total estimated cost of the work, which is almost EUR 330 million'. On the same case, see also I.L. Nocera, 'Un contratto di locazione di un'opera futura può essere qualificato come appalto di lavori' *Diritto Giustizia*, 19 May 2014, including comment to the conclusions of the Advocate General; D. Galli, 'La locazione di cosa futura e l'intangibilità del giudicato nazionale nel diritto europeo, il commento' *Giornale di Diritto Amministrativo*, 1, 53 (2015), and G. Vitale, 'Brevi note sulla giurisprudenza della Corte di giustizia dell'Unione europea tra qualificazione del rapporto contrattuale interno e incidenza sul giudicato nazionale' Federalismi.it, who expresses a different position, whereby the arrangement between the Municipality and Pizzarotti should have been subject to the law of the lease agreements.

[95] In many cases the courts have investigated agreements including elements belonging to the sale and elements belonging to the construction agreements. See, among others, Corte di Cassazione 30 June 1982 no 3944, *Giurisprudenza italiana*, I, 1, 178 (1984); Corte di Cassazione 20 April 2006 no 9320, *Contratti*, 21 (2006); Corte di Cassazione 24 July 2008 no 20391, *Giurisprudenza italiana*, 588 (2009); Corte di Cassazione 20 November 2012 no 20301, available at www.dejure.it. The literature on the topic cannot be exhaustively reported here. A clear summary can be found in E. del Prato, 'Contratti misti: variazioni sul tema' *Rivista diritto civile*, 1, 87 (2012).

[96] This does not exclude that other elements of the arrangement might be subject to the law provisions of the relevant contractual scheme to the extent they are not conflicting with the prevailing one. Corte di Cassazione 20 August 2020 no 17450, available at www.dejure.it; Corte di Cassazione-Sezioni Unite, 12 May 2008 no 11656, available www.dejure.it; Corte di Cassazione 17 October 2019 no 26485, available at www.dejure.it.

according to the judicial authority,[97] the interpreter should focus on the actual scope pursued by the parties and wonder whether – considering the actual scope pursued by the parties through the agreement – the works, ie, the design and building of the asset are prevailing over the lease of the premises or are just an ancillary element instrumental to the main scope of the contract, which is the lease of tailored premises to the tenant against a rent.

In a BTS transaction, the ultimate purpose of the arrangement is to deliver to the tenant a ready-to-use real estate asset in return for the payment of a long-term rent, after the expiry of which (or earlier, in the case of an early termination) the lessor receives back full possession of the asset, which can be allocated to other tenants, etc.[98] Hence the 'prevalence criterion', *prima facie*, suggests that, in lease agreements entered into in the context of BTS transactions, the 'lease component' prevails. However, one should not exclude disputes where the tenant-claimant tries to avail himself of certain rights attributed under Italian law to the principals *vis-à-vis* contractors. Lawyers can prevent such disputes by clarifying that the lessee will not proceed with the construction with its own organization and that the project, designs, etc are the property of the lessor and do not depend on the tenant, since the ultimate purpose of the arrangement is to enable the latter to use the asset for its activity in return for the payment of the rent and that in light of the preceding, all provisions of law governing construction agreements are not applicable and, to the extent necessary, expressly excluded by the parties. In particular, in respect of the warranties, the developer should adopt a 'non-warranty' position, clarifying that – no contractor's warranties apply to the agreement and that all such warranties are expressly excluded and waived by the tenant; therefore, among others when the tenant occupies the property, it is deemed to have agreed that the landlord has satisfactorily fulfilled all its pre-delivery obligations, with the exclusion of any warranty-related claim in connection with the works.[99]

[97] Corte di Cassazione 7 April 1998 no 3563, *Giustizia Civile Massimario*, 747 (1998), whereby the Supreme Court deemed that a lease agreement including undertakings on the part of the lessor to carry out substantial works is still subject to the lease law, since all the undertakings are means to enable the enjoyment of the leased premises and are therefore included in lessor's obligations under Art 1575 of the Civil Code.

[98] G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 33 point out that tenants prefer to have long term leases, 'often 10 to 20 years or longer' and that 'the more specialized is the project, the more important it is to the landlord that the lease term be long enough to fully amortize the landlord's investment in the property'. In Italy pursuant to Art 27 of Law no 392/1978, commercial lease agreements must have a minimum term of 6 years (9 years in case of hotel premises); moreover, pursuant Art 79 of the Lease Law (Law no 392/1978) – as amended by Law Decree no 133/2014 (converted into Law no. 164/2014), for lease agreements where rent exceeds 250,000 Euro per year there is no minimum term and the only main limitation is that the lease cannot last longer than 30 years, pursuant to Art 1573 of the Civil Code.

[99] G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 40, 63.

Essays

The United States Supreme Court and the Legacy of the Health Emergency: Partisanship and Conservative Judicial Activism

Federico Falorni*

Abstract

The article deals with the Supreme Court's jurisprudence during the health emergency to identify the different trends that have characterized the Court's decisions in that peculiar historical period compared to those of continental European courts. The case law reveals some exceptional patterns, still recurring in the most recent rulings: the Court has departed inconstantly from its long tradition of deference during times of crisis; it has accorded heightened protection to Free Exercise, even at the expense of the right to health; it has devalued medical evidence and scientific expertise. Finally, this article concentrates on the legacy of the health emergency, which may be centered around two related concepts: partisanship and conservative judicial activism.

'If judicial decisions greatly overlap with the views of members of an identifiable political party, something is unquestionably amiss'.

CASS. R. SUNSTEIN[1]

I. Introduction

Constitutional and administrative courts have played a crucial role in scrutinizing governmental and legislative measures during the pandemic, acting as important bulwarks against the unprecedented impact of those measures on fundamental rights and liberties.[2] In general, and while being aware of the relevant

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[1] C.R. Sunstein, *Why Extreme Right-Wing Courts Are Wrong for America* (New York: Basic Books, 2005), 19.

[2] P. Popelier et al, 'The Role of Courts in Times of Crisis: A Matter of Trust, Legitimacy and Expertise' *European Court of Human Rights* (2021), available at https://tinyurl.com/bdcu528y(last visited 30 September 2024).

differences in each system, it is possible to identify at least three common trends relating to the work of the courts in continental Europe. First, judicial review has shifted across the different stages of the pandemic: in the initial phase, marked by scientific uncertainty and limited knowledge, it has been deferential, and cases of rejection have prevailed. However, as more scientific data and knowledge became available, courts performed a relatively more stringent review in the subsequent phases.[3] Second, although the right to health, in both individual and collective dimensions, has been accorded a certain priority, courts have largely employed the technique of balancing different and contrasting rights, and in doing so, they have made extensive use of the four-part structure of proportionality.[4] Third, due to the increased relevance of experts and scientific institutions compared to ordinary times, judges gave great consideration to medical and scientific evidence. On the one hand, they have required pandemic mitigation measures to be scientifically grounded; on the other hand, they broadly referred to technical and scientific data to justify the outcome in their reasoning.[5]

Moving away from these common trends in judicial decision-making in continental Europe, the United States Supreme Court has proved once again to bean outlier, confirming the ever-present claim about the *American exceptionalism*.[6]

This article aims to investigate the Supreme Court's jurisprudence on COVID-19 orders and regulations, to identify the different approaches that have characterized the Court's decisions in that peculiar historical period, tracing the reasons (or rather, the reason) for them; and, finally, acknowledging the legacy of the health emergency.

Decisions collected concern challenges to government measures addressing the pandemic and deal with the following topics and legal issues: religious liberty and free exercise; eviction moratorium; federal vaccine mandate; abortion; prison conditions; voting rights and election law; census. Moreover, all the analyzed cases have come to the Court outside the merits docket on an accelerated basis through its shadow docket.[7] This term, coined by Professor William Baude,

> 'captures the obscurity of everything the Supreme Court does besides issuing signed decisions in argued cases – orders granting or denying certiorari; granting or denying applications for emergency relief; and so on'.[8]

[3] P. Iamiceli and F. Cafaggi, 'The Courts and effective judicial protection during the Covid-19 pandemic. A Comparative Analysis' *BioLaw Journal – Rivista di BioDiritto*, 377, 390, 401, 414, 377-416 (2023).

[4] F. Cafaggi and P. Iamiceli, 'Uncertainty, Administrative Decision-Making and Judicial Review: The Court's Perspectives' *European Journal of Risk Regulation*, 1, 11, 20-24 (2021).

[5] ibid 15-17.

[6] The French political scientist and historian Alexis de Tocqueville first used the expression: he described the United States as *exceptional* following his travel there in 1831. A. De Tocqueville, *Democracy in America* (New York: Alfred A. Knopf, 1948), II, 36-37.

[7] W. Baude, 'Foreword: The Supreme Court's Shadow Docket' 9(1) *New York University Journal of Law & Liberty*, 1, 5 (2015).

[8] S.I. Vladeck, 'The Most-Favored Right: COVID, the Supreme Court, and the (New) Free

Cases in the shadow docket do not have the usual briefing and oral argument, nor are they decided with broad and comprehensive explanations.[9]

The case law on the health emergency is of particular interest as it reveals specific patterns and features of the United States Supreme Court, which are still recurring in the most recent jurisprudence.

II. The Dominant Narrative: No More Deference?

The United States has a long tradition of judicial deference to the political branches during crises, including public health crises. With few remarkable exemptions,[10] courts have granted the executive and health officials a wide margin of discretion in managing national emergencies.[11]

The leading case is *Jacobson* v *Massachusetts*,[12] decided by the United States Supreme Court in 1905, which upheld a vaccine mandate during a smallpox epidemic despite constitutional challenges. In delivering the opinion of the court, Justice Harlan underlined the relevance of the state police power and of public health expertise to protect the public from the spread of a communicable disease. He noted that the legislator might delegate, in the first instance, the decision of 'what ought to be done in such an emergency' to a

> 'Board of Health, composed of persons residing in the locality affected and appointed, presumably, because of their fitness to determine such questions'.[13]

Otherwise, the Court

> 'would usurp the functions of another branch of government if it adjudged, as a matter of law, that the mode adopted under the sanction of the State, to protect the people at large, was arbitrary and not justified by the necessities of the case'.[14]

The opinion also recognized that there could be disparate ways to lessen the effects of a health crisis, but it

Exercise Clause' 15 *New York University Journal of Law & Liberty*, 699, 701 (2022).

[9] For an analysis of the Supreme Court's increasing use of the shadow docket, especially from 2017 as a result of the gradual establishment of a conservative majority, see S.I. Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (New York: Basic Books, 2023).

[10] These exceptions are discussed in A.L. Tyler, 'Judicial Review in Times of Emergency: From the Founding Through the Covid-19 Pandemic' 109(3) *Virginia Law Review*, 489, 513-524 (2023).

[11] W.E. Parmet, *Constitutional Contagion. COVID, the Courts, and Public Health* (Cambridge: Cambridge University Press, 2023), 20-24, 42-49.

[12] *Jacobson* v *Massachusetts* 197 US 11 (1905).

[13] ibid 27.

[14] ibid 28.

> 'is no part of the function of a court or a jury to determine which one of the two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain'.[15]

Finally, quoting his words in *Mugler* v *Kansas*,[16] Justice Harlan uttered the two-part standard judges should adopt in reviewing the constitutionality of public health regulations. First, courts should intervene when a statute, purporting to have been enacted to protect the public health or the public safety 'has no real or substantial relation to those objects'; second, if that statute is 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law'.[17] These expressions hint at a very deferential standard of review, and employing the language of modern constitutional law, they are ascribable to the rational basis test.[18]

In the early days of the pandemic, the Supreme Court, with Justice Ginsburg on the bench, relied on Jacobson and seemed disinclined to second-guess the exercise of health police powers in emergencies. In *South Bay United Pentecostal Church* v *Newsom (South Bay I)*,[19] by a five-four decision from the shadow docket, the Court refused to block a California order restricting attendance at places of religious worship. There was no opinion of the Court, but Chief Justice Roberts, who voted with the majority, wrote a concurring opinion, emphasizing the need for great deference towards government and state officials. He clearly stated, 'Our Constitution principally entrusts the safety and health of the people to the politically accountable officials of the States'; then, citing *Marshall* v *United States*,[20] he added, 'When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad'. Consequently, 'where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary'.[21] The conservative judges firmly disagreed with this view. Justice Kavanaugh, joined by Justices Thomas and Gorsuch, drafted a dissent, where he pointed out that deference was not due because California had discriminated against religion by imposing stricter limitations on religious services than on some comparable secular activities.

A few months later, in July 2020, by another five-four decision, again from the shadow docket, without an opinion, with Chief Justice Roberts still joining the more liberal Justices, the Supreme Court in *Calvary Chapel Dayton Valley* v *Sisolak* rejected a petition to enjoin a Nevada order, imposing an occupancy

[15] ibid 30.
[16] *Mugler* v *Kansas* 123 US 623, 661 (1887).
[17] *Jacobson* v *Massachusetts* n 12 above, 31.
[18] E. Chemerinsky and M. Goodwin, 'Civil Liberties in a Pandemic: The Lessons of History' 106 *Cornell Law Review*, 815, 849 (2021).
[19] *South Bay United Pentecostal Church* v *Newsom* 590 US _ (2020).
[20] *Marshall* v *United States* 414 US 417, 427 (1974).
[21] *South Bay United Pentecostal Church* v *Newsom* n 19 above, 2 (Roberts, C.J., concurring).

limit on gatherings for religious worship.[22] Once again, the conservative justices forcefully dissented. According to Justice Alito,

> 'it is a mistake to take language in Jacobson as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic'[23]

because *Jacobson* involved a substantive due process challenge and, consequently, may not be invoked in a First Amendment case. In his dissent, Justice Kavanaugh firstly recognized that, in general, courts should grant officials appreciable levels of deference because 'state and local governments, not the federal courts, have the primary responsibility for addressing COVID-19 matters'.[24] Nevertheless, he admonished soon after, stating that there are

> 'certain constitutional red lines that a State may not cross even in a crisis' and that 'this Court's history is littered with unfortunate examples of overly broad judicial deference'.[25]

However, as the pandemic progressed and after the replacement of Justice Ginsburg with Justice Barrett, whose nomination by President Trump was confirmed by the Senate on October 26, 2020, the Supreme Court changed its approach to constitutional challenges (at least, to those of Free Exercise) to COVID-19 orders.[26] Following the modification in its composition, the majority of the Court embraced the view of those Justices who, until then, were in the minority and became increasingly unwilling to defer to public officials and health authorities.

This new trend was inaugurated in *Roman Catholic Diocese of Brooklyn* v *Cuomo*,[27] where Justice Barrett joined the dissenters from the earlier two cases to establish a new conservative majority. By a five-four vote, in a *per curiam* opinion from the shadow docket, decided on 25 November 2020, the Supreme Court halted New York's order, limiting attendance at religious services in areas classified as *red* or *orange* zones because it violated the Free Exercise Clause. Interestingly, both Justice Gorsuch and Justice Kavanaugh, in their concurring opinions, rejected *Jacobson* and the deference to the government that has been accorded in previous cases. The former noted,

> 'Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical' and therefore 'courts must resume applying the

[22] *Calvary Chapel Dayton Valley* v *Sisolak* 591 US _ (2020).
[23] ibid 9 (Alito, J., dissenting).
[24] ibid 10 (Kavanaugh, J., dissenting).
[25] ibid 10 (Kavanaugh, J., dissenting).
[26] E. Chemerinsky, 'Covid-19 Ruling Reveals Much About the New Supreme Court' *ABA Journal*, available at https://tinyurl.com/35mxeymt(last visited 30 September 2024)
[27] *Roman Catholic Diocese of Brooklyn* v *Cuomo* 592 US _ (2020).

> Free Exercise Clause'.[28]

Furthermore, the latter argued that judicial deference in an emergency

> 'does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised'.[29]

The Court considered the order not neutral regarding religion and subjected it to strict scrutiny. Even though containing the spread of COVID-19 was a compelling state interest, the Court held that the order was not narrowly tailored to achieving that interest. First, because there was no evidence that the applicants had contributed to the diffusion of the disease; second, because there were many other less restrictive measures that could have been adopted to minimize the risk to those attending religious services.

In two subsequent free exercise cases, the Court confirmed that deference would no longer be the prevailing standard. In *South Bay United Pentecostal Church* v *Newsom (South Bay II)*,[30] a six-justice majority, including Chief Justice Roberts with the conservatives, in an unsigned opinion from the shadow docket, halted California's prohibition on indoor worship services, but left in force a capacity limit and a ban on singing and chanting. The Chief Justice's concurring opinion testifies to the shift in the Court's approach: after recalling his words in *South Bay I*, he argued that even during a pandemic, the Constitution 'entrusts the protection of the people's rights to the Judiciary' and, consequently, 'deference, though broad, has its limits'.[31] In addition, in *Tandon* v *Newsom*,[32] by a five-four vote, again in a per curiam opinion and again from the shadow docket, the Court blocked a California order limiting religious gatherings in private homes because it did not satisfy the narrowly-tailored requirement of strict scrutiny.

Roman Catholic Diocese of Brooklyn v *Cuomo* and the other two decisions announced the abandonment of the Court's traditional approach to public health measures: orders issued to curb a pandemic would not continue to receive deference, at least in free exercise cases. Indeed, the Court has taken an increasingly active role in second-guessing orders, which restricted religious worship, and subjected them to strict judicial scrutiny.

III. Inconsistency

After *Roman Catholic Diocese of Brooklyn* v *Cuomo*, one would have predicted

[28] ibid 3 (Gorsuch, J., dissenting).
[29] ibid 3 (Gorsuch, J., dissenting).
[30] *South Bay United Pentecostal Church* v *Newsom* 592 US _ (2021).
[31] ibid 2 (Roberts, C.J., concurring).
[32] *Tandon* v *Newsom* 593 US _ (2021).

that the Supreme Court would uniformly move away from a deferential standard of review of public health powers. At the same time, one would have equally expected the Court to apply ordinary tiers of scrutiny when reviewing challenges to orders that imposed restrictions on fundamental rights.

Both these assumptions, however, have turned out to be wrong.

On 12 January 2021, in *Food and Drug Administration* v *American College of Obstetricians and Gynecologists*,[33] the Supreme Court refused to block an order adopted by the Food and Drug Administration, which set specific conditions for obtaining a medication abortion. The order required patients to go in person to a hospital, clinic or medical office to pick up the mifepristone, while the in-person requirement was not demanded for any other medical treatment. At the time, the right to abortion was still constitutionally protected at the federal level by *Roe*[34] and *Casey*;[35] consequently, under the new non-deferential approach, one would have expected the Court to apply the most stringent form of review to the limitation on abortion and to conclude that such restriction no longer survived strict scrutiny. However, the conservative majority of the Justices, without explanation and again with a decision from the shadow docket, held that the restriction for patients seeking to obtain a medicine to terminate early pregnancy was constitutional. Quite surprisingly, Chief Justice Roberts delivered a concurring opinion, highlighting the need for judicial deference to the elected branches and the health officials to whom they delegate power. He clearly stated that in

> 'contexts concerning government responses to the pandemic, my view is that courts owe significant deference to the politically accountable entities with the 'background, competence, and expertise to assess public health'".[36]

This language and the outcome of the case undoubtedly show that the Court was not uniform in departing from the tradition of deference.

Another striking demonstration of the Court's inconsistency is offered by comparing Justice Kavanaugh's dissent in *Calvary Chapel Dayton Valley* v *Sisolak* and Justice Kavanaugh's concurring opinion in *Andino* v *Middleton*.[37] In the former, as noted previously, he warned that there are certain *constitutional red lines* that public health powers may not pass over and he cautioned that the Court's history is characterized by *unfortunate examples* of exceedingly broad judicial deference. The latter deals with the state's power to manage elections during a health emergency and, specifically, concerns South Carolina's witness requirement for absentee ballots. On 10 October 10 2020, the Supreme Court, with a decision from the shadow docket,

[33] *Food and Drug Administration* v *American College of Obstetricians and Gynecologists* 592 US _ (2021).

[34] *Roe* v *Wade* 410 US 113 (1973).

[35] *Planned Parenthood* v *Casey* 505 US 833 (1992).

[36] *Food and Drug Administration* v *American College of Obstetricians and Gynecologists*, n 33 above, 1-2 (Roberts, C. J., concurring).

[37] *Andino* v *Middleton* 592 US _ (2020).

declined to halt that requirement. Justice Kavanaugh, voting with the conservative Justices, wrote a concurring opinion, stressing the need to accord public health officials a high degree of deference. Quoting Chief Justice Roberts' concurring opinion in *South Bay I*, firstly he stated that 'the Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States'. Then, he argued

> 'that a State legislature's decision either to keep or to make changes to election rules to address COVID-19 ordinarily should not be subject to second-guessing by an 'unelected federal judiciary', which lacks the background, competence, and expertise to assess public health and is not accountable to the people'.[38]

However, under the Court's new approach, a more accurate scrutiny would have been appropriate because, as Justice Ginsburg recalled in her dissent in *Shelby County* v *Holder*, the right to vote is 'the most fundamental right in our democratic system'.[39]

These examples prove that abortion and election law[40] are two areas, where the Court has not moved away from the deferential review, which traditionally marked its approach during national crises.

In general, as Professor Amanda Tyler pointed out, the Court 'has not been consistent'[41] in second-guessing public health powers during the pandemic: it has 'exercised rigorous scrutiny of government actions'[42] over some claims, while, concerning other matters, it 'has fallen back on well-worn arguments about deference to those who are better suited to manage a public health crisis'.[43]

The first group, apart from the religious cases after *Roman Catholic Diocese of Brooklyn* v *Cuomo*, include decisions involving property rights and federal vaccine mandate. In these fields, the Court was distinctly active and orders issued to stem the spread of the pandemic have been struck down. On August 26, 2021, the Supreme Court decided *Alabama Association of Realtors* v *Department of Health*

[38] ibid 1-2 (Kavanaugh, J., concurring).

[39] *Shelby County* v *Holder* 570 US 529, 566 (2013).

[40] Besides *Andino* v *Middleton* and still on the subject of voting rights, the Supreme Court, on 6 April 2020, decided *Republican National Committee* v *Democratic National Committee*. With a *per curiam* opinion from the shadow docket, the Court granted the application for stay with reference to a District Court's order requiring that absentee ballots, mailed and postmarked after election day (7 April 7 2020), still be counted so long as they were received by 13 April 2020. See *Republican National Committee* v *Democratic National Committee* 589 US _ (2020).

[41] A.L. Tyler, n 10 above, 525.

[42] ibid 554.

[43] ibid 582. See also E.P.N. Meyer et al 'Courts and COVID-19: an Assessment of Countries Dealing with Democratic Erosion' 5 *Jus Cogens*, 85, 105 (2023): the authors observed that the 'US Supreme Court seems to adopt deferential or restrictive judicial behavior episodically and without following a fixed pattern'.

and Human Services:[44] by a six-three vote from the shadow docket, with a *per curiam* opinion, the Court blocked a nationwide moratorium on evictions, imposed by the Centers for Disease Control and Prevention. In particular, to justify its decision, the majority relied on the major questions doctrine, which holds that Congress has 'to speak clearly when authorizing an agency to exercise powers of "vast economic and political significance" '.[45] On 13 January2022, in *National Federation of Independent Business* v *Occupational Safety and Health Administration*,[46] by a six-three vote, in an unsigned opinion from the shadow docket, the Court referred to the same doctrine to halt an emergency rule, issued by the Occupational Safety and Health Administration (OSHA), which required employers with at least 100 employees to enforce the mandate vaccination programs for employees or, as an alternative, weekly testing and masking. Relying on a troublesome distinction between 'workplace safety standards', which OSHA is authorized to impose, and 'broad public health measures',[47] which it is not, the Court concluded the Congress 'has not given that agency the power to regulate public health more broadly'.[48]

Conversely, there are two other areas, besides the right to terminate pregnancy and voting rights, where the Court continued to defer to state officials: rights of prisoners and census. On the one hand, the Court refused to interfere with decisions concerning prison conditions and managing the pandemic inside penal institutions. On 16 November 2020, in *Valentine* v *Collier*,[49] another case from the shadow docket, the Court declined to reinstate a District Court order requiring a Texas prison to take specific steps to protect inmates against a COVID-19 outbreak. This despite - as Justice Sotomayor reported in her dissent - the 'rampant failures by the prison to protect its inmates from COVID-19'[50] and the fact that people incarcerated in that facility were 'some of our most vulnerable citizens' and faced 'severe risks of serious illness and death'.[51] On the other hand, the Court provides broad discretion to officials on how to conduct the 2020 census. In *Ross* v *National Urban League*,[52]

[44] *Alabama Association of Realtors* v *Department of Health and Human Services* 594 US _ (2021). Previously, on 12 August 12 2021, in *Chrysafis* v *Marks*, the Supreme Court granted a request from a group of New York landlords to lift part of the State moratorium on residential evictions put in place at the beginning of the COVID-19 pandemic. Specifically, the provision allowed New York tenants to avoid eviction by declaring that they had suffered financial hardship as a consequence of the pandemic. See *Chrysafis* v *Marks* 594 US _ (2021).

[45] ibid 6 (per curiam).

[46] *National Federation of Independent Business* v *Occupational Safety and Health Administration* 595 US _ (2022).

On the same day, in *Biden* v *Missouri*, the Supreme Court upheld a Centers for Medicare and Medicaid Services rule, which demanded facilities that participate in Medicare and Medicaid to ensure that their staff were vaccinated against OVID-19 (subject to medical and religious exemptions). See *Biden* v *Missouri* 595 US _ (2022).

[47] ibid 6 (per curiam).

[48] ibid 9 (per curiam).

[49] *Valentine* v *Collier* 592 US _ (2020).

[50] ibid 2 (Sotomayor, J., dissenting).

[51] ibid 11 (Sotomayor, J., dissenting).

[52] *Ross* v *National Urban League* 592 US _ (2020).

in a one-paragraph unsigned decision from the shadow docket, the Court temporarily stayed an order by a District Courtin California requiring the 2020 census count to continue through 31 October 2020, in light of the COVID-19 pandemic. Justice Sotomayor wrote a powerful dissent, where she emphasized that the previous deadline for counting votes (30 September 2020) resulted in a discriminatory effect because of the higher percentage of non-responses 'among marginalized populations and in hard-to-count areas, such as rural and tribal lands'.[53]

It has been observed that the continental European courts were more likely to defer in the early stages of the pandemic due to a framework of uncertainty, while, with the evolution of scientific knowledge, in successive phases, judicial review of COVID-19 measures became progressively more stringent. It can also be observed that the United States Supreme Court has followed a different pattern. As the caselaw demonstrates, the Court has inconsistently shifted its approach, deferential or rigorous, depending on the areas and matters of the constitutional challenges, without following the progression between different stages of the health emergency.

IV. The Most Favored Nation Status of the Free Exercise Clause

On 12 November 2020, as part of a speech to the Federalist Society, Justice Alito warned: 'It pains me to say this, but in certain quarters, religious liberty is fast becoming a disfavored right'.[54]

A couple of weeks later, Justice Alito's concern proved unfounded with the decision in *Roman Catholic Diocese of Brooklyn* v *Cuomo* and subsequent cases on religious liberty. Indeed, one of the most apparent consequences of Justice Ginsburg's replacement with Justice Barrett was an expansion in the safeguard of the First Amendment's Free Exercise Clause: the new conservative majority, consisting of Justices Thomas, Alito, Gorsuch, Kavanaugh, Barrett plus the Chief Justice Roberts, seemed willing to afford larger protection to religion.[55]

[53] ibid 6 (Sotomayor, J., dissenting).

[54] 'Supreme Court Justice Samuel Alito Speech Transcript to Federalist Society' *Rev.com*, available at https://tinyurl.com/ycyfzv6n (last visited 30 September 2024).

[55] In general, it has been observed that the Roberts Court has been more inclined to grant greater protection to religious freedom. Professor Lee Epstein and Professor Eric A. Posner reported that across 'the Warren, Burger, and Rehnquist courts the religious side prevailed about half the time, with gradually increasing success. In the Roberts Court, the win rate jumps to 81%'. See L. Epstein and E.A. Posner, 'The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait' *Supreme Court Review*,315, 324 (2021). This trend is likely to become more pronounced with Justice Barrett's confirmation.

At the same time, an analysis related to state and federal judicial decisions, issued between 1 March 2020, and 1 July 2022, has revealed that Free Exercise Challenges to COVID-19 orders, limiting religious worship, have had a higher success rate. Indeed, 'although most decisions rejected such claims, plaintiffs were more successful in these claims than in many other types of individual rights claims, as courts ruled partially or fully for plaintiffs in 37 of the 143 decisions in our compilation in which plaintiffs challenged gathering restrictions based on religious liberty claims'. See W.E. Parmet and F. Khalik, 'Judicial Review of Public Health Powers Since the Start of the COVID-19

In order to perceive this change, labeled as 'dramatic',[56] it is necessary, once again, to refer to COVID-19 cases involving free exercise claims and, specifically, to *South Bay I*, decided before Justice Barrett's confirmation, *Roman Catholic Diocese of Brooklyn* v *Cuomo* and *Tandon* v *Newsom*. As noted above, these decisions concerned challenges to orders, which imposed numerical restrictions on places of worship, at-home religious gatherings, and many secular services. At the same time, a few different secular entities were exempted and subjected to less stringent limitations. The constitutional question with which the Justices grappled was whether these mitigation measures discriminated against religion by imposing preferential treatments on secular gatherings while declining them for religious gatherings. Specifically, in addressing the argument of discrimination, they dealt with the matter of comparability: whether the secular activities that were disciplined less rigorously were comparable to the religious practices that were treated more strictly.[57]

The Court resolved these issues in different manners, following the modification in its composition.

In *South Bay I*, the Court declined to halt the pandemic order on free exercise grounds. In his concurring opinion, Chief Justice Roberts explained that limitations of places of worship did not discriminate against religion, because

> 'similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances'.[58]

In his view, the apt comparators were these gatherings, given that 'large groups of people gather in close proximity for extended periods of time', and not the exempted secular activities, such as operating grocery stores, banks and laundromats, where people 'neither congregate in large groups nor remain in close proximity for extended periods'.[59] Therefore, in the majority of the Court's view, religious gatherings should be compared to secular activities that exhibit analogous characteristics and, therefore, are similar in their likelihood of spreading the disease.

The Court's approach, however, changed drastically after Justice Barrett's confirmation.

In *Roman Catholic Diocese of Brooklyn* v *Cuomo*, the Court held that the order violated the neutrality and the general applicability requirements set in *Employment*

Pandemic: Trends and Implications' 113(3) *American Journal of Public Health*, 280, 282 (2023).

[56] E. Chemerinsky, *The Supreme Court in Transition: October Term 2020* (Chicago: American Bar Association, 2021), 55.

[57] In this regard, it has been noted that 'The issue of comparator is an increasingly significant theme of United States jurisprudence, in particular from the Supreme Court'. See B. Bennett et al, *COVID-19, Law & Regulation. Rights, Freedoms, and Obligations in a Pandemic* (Oxford: Oxford University Press, 2023), 217.

[58] *South Bay United Pentecostal Church* v *Newsom* n 19 above, 2 (Roberts, C.J., concurring).

[59] ibid 2 (Roberts, C.J., concurring).

Division v *Smith*[60] (although the *per curiam* opinion did not cite this decision) and in *Church of Lukumi Babalu Aye* v *City of Hialeah*,[61] and consequently discriminated against religion.[62] In particular, the conservative majority argued that the regulations were not a neutral rule of general applicability because 'they single out houses of worship for especially harsh treatment'.[63] Hence, the Court explained that the State has placed less onerous restrictions on businesses, categorized as essential, such as acupuncture facilities, campgrounds, garages and transportation facilities, compared to constraints imposed on houses of worship. According to the Court, New York had regulated religious activities more rigorously than comparable secular activities. However, on the one hand, the Court omitted to justify why it believed those secular entities were the appropriate comparators; on the other hand, the Court clearly overlooked the relevant differences between the businesses in question and religious worship. Nevertheless, the order was subject to strict scrutiny: although stemming the diffusion of the virus was considered a valid compelling interest, the narrowly tailored condition was not satisfied.

Roman Catholic Diocese of Brooklyn v *Cuomo* case makes evident that when the Court referred to a secular comparator, it did no longer intend 'an activity or venue of comparable risk, size or kind';[64] instead, it meant any secular business that was more leniently regulated compared to religious entities. This view is expressly revealed by Justice Kavanaugh's concurring opinion, where he argued that

> 'once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class'.[65]

This approach has been confirmed and further developed in *Tandon* v *Newsom*. The *per curiam* opinion expressly stated that government regulations violated the Free Exercise Clause 'whenever they treat any comparable secular activity more favorably than religious exercise'.[66] Then, even though all secular at-home gatherings were limited in the same way as in-home religious meetings, the Court found California treated some comparable secular activities more

[60] *Employment Division* v *Smith* 494 US 872 (1990). For an in-depth discussion of the neutrality and general applicability requirement, C. Mala Corbin, 'Religious Liberty in a Pandemic' 70(1) *Duke Law Journal Online*, 1, 9-26 (2020).

[61] *Church of Lukumi Babalu Aye* v *City of Hialeah* 508 US 520, 532-546 (1993).

[62] Professor Cass Sunstein described *Roman Catholic Diocese of Brooklyn* v *Cuomo* as a 'kind of anti-*Korematsu* – as a strong signal of judicial solicitude for constitutional rights and of judicial willingness to protect against discrimination, even under emergency circumstances in which life is on the line'. See C.R. Sunstein, 'Our Anti-Korematsu' 1 *American Journal of Law and Equality*, 221, 222 (2021).

[63] *Roman Catholic Diocese of Brooklyn* v *Cuomo* n 27 above, 3 (*per curiam*).

[64] M. Karbon, 'Free Exercise in the COVID era: The New Court's Kantian Approach to Religion' 15(2) *Washington University Jurisprudence Review*, 383, 406 (2023).

[65] *Roman Catholic Diocese of Brooklyn* v *Cuomo* n 27 above, 3 (Kavanaugh, J., concurring).

[66] *Tandon* v *Newsom* n 32 above, 1 (*per curiam*).

favorably than at-home religious practice. In reaching that conclusion, without any justification, the Court compared private religious in-home gatherings with significantly different services, like 'hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants',[67] which were less stringently restricted. Ironically, but effectively, Justice Kagan, in her dissent, observed that 'the law does not require that the State equally treat apples and watermelons'.[68] Again, the order was subject to strict scrutiny and did not survive judicial control.

Tandon signals what, from the perspective of the new conservative majority, represents illegitimate discrimination towards religion: the decision to restrict worship while subjecting some secular activities to a more favorable treatment violates the First Amendment's Free Exercise Clause. In other words, the government is not allowed to regulate secular businesses less stringently than worship, regardless of any substantial difference between them. Indeed, 'any line-drawing that results in a better outcome for some secular spaces over religious spaces must be seen as a subordination of religion'.[69] Consequently, religious activities must always be treated in the same way as the most favored secular entities.

The Free Exercise challenges to pandemic mitigation measures reveal some astonishing features of the Supreme Court's approach during the health emergency.

First, the conservative justices have assigned religious liberty enhanced value, superior to the other fundamental rights that previously enjoyed equal consideration, and also to the right to health, despite the dramatic context of the pandemic.

Free exercise of religion has been provided greater protection to the extent that some commentators have observed that it has been afforded a kind of 'Most Favored Nation status'.[70] This expression, borrowed from economics and originally referred to international agreements, 'refers to any system which mandates that all privileges bestowed upon one entity must also be awarded to another, regardless of circumstances'.[71] It also perfectly aligns with the Court's view about religion. As noted above, according to the Court's conservative wing, religious liberty has to be treated the same as the most leniently regulated secular activity. Hence, 'if a statute provides any exemptions to the regulation at issue for secular reasons, then religious activity must be accorded an exemption as well'.[72]

[67] ibid 3 (*per curiam*).

[68] ibid 1 (J. Kagan, dissenting).

[69] Z. Rothschild, 'Free Exercise Partisanship' 107 *Cornell Law Review*, 1067, 1119 (2022).

[70] D. Laycock, 'The Remnants of Free Exercise' *Supreme Court Review*, 1, 49-50 (1990).

[71] M. Karbon, n 64 above, 402.

[72] M. Strasser, 'COVID-19, Free Exercise, and Most Favored Nation Status' 27(1) *Lewis &Clark Law Review*, 1, 2 (2023). The enforcement of the Most Favored Nation (MFN) principle may be quite problematic and may result in undesirable consequences, as the following example demonstrates. 'Assume a court upholds a city ordinance requiring private parades traveling through city streets to obey traffic rules and stop at stop signs and red traffic lights. Assume also that the court has recognized that ambulances driving patients to the hospital are not subject to these limitations. Certainly the Free Speech Clause would not require that a caravan of car protestors receive the same

The second feature pertains to the intensity of review: the mere existence of a secular exemption in public health measures has triggered strict scrutiny. Once strict scrutiny was applied to public health orders, infringing on religious liberty, the conservative majority of the Justices concluded that those orders could not survive judicial review, because they failed the narrowly tailored requirement.

In 2015, Professor Elizabeth Sepper introduced the phenomenon of Free Exercise Lochnerism in the scholarship debate, noting that courts have increasingly incorporated 'the central premises of Lochner into religious liberty doctrine'.[73] The fact that the Court has placed the right to free exercise above all others and the aggressive protection it has granted to this right enable to refer this concept also to the jurisprudence during the health emergency. Free Exercise Lochnerism alludes to the rigor and severity of the judicial control of public health regulations, infringing on religious liberty. Indeed, echoing Professor Gerald Gunther's renowned expression, the Court has exercised an excessive stringent form of scrutiny, which was 'strict in theory', but 'fatal in fact'.[74]

Finally, Free Exercise cases reveal that religion has been treated as a 'trump' card[75] and not as a 'shield':[76] plaintiffs who have challenged public health orders on religious grounds have always succeeded after the Supreme Court's composition change. Indeed, the conservative majority has been reluctant to balance religious liberty with other fundamental rights, nor has it accorded a certain degree of priority to the right to health. The difference between the balancing technique and the quadripartite structure of proportionality, employed by courts in continental Europe, is quite apparent.

V. Disregard for Science

The third feature, which distances the Supreme Court from continental European courts, pertains to the role of science in judicial-decision making: if the latter has accorded great weight to technical and scientific expertise, the former,

favored traffic-law treatment provided to ambulances. Yet under a MFN approach, if the caravan consisted of religious worshippers – say, on the way to a funeral – would we conclude that unless the hearse and other mourners were allowed to speed through red lights that their religious liberty would be constitutionally disrespected and impermissibly demeaned on account of the relatively superior treatment of emergency medical vehicles?'. See, V.D. Amar and A.E. Brownstein, 'Exploring the Meaning of and Problems With the Supreme Court's (Apparent) Adoption of a "Most Favored Nation" Approach to Protecting Religious Liberty Under the Free Exercise Clause' *Verdict*, available at https://tinyurl.com/24b69kz9 (last visited 30 September 2024).

[73] E. Sepper, 'Free Exercise Lochnerism' 115 *Columbia Law Review*, 1453, 1455 (2015).

For an historical analysis of the Free Exercise Lochnerism phenomenon, also J.K. Kessler, 'The Early Years of First Amendment Lochnerism' 116(8) *Columbia Law Review*, 1915 (2016).

[74] G. Gunther, 'The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection' 86(1) *Harvard Law Review*, 1, 8 (1972).

[75] R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 193.

[76] F. Schauer, 'A Comment on the Structure of Rights' 27 *Georgia Law Review*, 415, 429-430 (1993).

especially after the change in its composition in November 2020, has been indifferent, if not hostile, towards public health evidence.[77] On the one hand, judges required governments to take evidence-based, or at least evidence-informed, decisions, acknowledging the growing relevance of science in 'providing guidance'[78] to decisions related to pandemic mitigation measures; on the other hand, scientific and medical expertise received little, if any, consideration by the conservative majority of the Justices.[79]

It is pertinent, once again, to first refer to Free Exercise challenges to COVID-19 orders. As noted, the key issue was comparability: whether religious gatherings have been regulated more strictly than comparable secular activities. The scientific consensus suggested that places of worship and at-home religious services, where people congregate in large groups, talk, chant and remain in close proximity for extended periods, often have turned into 'super-spreader events'.[80] Consequently, one would have expected the comparison to be made with other secular activities, which, according to the scientific community and based on the evolving knowledge about the pandemic, present similar and elevated risks of spreading the virus.[81] However, the conservative Justices have surprisingly followed a different pattern: they regularly overlooked the factual findings[82] of the lower courts, nor did they consider the relevant expertise in making the comparability evaluation. Instead, the majority appeared to rely 'on its own intuition to determine which activities were comparable to the religious services that were restricted'.[83]

This approach was explicitly foreshadowed in Justice Kavanaugh's dissent in *Calvary Chapel Dayton Valley* v *Sisolak*. Substituting a scientifically grounded assessment with his own personal judgement, he affirmed: 'I continue to think that the restaurants and supermarkets … pose similar health risks to socially distanced religious services'.[84]

The trend was confirmed once the conservative Justices became the majority.

[77] W.E. Parmet, n 11 above, 87.

[78] F. Cafaggi and P. Iamiceli, n 4 above, 33.

[79] H. Hershkoff and A.R. Miller, 'Courts and Civil Justice in the Time of Covid: Emerging Trends and Questions to Ask' 23 *Legislation and Public Policy*, 321, 332, 396, 399, 405 (2021).

[80] L.M. Marsh, 'Confusion in the Time of COVID: The Supreme Court's Lack of Clarification in Balancing a Public Health Emergency and the Constitutional Right to Free Exercise' 86 *Missouri Law Review*, 647 (2021): a super-spreader event is 'where the number of cases transmitted will be disproportionately high compared to general transmission' (fn 3). See also, A. Woodward 'Trump declared houses of worship essential. Mounting evidence shows they're super-spreader hotspots' *Business Insider* available at https://tinyurl.com/4r54vc9a (last visited 30 September 2024).

[81] C. Mala Corbin, n 60 above, 5.

[82] M. Strasser, n 72 above, 30. The author first recalls that 'district court is the finder of fact', then argues that 'it is difficult to understand why the trier of fact's findings would be ignored, especially if there were various reasons that the practices at the religious institutions would be more likely to cause virus transmission'.

[83] W.E. Parmet, 'From the Shadows: The Public Health Implications of the Supreme Court's COVID-Free Exercise Cases' 49 *The Journal of Law, Medicine & Ethics*, 564, 569 (2021).

[84] *Calvary Chapel Dayton Valley* v *Sisolak* n 22 above, 11 (J. Kavanaugh, dissenting).

In *Roman Catholic Diocese of Brooklyn* v *Cuomo*, the Court held that some secular businesses, classified as essential, were the apt comparators to religious services. In reaching that conclusion, it ignored the factual findings of the District Court: indeed, as Justice Breyer highlighted in his dissent,

> 'After receiving evidence and hearing witness testimony, the District Court in the Diocese's case found that New York's regulations "were crafted based on science and for epidemiological purposes"'.[85]

Hence, according to the District Court, the appropriate comparators should have been 'public lectures, concerts or theatrical performances',[86] treated even more rigorously than religious services. At the same time, the Court did not explain the reasons why it believed that essential businesses were comparable to religious ones, nor did it consider medical and scientific expertise, related to the heightened likelihood of infection in these latter services, thus playing, in Justice Sotomayor's words,

> 'a deadly game in second-guessing the expert judgement of health officials about the environments in which contagious virus, now infecting a million Americans each week, spreads most easily'.[87]

In *Tandon* v *Newsom*, the Court also added that 'comparability is concerned with the risks various activities pose';[88] however, surprisingly, the majority did not take into account any evidence regarding the different risks of contamination, that in-home religious gatherings posed compared to secular businesses more leniently regulated; nor did it provide any explanation about how the Court has determined the relevant comparable activities. Once again, the minority dissented: Justice Kagan sharply criticized the majority for neglecting the District Court's findings, 'based on the uncontested testimony of California's public-health experts', and for avoiding any discussion of the health evidence. Hence, she bitterly concluded, the Court

> 'once more commands California "to ignore its experts' scientific findings," thus impairing "the State's effort to address a public health emergency"'.[89]

Another area where the Court's tendency towards science is evident concerns constitutional challenges to federal vaccine mandates. In general, vaccination is a matter where the evidentiary basis of decision-making was largely discussed: indeed, in continental Europe, courts focused essentially on the efficacy and the safety of the COVID-19 vaccines, as well as on the adequacy of the mandates to

[85] *Roman Catholic Diocese of Brooklyn* v *Cuomo* n 27 above, 2 (J. Breyer, dissenting).
[86] ibid 2 (J. Breyer, dissenting).
[87] ibid 3 (J. Sotomayor, dissenting).
[88] *Tandon* v *Newsom* n 32 above, 2 (per curiam).
[89] ibid 2 (J. Kagan, dissenting).

mitigate the spread of the pandemic. On the contrary, the United States Supreme Court has resolved these disputes on a different ground. Both *Biden* v *Missouri* and *National Federation of Independent Business* v *Occupational Safety and Health Administration (NFIB* v *OSHA)*, albeit with different outcomes, are centered on who has the power to introduce compulsory vaccination. Specifically, the Court has hinged the issue on the principle of horizontal separation of powers, ultimately investigating how much authority Congress has delegated to the executive branch.[90] Justice Gorsuch's concurring opinion in *NFIB* v *OSHA* is truly illustrative in this regard. He began by affirming that 'the central question we face today is: Who decides?'; then, he specified,

> 'the only question is whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people'.[91]

Nevertheless, the Court's seemingly science-neutral approach tends to devalue medical and scientific evidence. In *NFIB* v *OSHA*, the conservative majority concluded that the Occupational Safety and Health Administration did not have the authority to impose a vaccine mandate, neither testing nor masking as alternatives. From a substantive standpoint, however, the Court ended up displacing a rule by a federal agency, which, as Justices Breyer, Sotomayor and Kagan in their dissent observed, was based

> 'on a host of studies and government reports showing why those measures were of unparalleled use in limiting the threat of COVID-19 in most workplaces'.[92]

Therefore, compared to Justice Gorsuch's concurring opinion, the question seems better posed in the dissent:

> 'Who decides how much protection, and of what kind, American workers need from COVID-19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?'.[93]

The majority felt it was entitled to the final word, granting itself the power to second-guess the experts and replacing scientific assessments with judgements,

[90] For some justices, the preliminary problem of vertical separation of powers also arises, ie could Congress delegate this power or was it the responsibility of the state level.

[91] *National Federation of Independent Business* v *Occupational Safety and Health Administration* n 46 above, 1 (J. Gorsuch, concurring).

[92] ibid 5 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

[93] ibid 12 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

unsupported by any medical competence.[94]

In 2000, Justice Breyer wrote that science should expect to find a 'warm welcome, perhaps a permanent home, in our courtrooms'.[95] Although he acknowledged that a 'judge is not a scientist and a courtroom is not a scientific laboratory', he famously stated that the 'law must seek decisions that fall within the boundaries of scientifically sound knowledge'.[96] In Justice Breyer's view, judicial decisions should reflect an appropriate scientific and technical awareness to cope with the needs of society. In an emergency, in which there was a compelling need for health protection, the attitude of the current majority of the Court toward science raises more than a few concerns. Far from fulfilling Justice Breyer's wish, the cases analyzed[97] expose the majority's indifference to health evidence and its unwillingness to accord any relevance to medical expertise.

VI. The Legacy of the Health Emergency: Partisanship and Conservative Judicial Activism with Distinctive Features

The Supreme Court's case law on COVID-19 orders reveals some *exceptional* patterns: the Court has departed inconstantly from its long tradition of deference during times of emergency; it has accorded heightened protection to Free Exercise, even at the expense of the right to health; it has devalued health evidence and scientific expertise.

The origins of this peculiar approach lie essentially in the composition of the Court, especially after the replacement of Justice Ginsburg by Justice Barrett, and in the Justices' inclination to mirror the preferences of the appointing Presidents. The actual majority consists of Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, Kavanaugh and Barrett. All of them are Republican appointees (the last three by President Trump), ideologically conservative and more pro-religion than average.[98] With the exception of Chief Justice Roberts, who, at least on some occasions,[99] settled on a more moderate position, the others have regularly voted

[94] President Biden harshly lambasted the decision in *NFIB* v *OSHA*, noting that 'I am disappointed that the Supreme Court has chosen to block common-sense life-saving requirements for employees at large businesses that were grounded squarely in both science and the law'. See 'Statement by President Joe Biden on the U.S. Supreme Court's Decision on Vaccine Requirements' available at https://tinyurl.com/5y29457x (last visited 30 September 2024).

[95] S. Breyer, 'Science in the Courtroom' 16(4) *Issues in Science and Technology*, 52 (2000).

[96] ibid 53.

[97] In this regard, the following previously mentioned cases might also be included: *Alabama Association of Realtors* v *Department of Health and Human Services*; *Valentine* v *Collier*; *Republican National Committee* v *Democratic National Committee*. In all, the Court gave no consideration to what the science said, nor it was concerned about the negative consequences of its decisions on the public health.

[98] L. Epstein and E.A. Posner, n 55 above, 327.

[99] See *Roman Catholic Diocese of Brooklyn* v *Cuomo*, where the Chief Justice Roberts dissented with the conservative majority, because he considered that the case has become moot.

in line with the views of the Republican Party.

In a country marked by profound polarization, Republican politicians have been more skeptical of the pandemic mitigation measures than Democrats; they are also known for their attitude towards religious rights, as well as for their aversion to abortion. On the one hand, this may justify the abandonment of the deferential approach in favor of more rigorous judicial control, with many challenges won, mostly with the casting votes from Justices appointed by Republican Presidents.[100] The trend is particularly evident in Free Exercise challenges to COVID-19 orders, where the conservative Justices have almost always ruled in favor of religious liberty, and in particular, those appointed by Trump, while the liberals have always sided with the government.[101] On the other hand, the Republicans' view on abortion (entirely endorsed by President Trump) may help to explain the inconsistency of the Court: the inclination of conservative Justices to exercise a stringent review during the pandemic, when fundamental rights were implicated, and to rule against public health orders has been overcome by their hostility to the right to terminate the pregnancy. An opposite shift has characterized the liberal minority, with Justices Breyer, Sotomayor and Kagan voting for abortion and against the government.[102] As noted, the result has been a deferential review, which, anticipating the decision in *Dobbs* v *Jackson Women's Health Organization*,[103] has essentially allowed anti-abortion governors 'to use the pandemic as a proxy for denying or infringing on reproductive rights through anti-abortion measures'.[104]

Free Exercise and abortion challenges are illustrative[105] of the fact that the

[100] W.E. Parmet, n 11 above, 75.

[101] This conclusion is consistent with the results of a research conducted on a sample of 123 federal courts decisions, pertaining to free exercise challenges to COVID-19 orders, occurred between the outbreak of the pandemic and 31 December 31 2020. In COVID-19-related free exercise cases, 'Democratic-appointed judges sided with the government 100% of the time, while Republican-appointed judges sided with the government 34% of the time and with religious plaintiffs 66% of the time (a 66% differential). Trump-appointed judges, meanwhile, sided with the government 18% of the time and with religious plaintiffs 82% of the time (an 82% differential with Democratic-appointed judges)', see Z. Rothschild, n 69 above, 1083.

[102] K. Mok and E.A. Posner 'Constitutional Challenges to Public Health Orders in Federal Courts during the COVID-19 Pandemic' 102 *Boston University Law Review*, 1729, 1747-1748 (2022). The authors focused on all civil liberties challenges other than those based on the First Amendment's Free Exercise Clause; they collected cases decided at all levels of the federal judiciary, between 1 March 2020 and 29 June 29 2021. They found that 'the abortion cases present a special twist. Here, the inclination of Democratic-appointed judges to side with the state during the public health crisis conflicted with the commitment to abortion rights. The Republican-appointed judges faced the same tension in the opposite direction: the suspicion of public health orders conflicted with hostility to abortion rights. The groups switched sides, possibly indicating attitudes toward abortion trumped attitudes toward government public health action'.

[103] *Dobbs* v *Jackson Women's Health Organization* 597 US _ (2022).

[104] E. Chemerinsky and M. Goodwin, n 18 above, 817.

[105] In this regard, however, the decisions on evictions moratorium and prison conditions are also worth mentioning. Both mirrored the Republicans' attitude respectively on property rights and prisoners' right not to be subjected to cruel and unusual punishments: in the former, the Court

Court has split along partisan lines. In those cases, party affiliations and political ideologies align with votes by Democratic and Republican-appointed Justices.

However, increased judicial partisanship is not the only legacy of the health emergency. Closely related to the latter, the case law also reports a tendency toward judicial activism: a conservative judicial activism with some peculiar traits.

As has been observed, judicial activism is 'not a monolithic concept'; instead, it can 'represent a number of distinct jurisprudential ideas'[106] and may take on different meanings.

In the specific context of the health emergency, first of all, judicial activism, as Professor Cass Sunstein observed years ago, refers to the Supreme Court's tendency to frequently strike down the actions of other parts of government[107] in cases where those actions were not plainly unconstitutional.[108] As noted, the Court has departed, at least in some areas, from a long tradition of deference to political elected branches and officials during national emergencies, exercising a more rigorous review and invalidating public health measures which were not plainly unconstitutional (or rather, which were not unconstitutional at all).

Secondly, the Court has overturned a long-established approach to how courts should control public health orders and has affirmed relevant principles in constitutional law by relying entirely on its shadow docket. Professor William Baude affirmed that the non-merits docket is 'opaque'.[109] Even during the pandemic, its use confirmed the transparency concern: the Court has offered little, and in some cases, no explanations to justify the outcomes, thereby significantly reducing the quality of the reasoning.

Judicial activism also usually correlates with a low regard for precedents and stare decisis. In this regard, however, the pandemic context reveals a distinguishing feature. Traditionally, the Court has held that decisions from the shadow docket lack precedential value.[110] However, Professor Stephen Vladeck argued that the Supreme Court, at least in Free Exercise cases, has given precedential effect also to its decisions from the non-merits docket: in the Court's view, he noted, all of the Court's shadow docket orders 'were to be treated as precedent by lower courts, even the unsigned and unexplained ones'.[111] The recognition of precedential

ruled in favor of property owners and against tenants; in the latter, it ruled against inmates' right to have safe prison conditions.

[106] K.D. Kmiec, 'The Origin and Current Meanings of "Judicial Activism"' 92 *California Law Review*, 1441, 1476 (2004).

[107] C.R. Sunstein, n 1 above, 41.

[108] C.R. Sunstein, 'Opinion. Taking Over the Courts' *The New York Times*, available at https://tinyurl.com/kh9yhhhw (last visited 30 September 2024).

[109] W. Baude, n 7 above, 4. See also S.I. Vladeck, 'The Supreme Court Needs to Show Its Work' *The Atlantic* available at https://tinyurl.com/yrx938kj (last visited 30 September 2024); I. Somin, 'Major Question of Power: The Vaccine Mandate Cases and Limits of Executive Authority' *Cato Supreme Court Review*, 69, 70, 93-95 (2021-2022).

[110] S.I. Vladeck, n 8 above, 724.

[111] ibid 734. See also S.I. Vladeck, 'The Supreme Court's Most Partisan Decisions Are Flying Under the Radar' *Slate* available at https://tinyurl.com/yc39c3sn (last visited 30 September 2024).

value to emergency decisions may be ascribed to judicial activism.

Another expression of judicial activism lies in the Court's willingness to second-guess scientific expertise, albeit amid a health emergency. Professors Helen Hershkoff and Arthur Miller pointed out that, during the pandemic, President Trump 'undermined the public's trust in medical guidelines, routinely disparaging health professionals'.[112] In this respect, the majority of the Court was also aligned with the President's attitude, replacing scientifically-based considerations with personal judgements not grounded in medical evidence.[113]

Lastly, judicial activism within the emergency context means 'result-oriented judging'.[114] On the one hand, the inconsistent approach of the conservative majority, sometimes inclined to exercise a rigorous review of the pandemic mitigation measures, other times deferential, seems 'driven by the particular merits of the cases'.[115] On the other hand, but closely related, the Court, in the manner of a 'judicial arm of the Republican party',[116] seemed much more inclined to realize a Republican agenda than to safeguard public health at a time, however, when there was a pressing need for it.

Two final remarks.

First, it has been argued that, even during a pandemic, ordinary tiers of review, and specifically strict scrutiny, should be applied instead of deferential judicial control.[117] If this view is to be embraced in theory, the Supreme Court's case law on COVID-19 measures caution about calling for expansive judicial monitoring under emergency circumstances. What seems troubling is the Court's tendency to dismiss scientific evidence and the fact it appeared to have no regard for the consequences of its decisions on public health and safety.

Second. Justice Breyer, before his retirement, wrote that the Supreme Court's authority 'depends on trust, a trust that the Court is guided by legal principles, not politics'.[118] If this is true, and such is believed to be the case, judicial partisanship seems to erode the Court's authority and, before that, the public's confidence in the Court and in its power to act as a constitutional check on the other branches and as a guardian of fundamental rights.

[112] H. Hershkoff and A.R. Miller, n 79 above, 353.

[113] Not surprisingly, on *Nature*, has been published an essay, with the impressive title 'The Supreme Court's War on Science', where the author, discussing the trio of landmark decisions issued by the Supreme Court in late June 2022, noted that the ultraconservative, six-member supermajority, is 'often sceptical of – if not outright hostile towards – science'. See J. Tollefson, 'The Supreme Court's War on Science' 609 *Nature*, 460, 461 (2022).

[114] K.D. Kmiec, n 106 above, 1475.

[115] A.L. Tyler, n 10 above, 496, 588-593.

[116] 'The Supreme Court Isn't Listening, and It's No Secret Why' *New York Times*, available athttps://tinyurl.com/5c2yprrj (last visited 30 September 2024).

[117] L.F. Wiley and S.I. Vladeck, 'Coronavirus, Civil Liberties, and the Courts: the Case Against "Suspending" Judicial Review' 133(9) *Harvard Law Review Forum*, 179 (2020); E. Chemerinsky and M. Goodwin, n 18 above, 820, 849.

[118] S. Breyer, *The Authority of the Court and the Peril of Politics* (Cambridge, Massachusetts: Harvard University Press, 2021), 100.

Essays

Sustainability and Remedial Regime in the Sale of Consumer Goods

Andrea Fantini*

Abstract

The act of consumption is assuming an axiological dimension that deserves to be projected also in a remedial perspective. It is the relationship between private law and sustainability that comes into focus. An incentive policy for the remedy of the repair of goods is central to the project of a sustainable single market, in which the inseparability between individual interests and general interests should inspire the search for a new balance.

I. Sustainability: A Sociological View

There is a common thread that connects physics, astronomy, natural sciences, sociology, philosophy, law: we call it the System.

Great modern minds have dedicated and still dedicate their entire lives to the study of the System. Whether this variously assumes the connotations of Society, Universe, Legal order, eminent experts have tried to identify the principles that govern a system reducing the complexity of a complex system.[1]

So, what can be defined as Society is a complex system. And it could be considered the system that records the greatest increases of complexity. Where there is an increase of the know-how, consequently there is less knowledge. The spread of the know-how implies the lack of knowledge of the consequences.[2]

The extension of knowledge has generated the intensification of the production. The mechanisms of continuous production have made evident the lack of knowledge of the consequences: this is usually called 'unsustainability'.

Unsustainability is a more tangible concept, if compared to sustainability. Until now we have experienced unsustainability. We know how to be unsustainable. We are aware that it is unsustainable acting as we have done so far.

Frank Trentmann,[3] has meticulously detailed the past five hundred years of

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[1] Giorgio Parisi, Nobel Prize winner for physics in 2021 for his studies on complex systems, explains that a complex system is a 'system described by phenomenological laws that do not derive immediately from the laws that describe the behavior of the individual components', G. Parisi, *In un volo di storni. Le meraviglie dei sistemi complessi* (Milano: Rizzoli, 2021).

[2] E. Capobianco and A. Fantini, 'Rischio pandemia e diritto dei contratti', in L. Nuzzo and S. Tommasi eds, *La differenza e l'ostacolo* (Napoli: Edizioni Scientifiche Italiane, 2021), 136.

[3] F. Trentmann, *The Empire of Things. How we Became a World of Consumers, from the*

consumption, giving us a pessimistic assessment of how we have behaved and are still behaving today.[4]

Unsustainability is therefore the otherness that makes the unity of difference.[5] And the difference is made by the human conduct of a human being.

We use to deviate, or at least we try to deviate, from what we have been tied to until now. This is the unsustainability. Today the priority is not being sustainable, but not being unsustainable anymore; there is no to time left to be unsustainable.

The concept of sustainability brings out the close connection to what is called limit. Limit intended as limit of resources, consequently, limit of life.

And it is also linked to solidarity.[6] Sustainability and solidarity are connected by the opposition to the selfish vision.

Indeed, sustainability is the opposite of selfishness. Selfishness implies the centrality of the ego revealing its component of asociality. And asociality has nothing to do with freedom.

Fifteenth Century to the Twenty-First (London: Penguin Books, 2016).

[4] H.W. Micklitz, 'Squaring the circle? Reconciling consumer law and the circular economy' VI(8) *Journal of European Consumer and Market Law*, 229-237 (2020).

[5] A distinction can only be made compared to a unit. But the distinction allows you to see one side or the other. The unit remains undetectable. The unity of the distinction of good and evil cannot be observed; and this is why good is moral, just as evil is moral. Likewise, what is lawful pertains to the law and what is illicit pertains to the law itself. These observations are freely inspired by the extraordinary pages of N. Luhmann and R. De Giorgi, Teoria della società (Milano: Franco Angeli, 1992).

[6] Solidarity is icastically defined as 'an open window on society to allow its orderly development' by G. Vettori, 'Persona e mercato al tempo della pandemia' *Persona e mercato*, 6 (2020). Solidarity is identified as a 'speculative principle, internal to the judicial order; force of cohesion within the organism of objective law, and therefore a motive operating, from within, in the process of creation of subjective rights' by S. Pugliatti, *Teoria dei trasferimenti coattivi* (Messina: Casa Tipografica Ettore Silva, 1931), 111. In this perspective, the illustrious Author considers solidarity a 'unique vehicle, [...] through which an ineliminable contact between the State and the individual is established *ab origine*, and therefore between objective law and subjective law, the sole source from which arises, with that, the obligation of implementation and protection by the State, and with this the legitimate faculty of the individual, to which, as the obligation of protection extends, the right of disposal (limited and conditioned) also extends, which merges with it'. With particular regard to the compulsory relationship, R. Cicala, 'Produttività, solidarietà e autonomia privata' *Rivista di diritto civile*, 298 (1972), indicates that the 'solidarity formula [...] refers to a balancing of super-individual interests in the ethical perspective of the weakening of the "egoistic fact" not in the economic one of productivity'. In this perspective, P. Perlingieri, '«Depatrimonializzazione» e diritto civile', in Id, *Scuole, tendenze, metodi* (Napoli: Edizioni Scientifiche Italiane, 1988), 173; Id, 'Mercato, solidarietà e diritti umani' *Rassegna di diritto civile*, 82 (1995); Id, 'La tutela del consumatore tra liberismo e solidarismo', in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 308-316; see also S. Rodotà, *Le fonti di integrazione del contratto* (Milano: Giuffrè, 1969), 132-152; F. Lucarelli, *Solidarietà e autonomia privata* (Napoli: Jovene, 1970), 92; N. Lipari, '«Spirito di liberalità» e «spirito di solidarietà»' *Rivista trimestrale di diritto e procedura civile*, 1-25 (1997); P. Stanzione, *La tutela del consumatore tra liberismo e solidarismo* (Napoli: Edizioni Scientifiche Italiane, 1999); S. Rodotà, *Solidarietà. Un'utopia necessaria* (Roma-Bari: Laterza, 2014), 36, places emphasis on the emergence of an 'ecological citizen', not conditioned in his actions by the exclusive reference to selfish interests or market logic, 'but necessarily involved in collective processes, where a further connection manifests itself - that between solidarity and participation - which makes solidarity re-emerge as a republican virtue'; V. Rizzo, 'Contratto e costituzione' *Rassegna di diritto civile*, 349-362 (2015).

It has been authoritatively argued that

> 'sustainability is something that overcomes egoity and combines it with otherness, reconciling and reducing generational conflict to synthesis. Sustainability emphasizes the necessity, without it there isn't sociality, explaining the development (not the solution) between *status personae* and *status civitatis* declaring the continuity between individual liberties and social rights, pursuing the effectiveness of the minimum vital to the person as a guarantee of the order'.[7]

For all these reasons the construction of the idea of the common and universal good,[8] have been advocated. In the opinion of the writer, this is an invention of the modern reason addressed to justify policy decisions.

The same can be applied to the concept of sustainability. It is a semantics construct, artificial semantics, since it does not correspond to the truth. The construction of the meaning around the concept of sustainability implies freedom, which in turn is a condition of knowledge.

Another piece of untruth of the modern society is the choice between sustainable and unsustainable, since freedom of choice means having a choice.[9] However, all choices are built. So, the choice in this context, has not alternatives. The possibilities, before becoming alternatives, are multiple. When possibilities become choices, they have been already minimized. This is an artificiality, which has nothing to do with freedom.

Thus, the possibilities of being sustainable are multiple. However, the alternatives – already reduced among the many possibilities – that are proposed to us are the less sustainable.

As a consequence, the lack of freedom of choice. In other words, being able to decide only on what cannot be decided.

Another concept connected to sustainability is that of education. Education to sustainability, which is an arduous mission. The atavistic problem is that the action of individuals composes the action of the community and the individual, 'Man was created a rebel'.[10]

As mentioned above sustainability is a construct of semantics that has

[7] E. Caterini, *Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale* (Napoli: Edizioni Scientifiche Italiane, 2018). Book reviewed by G. Perlingieri, '«Sostenibilità», ordinamento giuridico e «retorica dei diritti». A margine di un recente libro' *Il Foro napoletano*, 101-118 (2020) and M. Pennasilico, 'Recensione a E. Caterini, Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale' *Rassegna di diritto civile*, 1511-1519 (2018).

[8] Among the most fervent supporters of the category of common goods, U. Mattei, *Beni comuni. Un manifesto* (Roma-Bari: Laterza, 2011).

[9] Without an alternative, after all, it is not possible to choose.

[10] '[…] and how can rebels be happy?', the words of Ivan Karamàzov, in F.M. Dostoevskij, *The Brothers Karamàzov* (New York: Dover Publications Inc., 2005), 227, in the sublime pages of the chapter *The Grand Inquisitor*.

established itself in social communication. The same can be applied to the sustainable development. But what does sustainability mean? Can a power plant be considered sustainable?[11] Can an incinerator be classified as sustainable? In addition, is the sustainable development sustainable?

II. Sustainable Development and Social Duty

'Sustainable development' is an evident oxymoron[12] consisting in approaching, in same locution, two words that express opposite and antithetical concepts (those of economic development and environmental sustainability). The concept of sustainable development has recently become a focal point of discussion between economists and ecologists; the adjective has been presented, in this discussion, more as a correction rather than a specification of the noun.

The expression has been included in the language and common sense, as the signal of a deep change in sensitivity, of a more widespread and aware ecological awareness.

Sustainable development has been effectively defined as

> 'development that guarantees to everyone basic environmental, social and economic services without threatening the evolution of the systems (natural, built, social) on which these services depend'.[13]

In 1972, the Report of the 'Club of Rome' stated that the economic growth is incompatible with the sustainability because, sooner or later, as the world population grows, needs arise and these needs cannot be met without affecting the natural resources currently available.[14]

Hence the concept of resources substitutability. The degree of resources substitutability is inversely proportional to the degree of development sustainability: substitutability increases as sustainability decreases. Currently the debate revolves around the two middle positions of the scale 'sustainability-substitutability' and attempts are made to get to the bottom of the question related to the conservation

[11] The announcement by the US authorities of the turning point on nuclear fusion is very recent, after the production, for the first time in history in a California laboratory, of a reaction that generates more energy than that needed to trigger it. It is a more environmentally sustainable source of energy than sources based on fossil fuels or nuclear fission.

[12] In this sense, M. Cafagno, 'Cambiamenti climatici tra strumenti di mercato e potere pubblico', in G.F. Cartei ed, *Cambiamento climatico e sviluppo sostenibile* (Torino: Giappichelli, 2013), 105-122.

[13] Definition found in the *Local Agenda 21* program, developed in 1994 by ICLEI (*International Council for Local Environmental Initiatives*).

[14] The reference is to the report published by a group of researchers from MIT published a report for the Club of Rome, entitled 'The Limits to Growth' aimed at gaining insights into the finiteness of our world system, D.H. Meadows et al, *The Limits to Growth* (New York: Universe Books, 1972).

of natural capital without however blocking economic growth.

The idea of sustainable development tends to challenge anthropocentric positions and pave the way to biocentric and ecocentric ones, considering all living and non-living people on the planet.[15]

The contribution of the United Nations fits into this scenario which, during its General Assembly of 25 September 2015, has been approved the document entitled 'Transforming our world: the 2030 Agenda for Sustainable Development', defined as '... a plan of action for people, planet and prosperity', the result of a long and complex preparatory process.

Even the European Union (EU) has adopted an articulated posture that involves multiple sectors and, thus, the member countries are converging towards binding objectives with coordinated legislation.[16] In particular, the European Green Deal establishes the objective of making Europe the first continent with zero climate impact by 2050.[17] In this, as well as in other documents, the centrality of the concept of sustainable development and, therefore, of sustainability emerges not only with reference to environmental protection but also with broader social implications.[18]

In relation to the implementation of the 2030 Agenda, the EU Council issued two important Conclusions: 'EU response to the 2030 Agenda for Sustainable Development – a sustainable European future', adopted in 2017 and the most recent 'Towards an ever more sustainable Union by 2030', drawn up in 2019, thanks to which it urges the Commission to develop a comprehensive implementation

[15] There are many appeals for a sustainable use of resources contained in Pope Francis' encyclical *Laudato Si*. In particular, it states that 'The urgent challenge to protect our common home includes a concern to bring the whole human family together to seek a sustainable and integral development' (Vatican City: Libreria Editrice Vaticana, 2015), 12. At the basis of the Holy Father's thought is the idea of a future that urgently requires real change, in support of a world that takes as intrinsic value the quality of life, of relationships between men and of relationships between man and the entire planet, his common home.

[16] A framework of the multilevel system of European environmental governance and of the critical issues that arose following the economic crisis and the alterations of European membershipis offered in A. Jordan et al, 'EU Environmental Policy at 50: Retrospect and Prospect', in A. Jordan and V. Gravey eds, *Environmental Policy in the EU* (London-New York: Routledge, 2021), 357-372.

[17] For an in-depth analysis, see L. Lionello, 'Il Green Deal europeo. Inquadramento giuridico e prospettive di attuazione' *Jus*, 105-142 (2020).

[18] The term 'sustainability', 'born in the world of environmental policies (especially for the concept of 'sustainable development'), has rapidly contaminated different sectors: sustainable finance, sustainable tourism, sustainable architecture, agriculture, etc. today everything appears sustainable, or, more often, unsustainable': see M. Cartabia and A. Simoncini, 'Introduzione', in Ead eds, *La sostenibilità della democrazia nel XXI secolo* (Bologna: il Mulino, 2009), 13. See also R. Bifulco, 'La responsabilità giuridica verso le generazioni future tra autonomia della morale e diritto naturale laico', in A. D'Aloia ed, *Diritti e costituzione. Profili evolutivi e dimensioni inedite* (Milano: Giuffrè, 2003), 171. In fact, as for the concept of sustainability, the 'origins can be found, without a doubt, in environmental matters, which refers to the potential of a certain ecosystem to remain unchanged over time; but the theme of sustainability is also linked to other sectors such as the economic, social and cultural one', G. Sciancalepore, 'The dimensions of sustainability' *Iura and Legal System*, I, 8 (2020). See also F. Cirillo, 'La sostenibilità come diritto delle generazioni presenti?', in S. Lanni ed, *Sostenibilità globale e culture giuridiche comparate* (Torino: Giappichelli, 2022), 139-140.

strategy outlining timelines, objectives and concrete measures to integrate the Sustainable Development Goals (SDGs) in all the related internal and external EU policies.

In particular, in December 2017 the National Sustainable Development Strategy (NSDS) was approved in Italy, defining the guidelines of the economic, social and environmental policies aimed at achieving the sustainable development objectives by 2030; it is structured in five areas, corresponding to the '5Ps' of sustainable development proposed by the 2030 Agenda, each of which contains strategic targets and choices for Italy, related to the SDGs of the 2030 Agenda.[19]

Starting from this global frame of reference, it is possible having a deep dive on the sustainable development concept, recalling, although in a nutshell, some of the key concepts that underlie it. Among them those of: a) systemic approach: it places emphasis not only on the relevance of the phenomenon studied and all elements which characterize it, but also and above all on the interactions between these elements and on the synergies that develop between them; b) complexity: systemic thinking is based on the idea that a system is something more than the sum of the parts that compose it. This statement opposes any attempt at reductionism, linearity of cause and effect, the decomposition of reality into isolated parts, placing the emphasis on the global aspect of knowledge, on the structural complexity of the whole, of organisms and on the interactions between various phenomena. So, the system, becomes a key notion for the formulation of a new world conception; c) uncertainty: the mentioned systemic approach leads to the consideration that both the environment and societies are regulated by complex mechanisms, characterized by non-linear dynamics and therefore very difficult to be predicted; d) limit: the prestigious scientific journal *Nature*, on this matter, has published an essay written by several scientists, in which it is highlighted how, in many situations, the human impact on natural systems is now close to critical points ('thresholds'), beyond which the effects generated could be devastating for humanity. Therefore, 'planetary boundaries' are identified, from a biophysical point of view, which boundaries should not be exceeded by human intervention in order not to unleash devastating and dramatic effects for social, economic and environmental systems;[20] e) the long-term logic: this can be considered the most explicitly recalled aspect within the *Brundtland Report*.

The reference to future generations necessarily brings the focus on the generations to come, those who will populate the Planet in the distant future, thus expanding the planning perspectives and evaluations related to the inter-

[19] A. Bachiorri, 'Agenda 2030: un'opportunità per costruire insieme un futuro sostenibile' *Quaderni di ricerca sull'artigianato*, 305 (2020).

[20] The researchers also estimated numerical data that should be 'unsurpassable' for nine planetary boundaries: climate change, biosphere integrity (functional and genetic), land-system change, freshwater use, biogeochemical flows (nitrogen and phosphorus), ocean acidification, atmospheric aerosol pollution, stratospheric ozone depletion, and release of novel chemicals (including heavy metals, radioactive materials, plastics, and more).

generational dimension.[21]

Hence the different approaches mentioned, even if reticent, in the form of attempts to legalize the relations between present and future generations[22] (as well as duties of the current generation).[23]

The dimension of co-responsibility that characterizes the component of sustainable development, which can be attributed to the principle of subsidiarity,[24] is also lead to recognize individual economic operators – consumers included – to an active role in the creation of a more sustainable society.[25]

III. Sustainability, Law and Progress

This renewed cultural context and the set of values included in the 2030 Agenda can allow the principle of sustainable development offering a synthesis also to be adopted by private activities. Even for this reason, a quick glance on the targets of the 2030 Agenda allow us to underline that the integrated approach cannot lead to considering private law impervious to sustainability.[26]

[21] A. Bachiorri, n 19 above, 299-300.

[22] See A. D'Aloia, 'Generazioni future (diritto costituzionale)' *Enciclopedia del diritto* (Milano: Giuffrè, 2016), IX, 311-390; Id, 'Costituzione e protezione delle generazioni future?', in F. Ciaramelli and F.G. Menga eds, *Responsabilità verso le generazioni future* (Napoli: Editoriale Scientifica, 2017), 293-337; E. Caterini, n 7 above, 114-133; Id, 'Sustainability and Civil Law' *The Italian Law Journal*, 289-314 (2018); C. Caccavale, 'Per un diritto sostenibile', in G. Conte and M. Palazzo eds, *Crisi della legge e produzione privata del diritto* (Milano: Giuffrè, 2018), 241-269; C. Perlingieri, 'Nuove forme di partecipazione politica e «metodo democratico»' *Rassegna di diritto civile*, 873-900 (2018).

[23] The rights of future generations are conjugated as duties of the current generation, for example, by S. Mabellini, 'La sostenibilità in campo ambientale e i diritti delle generazioni future: un'ulteriore prova delle capacità palingenetiche dell'art. 9, comma 2, Cost.' *Diritto e società*, 151-172 (2018). There is no doubt, then, that in constitutions there is a necessary 'projection towards future generations' which however does not necessarily translate into an explicit reminder: see S. Grassi, 'La Costituzione siamo noi' *Nomos*, 11 (2017).

[24] P. Perlingieri, 'La sussidiarietà nel diritto privato' *Rassegna di diritto civile*, 687-690 (2016).

[25] F. Bertelli, '«Dichiarazioni pubbliche fatte dal o per conto del venditore», conformità oggettiva ed economia circolare', in G. De Cristofaro ed, *La nuova disciplina della vendita mobiliare nel codice del consumo* (Torino: Giappichelli, 2022), 223. See G. Capaldo, 'Linee evolutive in tema di soggetti per una società sostenibile' *Persona e mercato*, 335, 340-341 (2020), which observes that 'freedom, social rights, fundamental human rights represent the testing ground of any economic system option, calling for an investigation which, as well as being juridical, also addresses and resolves ethical options and distributive and social justice' and states that 'subsidiarity is a value of the legal system which presupposes the integration between public power and social groups in the primacy of freedom and civil society [...] the art. 118 of the Constitution is a confirmation of the recognition of the centrality of the human person both as an individual and in social formations'.

[26] F. Bertelli, 'CSR Communication e consumo responsabile: un circolo virtuoso per la Circular Economy?', in S. Lanni ed, *Sostenibilità globale* n 18 above, 195. See E. Betti, *Teoria generale del negozio giuridico* (1950), repr. (Napoli: Edizioni Scientifiche Italiane, 1994), 48, which clarifies that the law does not have the merely static task of preserving reality unchanged, as well as 'of protecting the current distribution through the conferral of subjective rights to the present holders, it also has the dynamic task of making the perennial renewal possible, of facilitate the circulation

For all these reasons, private law not only cannot be considered extraneous to the ecological tradition, but it can represent a potential and determining factor to pursuit the target no 12 of the 2030 Agenda, specifically dedicated to 'Responsible consumption and production'.[27]

At this point, the question is the following: How can the private law reduce the unsustainability?

An attempt will be explained in details later on, considering that it is already too late trying to mitigate risks.

However, we are now explaining the meaning of sustainability.

In order to explain a concept resulting from a semantic construction which, as described before is based on fallacious assumptions of the distinction of an unobservable unit, it is mandatory combining abstractness and practical implications.

The first source of meaning lies in identifying 'sustainability as an essential concept for material and spiritual progress and, therefore, for law'.[28]

The second source of meaning lies in revealing through sustainability the

> 'need to adapt the categories to the demand for justice, as well as to propose solutions, when applicable, not so much compliant with the letter of the law but adequate to its *ratio*, to the overall logic of the system law in place,[29] based on inalienable normative values identifying the Italian constitutional legality, such as "solidarity" and "human dignity"'.[30]

Sustainable can be exclusively considered the 'development' referred to human being and social cohesion.[31]

This last concept, even more illusory of sustainability, cannot pass only through the exaltation of rights: it requires dutifulness.

of goods and the mutual use of services in accordance with gradually emerging needs'; D. Di Sabato, 'Diritto privato, rapporti economici, sostenibilità ecologica' 25 *The Cardozo Electronic Law Bulletin*, 1-8 (2019); C. Caccavale, n 22 above, 241-269; C. Mignone, 'Diritti e sostenibilità. una ricostruzione per immagini' 14 *Actualidad Jurídica Iberoamericana*, 213-218 (2021).

[27] F. Bertelli, '«Dichiarazioni pubbliche fatte dal o per conto del venditore»' n 25 above, 221-222.

[28] Definition taken from G. Perlingieri, n 7 above, 101.

[29] Complex and unitary, P. Perlingieri, 'Complessità e unitarietà dell'ordinamento giuridico vigente' *Rassegna di diritto civile*, 188-216 (2005).

[30] G. Perlingieri, n 7 above, 101, which, in turn, recalls the values evoked by E. Caterini, n 7 above, 11.

[31] ibid 145: 'Therefore sustainability is a transversal concept that concerns the judge and the legislator; and it is also a noun that must assist the operation of all legal institutions, in order to ensure respect for the hierarchy of sources and values, as well as the "pre-eminence of the personalist function over the mercantile and patrimonialist one", since without a consideration of the weaker groups the European project is destined to fade away', see G. Perlingieri, n 7 above, 102; G. Vettori, *Contratto e rimedi. Verso una società sostenibile* (Padova: CEDAM, 2021), 60; Id, 'Diritti e coesione sociale. Appunti per il seminario fiorentino del giorno 8 giugno 2012' *Persona e mercato*, 4 (2012), who notes that '(t)he European institutions set the objective of sustainable development based on balanced growth and a highly competitive social market economy (...) it is not an empty formula, but a clause general principle which must be translated into principles and operational rules with the collaboration of all the social sciences'.

> 'It has to be guaranteed inviolable rights[32] to the person recognizing the mandatory duties of human being. Without dutifulness there is no sociality',[33] so that duty is 'immanent to sociality'.

Sustainability, it has been authoritatively written, becomes a parameter of worthiness of all interests pursued.[34]

In coordination with the renewed requests for sustainability, consumer protection brings new content into an evolutionary dimension intended to give added value to the human choices, well beyond the profit achievement, pursuing relevant interests in terms of sustainability.[35]

The evolution in the globalized economy[36] originated through a development dynamic characterized by the circularity of the production and consumption cycle, as well as to the recovery, reuse and recycling of the good.[37]

Private autonomy can achieve a model of production and consumption able to preserve these elements till their exhaustion, contemplating the principle of solidarity[38] as driving force of the economic system.[39]

[32] See F.G. Viterbo, 'Bisogni primari della persona e diritti inviolabili: limiti dell'autonomia individuale e collegiale', in M. Costantino et al eds, *Destinazioni d'uso e discipline inderogabili nel condominio* (Milano: Giuffrè, 2014), 147-193; G. Berti De Marinis, *Disciplina del mercato e tutela dell'utente nei servizi pubblici economici* (Napoli: Edizioni Scientifiche Italiane, 2015), 183-268.

[33] E. Caterini, n 7 above, 21.

[34] G. Perlingieri, n 7 above, 102. See also G. Perlingieri, 'Il controllo di «meritevolezza» degli atti di destinazione *ex* art. 2645 *ter* c.c.' *Foro napoletano*, 63 (2014). With regard to the different methods of recourse to the principles underlying the control over acts of autonomy, S. Polidori, 'Il controllo di meritevolezza sugli atti di autonomia negoziale', in G. Perlingieri and M. D'Ambrosio eds, *Fonti, metodo e interpretazione. Primo incontro di studio dell'associazione dei dottorati di diritto privato* (Napoli: Edizioni Scientifiche Italiane, 2017), 391-408. With regard to the control of merit of 'sustainable finance' contracts see R. Di Raimo and C. Mignone, 'Strumenti di finanziamento al Terzo settore e politiche di intervento locale nella «società inclusiva» europea. (Dalla filantropia alla finanza alternativa)' *Giustizia civile*, 139-196 (2017).

[35] G. Vettori, 'Verso una società sostenibile' *Persona e mercato*, 466 (2021).

[36] On the evolution of the economic system in a 'globalized' sense see E. Capobianco, 'Globalizzazione, mercato, contratto' *Persona e mercato*, 133-143 (2017).

[37] Concepts to which we will return. See also M.A. Ciocia, 'Circolarità economica e trasparenza del prodotto' I *The European Journal of Privacy Law & Technologies*, 57-71 (2022).

[38] S. Rodotà, *Solidarietà* n 6 above, 102, who observes that solidarity is 'a principle that provides the legal basis for the continuous restructuring of the socio-institutional system. It thus shows an inclusive attitude not only towards people, but towards the set of tools which, in the variability of times and contexts, make its realization possible'. On the principle of solidarity, in addition to the works cited in n 6 above, see A. Lener, 'Ecology, person, solidarity: a new role of civil law', in N. Lipari ed, *Tecniche giuridiche e sviluppo della persona* (Roma-Bari: Laterza, 1974), 333-348; N. Lipari, 'Il senso della Costituzione. La cultura della solidarietà nella Costituzione italiana' *Parlamento*, 16-24 (1989); P. Perlingieri, 'I diritti umani come base dello sviluppo sostenibile. Aspetti giuridici e sociologici' *Rivista giuridica del Molise e del Sannio*, 71-74 (2000); F.D. Busnelli, 'Solidarietà: aspetti di diritto privato' *Iustitia*, 435-452 (1999); R. Di Raimo, 'Date a Cesare (soltanto) quel che è di Cesare. Il valore affermativo dello scopo ideale e i tre volti della solidarietà costituzionale' *Rassegna di diritto civile*, 1082-1095 (2014); D. Porena, *Il principio di sostenibilità. Contributo allo studio di un programma costituzionale di solidarietà intergenerazionale* (Torino: Giappichelli, 2017), 172-178.

[39] See M. Monteduro and S. Tommasi, 'Paradigmi giuridici di realizzazione del benessere

Even before that, the arduous task falls to the legislator.

IV. Circular Economy and Market Regulation

In ancient times, consumption assumed a strongly negative meaning. So, the Latin verb '*consumere*', adopted into European languages, has assumed different meanings such as: 'using up, wasting away, finishing'.

Considering consumption no longer as wasteful, or as ruining a community, but rather as a way to make nations richer, more civilized and stronger can be traced back to the 18th century.

Adam Smith has highlighted the social and psychological impulses that drive people to gather and consume goods: they have begun to look at objects as 'means of happiness'.[40]

This has led to the implementation of consumption models, and before that of production, which focus on immediate gratification, wanting and owning more and more.

Different and more circular business models try to limit those externalities and can even help achieving sustainable economy along the lines of Kate Raworth's alternative 'doughnut' economic model: a model aimed to ensure access to basic needs for everyone, including but not limited to adequate food and education for the present and future generations. This model protects our ecosystem and evaluates the planetary boundaries.[41]

To enable and incentivize such more circular business models, the Law has a key role to play; this can also be applied to the 'conventional' consumer law. If consumer law needs to stay relevant, particularly because this role has already been acquired, it cannot only consider consumer protection goals in the short term; it should balance them with sustainability goals in order to protect consumers interests in the long term.[42]

Reflection of the new model of 'circular economy',[43] on the consumer level,

umano in sistemi ecologici ed esistenza indisponibile e ad appartenenza necessaria' *Benessere e regole di rapporti civili. Lo sviluppo oltre la crisi. Atti del 9° Convegno Nazionale S.I.S.Di.C. in ricordo di G. Gabrielli* (Napoli: Edizioni Scientifiche Italiane, 2015), 161-202.

[40] A. Smith, *Teoria dei sentimenti morali* (Milano: BUR, 1995).

[41] K. Raworth, *L'economia della ciambella. Sette mosse per pensare come un economista del XXI secolo* (Milano: Edizioni Ambiente, 2020), 373.

[42] E. Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' IV *European Review of Private Law*, 872 (2019).

[43] We talk about the 'circular economy' to describe that new economic model, as opposed to the so-called linear 'take-make-consume-throw away' one, in which products and materials maintain their value and functions for as long as possible. This is on the assumption that the resources necessary for the production of goods are not unlimited, always accessible and can be eliminated at low cost. Therefore, the implementation of such a model would contribute to environmental protection in a dual way: on the one hand, it would reduce the demand and use of raw materials; on the other hand, the production of waste and pollution would decrease. See D.M. Matera, 'Difetto di conformità, gerarchia dei rimedi e sostenibilità ambientale nel nuovo

is the idea of sustainable consumption, which is also expressly valued at least in the inspiring reasons – translated in the recitals – by Directive 2019/771/EU.[44]

The new legislation on the sale of consumer goods, in reality, has fallen down into a regulatory environment that is already markedly eco-based.[45] This is primarily evidenced by sources of the primary rank.[46]

art. 135-*bis* cod. cons. e nella Dir. 771/2019' *Rivista di diritto privato*, 458-459 (2022).

[44] On EU Directive 2019/771 see G. Alpa, 'Aspetti della nuova disciplina delle vendite nell'Unione europea' *Contratto e impresa*, 825-830 (2019); J.M. Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services. Overview of Directives 2019/770 and 2019/771' *Journal of European Consumer and Market Law*, 194-201 (2019); A. De Franceschi, *La vendita di beni con elementi digitali* (Napoli: Edizioni Scientifiche Italiane, 2019), 31-36; F. Addis, 'Spunti esegetici sugli aspetti dei contratti di vendita di beni, regolati nella nuova Direttiva (UE) 2019/771' *Rivista Nuovo Diritto Civile*, 5-27 (2020); A. Barenghi, 'Osservazioni sulla nuova disciplina delle garanzie nella vendita dei beni di consumo' *Contratto e impresa*, 806-822 (2020); J. Venherpe, 'White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content' *European Review of Private Law*, 251-274 (2020); G. De Cristofaro, 'Verso la riforma della disciplina delle vendite mobiliari b-to-c: l'attuazione della dir. UE 2019/771' *Rivista di diritto civile*, 205-249 (2021).

[45] On the importance of the environmental issue in the European Union, M. Pennasilico, 'Economia circolare e diritto: ripensare la "sostenibilità"' *Persona e mercato*, 714-716 (2021) with a reference to European acts that enhance the principle of sustainable development. The A. speaks of ecological 'conversion', considering the use of this term preferable to that of 'transition'; see also Id, 'Dal "controllo" alla "conformazione" dei contratti: itinerari della meritevolezza' *Contratto e impresa*, 823 (2020), he highlights how social and environmental interests emerge in the Italian-European system of public and private negotiations. The role that environmental sustainability must play in consumer law is now widely emphasized by the doctrine, which attributes a fundamental role to this discipline in the development of a circular economy. Among the many opinions in this sense, see especially the reflections of H.W. Micklitz, n 4 above, 229-237; M. Pennasilico, 'Contratto ecologico e conformazione dell'autonomia negoziale' *Rivista quadrimestrale di diritto dell'ambiente*, 6 (2017), he considers the consumer an active part, which promotes and defends a fairer, more correct and responsible market. F. Capra and U. Mattei, *The Ecology of Law. Toward a Legal System in Tune with Nature and Community* (Oakland: Berrett-Koehler, 2015), 131, they argue the need for a general valorization of environmental protection in the very concept of law. For reflections on the relevance of sustainability in the contractual context see M.C. Gaeta, 'Il problema della tutela giuridica della natura: un'analisi comparata tra Italia e Stati dell'America Latina' *Rivista Nuovo Diritto Civile*, 313-342 (2020).

[46] D. Imbruglia, 'Mercato unico sostenibile e diritto dei consumatori' *Persona e mercato*, 510 (2021), who notes that 'the formula of sustainable development is today present in numerous sources of international law and in the jurisprudence of the International Court of Justice. In current primary source Euro-unitary law, sustainable development is an objective that binds the internal and external action of the Union, with respect to a plurality of environmental, social and market policies. With reference to this last dimension, the discussion initiated in recent years determines a new season of regulation of private autonomy which entails a bringing of the market closer to the ideal of sustainable resource management and therefore careful to avoid waste in the production and consumption of goods and he concludes by highlighting that 'this objective passes through private law. In particular, it is articulated in a strategy of effective control of misleading advertising statements, in the provision of an information exchange extended to the characteristics relating to the durability and repairability of the good, a strong incentive for repair instead of replacement, as well as reuse of the good'. Among the milestones recalled by the International Court of Justice to highlight the hermeneutic role of the principle of sustainable development we can mention, in particular, the decision *Gabcikovo-Nagymaros Project* (*Hungary* v *Slovakia*), 25 September 1997, available at tinyurl.com/4zepamy9(last visited 30 September 2024).

The Treaty on European Union (TEU) in Art 3, para 3, is providing that the Union works for the sustainable development,[47] specifying that this development has to be based (among other elements) 'on a high level of protection and quality environment improvement'. Para 5 of the same article is establishing the active role that the Union plays in accordance with the rest of the world in promoting 'the sustainable development of the Earth'.

On the other hand, the Treaty on the Functioning of the European Union (TFEU) in Art 11 is providing that environmental protection requirements must be integrated into the definition and implementation of Union policies aimed at the sustainable development promotion.

Similarly, Art 37 of the Charter of Fundamental Rights of the Union is also establishing that Union policies should aim to a high level of environmental protection and quality improvement, to be ensured in accordance with the principle of sustainable development.[48]

It is clear that, in these sources the idea itself of 'sustainable development' is firmly linked to the environmental protection, and can be translated with the need a new sustainable single market.[49]

In recent times, the Euro-unitary institutions seem to have reached the targets, already affirmed in primary-ranking sources, of establishing a sustainable single market.

This goal fixes the internal and external action of the Union, with respect to a plurality of environmental, social and market policies.

The principle of 'sustainable development' - introduced, but not defined by the Treaty of Amsterdam of 1997 - establishes its best-known definition in the 1987 Report of the World Commission on Environment and Development (so-called *Brundtland Report*),[50] which considers 'sustainable' the 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

The analysis of the relationship between constitutional legality and sustainable development, carried out without ideological preconceptions and in the awareness of the axiological hierarchy that legitimizes the legal system in force, allows us to understand that the notion of sustainable development can only be conform to the priority of personalist and solidarity values,[51] indicated by Italian-European

[47] On the notion of sustainable development see M. Pennasilico, 'Sviluppo sostenibile, legalità costituzionale e analisi "ecologica" del contratto' *Persona e mercato*, 37-38 (2015); Id, 'Economia circolare' n 45 above, 714-716.

[48] D.M. Matera, n 43 above, 460.

[49] The European Parliament reaches these conclusions in the European Parliament Resolution (2020/2021(INI)) of 25 November 2020 on Towards a more sustainable single market for business and consumers [2021] OJ C 425/10. In this regard, see D. Imbruglia, n 46 above, 506-508.

[50] The document, commissioned by the United Nations under the title *Our Common Future*, is usually referred to by the name of the coordinator Gro Harlem Brundtland, who chaired the Commission in 1987.

[51] P. Perlingieri, 'Principio personalista, dignità umana e rapporti civili' *Annali della SISDiC*

positive law.[52]

So, in light of these guidelines, the programmatic regulatory framework outlined in recent years is defining a new season of regulation of private autonomy bringing the market closer to the ideal of sustainable resource management and consequently taken to avoid production wastes and goods consumption.

More importantly, ethical, social and ecological considerations must be taken into account to define the market consumer choices.

The classic vision of consumer law, which reflects the *homo oeconomicus* model – the model of 'rational economic agent' – has to be re-examined nowadays in the light of consumption acts carried out by players who act in the market as bearers of complex interests.

The ability of a commodity to satisfy its needs is increasingly evaluated on the basis of ecological, social and political considerations. This evaluation is not simply looking at just the function of the purchased goods and its enjoyment.

It is no longer a 'niche' phenomenon. The 'ethical consumption' has grown in recent years, so much to influence the production and goods supply. We are now observing the proliferation of commercial operators who adopt (and advertise) sustainability policies on several fronts: from the selection of raw materials, to production techniques, up to the working conditions of their employees.[53]

The goal of the convenience of the immediate result is set aside according to the perspective of the neoclassical vision which is based on the theory of personal interest.

Consumer choices no longer merely respond to a pure selfish calculation. The act of consumption often assumes an axiological dimension that deserves to

2020, 1-17 (2020).

[52] M. Pennasilico, 'Sviluppo sostenibile' n 47 above, 41. Ample evidence of the primacy of personalistic and solidarity values in P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, II, *Fonti e interpretazione* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), 159-190; see also N. Lipari, *Diritto e valori sociali. Legalità condivisa e dignità della persona* (Roma: Studium, 2004); S. Rodotà, *Dal soggetto alla persona* (Napoli: Editoriale Scientifica, 2007), 26-88; Id, 'Il nuovo *Habeas Corpus*: la persona costituzionalizzata e la sua autodeterminazione', in S. Rodotà and M. Tallacchini eds, *Trattato di bio-diritto Rodotà e Zatti, Ambito e fonti del biodiritto* (Milano: Giuffrè, 2010), 169-230; Id, *Solidarietà* n 6 above, 2014; F.D. Busnelli, 'La persona nell'interazione tra norme di diritto internazionale e princìpi di diritto privato «costituzionalizzato»', in *L'incidenza del diritto internazionale sul diritto civile. Atti del 5° Convegno Nazionale S.I.S.Di.C.* (Napoli: Edizioni Scientifiche Italiane, 2011), 43-55; F. Parente, 'La persona e l'assetto delle tutele costituzionali', in G. Lisella and F. Parente eds, *Persona fisica* (Napoli: Edizioni Scientifiche Italiane, 2012), 43-49. More generally, the principle of sustainable development could also be recognized as having that 'nomogenetic' function, which assigns 'even to subjects other than the legislator, the task of identifying what the legislator is no longer able to do exclusively' (F. Addis, 'Sulla distinzione tra regole e principi' *Europa e diritto privato*, 1043 (2016)).

[53] C. Mignone, Report entitled '*Homo oeconomicus*, *homo ecologicus*, *homo digitalis*. Towards a sustainable consumer law' as part of the *Summer School* '*Consumer Rights and Europe's Digital Future*' held in Lecce on 10 May 2022.

be projected also in a remedial perspective.[54] We are now going to better clarify this point.

Therefore, the act of consumption becomes an 'axiological act'.[55] The ethical consumer, moreover, is willing to pay a higher price for goods that ensure this correspondence, in the belief that their individual purchasing choices contribute to the promotion of a fairer and more equitable market.

This leads us to reflect on the relationship between 'sustainable consumption' and market regulation goals. Especially if we consider that these 'new values' which inspire the act of consumption today do not express simple tastes or consumers whims. On the contrary, they reveal particular attention toward fundamental rights, whether they are related to individuals, non-human subjects, or to the environment. These rights are no longer conceived in a purely vertical value – such as claims against public authorities – but in a horizontal dimension, as a limit to the exercise of economic activities.[56]

V. Conformity and Remedies in the New Regulation of the Sale of Consumer Goods

It is the relationship between private law and sustainability that is solicited, in light of the technological transformations and the digital revolution which have opened up important glimmers for reflecting, as anticipated, in a remedial perspective on the durability of products and the 'right to repair'.[57]

As for the first concept, there is an important evolution.

It is quite obvious referring to the notion of 'non-conformity', recently restructured by the European legislator with the approval of the Directives 2019/770/EU and 2019/771/EU on contracts for the supply of digital content and digital services and on contracts for the goods sale.[58]

The concept reflects a set of rules somewhat 'crushed' on the material features of the contract good where potential anomalies in the production process are destined to be detected only if they have an impact on the consumer's right to use the thing protected from the hypothesis of 'malfunctioning'.

[54] In this sense A. Quarta, 'Per una teoria dei rimedi nel consumo etico. La non conformità sociale dei beni tra vendita e produzione' *Contratto e Impresa*, 523 (2021). See also L. Mezzasoma, 'Consumatore e Costituzione' *Rassegna di diritto civile*, 311-327 (2015).

[55] A. Quarta, n 54 above, 524.

[56] C. Mignone, '*Homo oeconomicus*' n 53 above.

[57] A. Quarta, 'Contenuti digitali e beni con elementi digitali: c'è ancora posto per la proprietà privata?', in T. Pasquino et al eds, *Questioni attuali in tema di commercio elettronico* (Napoli: Edizioni Scientifiche Italiane, 2020), 46-52.

[58] European Parliament and Council Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1 and European Parliament and Council Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28.

And yet, for some time now, an authoritative doctrine has tried to filter, within these rather tight meshes, those hypotheses of 'social non-conformity'[59] which are due to 'unsustainable' production processes, because they are characterized by the violation of the fundamental rights of third parties.

In particular, Art 2, para 2 (d) of Directive 99/44/EC, repealed by Directive 2019/771/EU, identified, as an index of conformity, the usual qualities and performances, specifying that both should be defined in relation to the reasonable consumer expectations,

> 'considering the nature of the goods and public statements about the characteristics of the goods made by the seller, the manufacturer or his agent or representative, in advertising or on labelling'.[60]

Especially before the entry into force of 170/2021 Decree Law[61] implementing the Directive 2019/771/EU, an asset could be considered compliant with the provisions of the law when it was suitable 'for the use for which goods of the same type are usually used' (Art 129, para 2, (a) Consumer Code) and it was therefore able to ensure the typical and normal use to which the goods falling within the same product category are destined. Therefore, they detected the intrinsic features of the consumer good which ensure the perfect functioning of the good, allowing its use.

Art 129, para 2, (c) Consumer Code identified the usual qualities and performances as an index of conformity, to be defined not only in relation to goods of the same type, but also to the reasonable expectations of the consumer

> 'considering the nature of the goods and, where appropriate, public declarations on the specific features of the goods made in this regard by the seller, the producer or his agent or representative, with a particular focus on advertising or on labeling'.

Furthermore, the conformity was verified starting from the description of the goods made by the trader (point b)) and detecting the brochures contents or other information delivered to the consumer. Finally, the last index concerned the lack of promised qualities in relation to 'the particular use desired by the consumer', provided that this was accepted by the trader 'also by conclusive facts' (point d)).[62]

The aforementioned Directive on certain aspects concerning contracts for the sale of goods (Dir 771/2019/EU) has changed the regulation on the conformity of the goods sold, providing, in place of the complicated system of presumptions referred to in Art 2 of Directive 1999/44/EC, two distinct conformity profiles: one

[59] The expression is used by A. Plaia, 'La garanzia convenzionale nella vendita al consumo' *Rivista di diritto civile*, 159 (2005).

[60] H. Collins, 'Conformity of goods, the network society, and the ethical consumer' *European Private Law*, 633 (2014).

[61] Decreto legislativo 4 November 2021, n. 170 entered into force on 10 December 2021.

[62] A. Quarta, 'Per una teoria' n 54 above, 533.

defined as subjective (Art 6) and the other as objective (Art 7). From an attention standpoint to sustainability needs, point d) of this last provision comes into clear relief and, therefore, the reference to durability as an objective requirement of conformity, so that the seller is obliged to provide the consumer (Art 5) a good that has the normal durability 'in a good of the same type and which the consumer may reasonably expect' (Art 7.1. (d)). Moreover, if the inclusion of the average life expectancy that the consumer can reasonably expect among the good conformity requirements represents the real effect of the provision, other doctrine, in an interpretative way, believes that the same reference (durability) should also include reparability.

By always placing ourselves in a favorable perspective to a sustainable market, it signifies that among the elements that contribute to the formation of the expectation on the durability of the good, Directive 2019/771/EU also includes the

> 'public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling' (Art 7.1. (d)).

It is argued[63] that this statement, could provide legal basis for the fight against greenwashing[64] which is further and different from that one followed up to now, represented by the reconciliation of misleading sustainable declarations in the context of unfair commercial practices.[65]

As for the remedy plan, Art 13 of Directive 2019/771/EU, fully transposed in Art 135-*bis* of the Consumer Code, provides that in case of lack of conformity of the good, the consumer has the right to restore the conformity of the goods, or, alternatively, to receive a proportional price reduction, or to terminate the contract.

[63] E. Van Gool and A. Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: a Critical Analysis' IV(10) *Journal of European Consumer and Market Law*, 136-147 (2021).

[64] The term 'greenwashing' aims to summarize the exploitation of information relating to the social and environmental responsibility of the company for advertising purposes, motivated by the factual data which increasingly sees commercial decisions based on reasons that go beyond economic interest. In this sense F. Bertelli, *Le dichiarazioni di sostenibilità nella fornitura di beni di consumo* (Torino: Giappichelli, 2022), 45; Id, 'Dichiarazioni pubbliche' n 25 above, 228-229. On the topic, see R. Torelli et al, 'Greenwashing and Environmental Communication: Effects on Stakeholders' Perceptions' *Business Strategy and the Environment*, 407-421 (2020). On the effects of greenwashing on consumption choices, from a sociological and economic perspective see *ex multis*, M. Carrigan and A. Attalla, 'The Myth of the Ethical Consumer – Do Ethics Matter in Purchase Behaviour?' *Journal of Consumer Marketing*, 560-574 (2001); E. Maitre-Ekern, 'The choice of regulatory instruments for a circular economy', in K. Mathis and B. Huber eds, *Environmental Law and Economics* (Cham: Springer, 2017), 305-334; I. Topall et al, 'The Effect of Greenwashing on Online Consumer Engagement: A Comparative Study in France, Germany, Turkey, and the United Kingdom' *Business Strategy and the Environment*, 465-480 (2020).

[65] D. Imbruglia, 'La sostenibilità dei rimedi consumeristici nella direttiva 771/2019/UE e oltre' XVI *Actualidad Jurídica Iberoamericana*, 358 (2022), who recalls the proceedings AGCM, PS/4026; PI/2486; PS/ 6302; PS/10211; PS/8438; PS/1038; PS/7235; PS/11400 (all available at https://tinyurl.com/39bxu3t8) (last visited 30 September 2024).

For the purposes of the so-called primary remedy (restoration of the conformity of the goods), Art 13, para 2 of Directive 2019/771/EU states that the consumer can choose between repair and replacement. The provision then clarifies that the seller is obliged to carry out the restoration of conformity according to the method chosen by the consumer (repair or replacement) unless this does not present disproportionate costs.

The same Art 135-*bis* of the Consumer Code specifies that the disproportion has to be assessed considering all the circumstances and in particular: a) the value that the goods would have if there were no lack of conformity; b) the significance of the lack of conformity; c) the possibility of using the alternative remedy without significant inconvenience for the consumer.[66]

The choice between repair and replacement is left to the consumer, once again.

All sustainability needs are debased by this recent regulatory framework; by the lack of hierarchization of the remedies suitable for restoring the conformity of the property.

Even more if we consider that the Directive 2019/771/EU itself advocates these needs in its recitals.

Reference is made, first of all, to recital no 32 of Directive 2019/771/EU, in the part in which it specifies that 'Ensuring longer durability of goods is important for achieving more sustainable consumption patterns and a circular economy'. At the same time, then, the recital no 48 identifies in the repair the tool to 'encourage sustainable consumption and could contribute to greater durability of products'.[67]

And, therefore, repair as 'an inherently sustainable remedy'.[68]

Although reparation is therefore one of the primary remedies in the remedial system outlined by the Directive, which is a commendable choice in terms of sustainability, it is not preferred to the alternative primary remedy of replacement by the European legislator. The choice between repair or replacement is up to the consumer in the system of the Directive,[69] but there is no incentive or obligation

[66] Art 13, para 2, Directive (EU) 2019/771. With regard to the disproportionality of costs, a difference can be identified in the literal wording between the old and new legislation. Directive 1999/44/EC, in fact, provided for and specified that a remedy should be considered disproportionate if it imposed unreasonable costs on the seller compared to the other, taking into account: i) the value the goods would have if there were no lack of conformity; ii) the significance of the lack of conformity; iii) whether the alternative remedy could be completed without significant inconvenience to the consumer. The new legislation makes it explicit that for the purposes of assessing the disproportionality of the costs of the remedy, 'all the circumstances' must be taken into account and in particular those indicated in points a), b) and c) of para 2, Art 13 Directive (EU) 2019/771.

[67] See S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/771' *Giurisprudenza Italiana*, 230-238 (2020); and in Id, *Il diritto privato europeo in trasformazione. Dalla direttiva 771/2019/UE alla direttiva 633/2019/UE e dintorni* (Torino: Giappichelli, 2020), 8-13;A. Barenghi, n 44 above, 810; T.M.J. Möllers *'The Weaknesses* of the Sale of Goods Directive – Dealing with Legislative Deficits' *Jus civile*, 1186 (2020).

[68] E. Van Gool and A. Michel, n 63 above, 136-147.

[69] S. Jansen, 'Hiërarchie der remedies in de consumentenkoop: EU vs VS' I *Tijdschrift Voor Privaatrecht*, 211 (2017); D. Staudenmayer, 'The Directive on the Sale of Consumer Goods and

for the consumer to opt for the repair instead of the replacement.

Environmental impact does not appear to play any role in the weighting exercise.[70]

From a sustainability perspective, inputs referred to in the aforementioned recitals, are thwarted and have no correspondence in the body of the legislative framework.

In addition to not having foreseen a preference for repair over replacement,[71] the European legislator, perhaps unconsciously, has even reduced the spaces for restoring conformity (and, therefore, those for possible repair), by introducing hypotheses in which the lack of conformity gives the consumer the right to directly request the proportional reduction of the price in compliance with or the termination of the sales contract (Art 13, para 4, Dir 2019/771/EU).[72]

All things considered, in a society in which consumers are used to instant gratification and in which manufacturers spend huge budgets 'to wet consumer's appetites for the most recent products with the newest design features',[73] it is not objectively easy justify the option for the reparative remedy over the replacement.

VI. Possible Techniques to Encourage the Repair of Goods

It is certainly correct to confirm that the consumer is in the best position if he has a free choice of remedies, as this is currently the case in some EU Member

Associated Guarantees – A Milestone in the European Consumer and Private Law' *European Review of Private Law*, 547-554 (2000); M.C. Bianca, 'Article 3: Rights of the consumer', in M.C. Bianca and S. Grundmann eds, *EU Sales Directive – Commentary* (Antwerpen: Intersentia, 2002), 149-168.

[70] A case judged by the Norwegian Supreme Court in 2006 is quite interesting in this regard. In Norway, consumers also have the right to choose between repair or replacement, unless the chosen remedy involves 'unreasonable costs' for the seller. The case concerned the heels of boots that had broken six weeks after the purchase. The seller refused the replacement as this would lead to unreasonable costs. The Supreme Court considered this justified and explicitly made reference to environmental reasons: the repair was justified as it seemed also the most respectful option of the environment.

[71] S. Pagliantini, n 67 above, 230-238, which underlines how the restoration of compliance by means of a repair intervention of the asset/correction of the defect certifies that the European discipline of the sale of consumer goods and the remedies to protect the consumer cannot be read in the exclusive interest of one of the parties, but are more generally aimed at encouraging sustainable consumption; A. Barenghi, n 44 above, 811-812, who notes that 'durability and sustainability are taken into consideration by the legislator of the reform in complementary terms with respect to the specific legislation on individual products, identified as a more suitable *sedes materiae* and in order to connect on the one hand the assessment of compliance of the product, in the sense that the product must guarantee durability considered normal for assets of the same type and that the consumer can reasonably expect, taking into account the nature of the specific goods, including any need for reasonable maintenance of the goods'.

[72] D. Imbruglia, 'La sostenibilità' n 65 above, 360.

[73] J. McCollough, 'The disappearing repair trades' VI(33) *International Journal of Consumer Studies*, 625 (2009).

States[74] and as proposed by the *Bureau Européen des Unions de Consommateurs* (BEUC). However, this option does not consider externalities and is difficult to be reconciled with sustainability goals.

It is (at this stage) neither realistic nor desirable to impose remediation as the only remedy in all circumstances. However, a clear hierarchy whereby repair would take priority over replacement rather than being treated as an alternative of equal merit/value to the latter would at least have an awareness-raising effect on both consumers and businesses.[75]

There are many reasons why consumers may prefer the replacement rather than the repair.

Among these: there is the tendency to prefer a new product compared to a repaired one, both from a functional and aesthetic point of view (so-called fashion obsolescence); the consumers distrust delegating their goods to a repairer, distrust of expected repair time and distrust on how repairs are made.[76]

The consumer propensity is also encouraged by a regulatory datum of the new discipline, result of the transposition of a well-known orientation of European jurisprudence.[77] The reference goes to the Art 135-*ter*, para 4, of the Consumer Code, in which it is foreseen that the consumer is not required to pay for the normal use of the replaced good in the period preceding the exercise of the remedy. The weak contractor has the right to ask for a new good, for free, even after the conclusion of the contract.

The goodness of repair is also appreciable in the presence of other techniques usually considered sustainable.

It is a far more efficient strategy than recycling.[78] Repair (and re-use) provides energy, materials, water and other savings, and the transportation costs to put a product back into use are usually lower. Recycling is less efficient as it causes a loss of material and a deterioration of the materials quality. In addition, recycling a product implies a secondary production stage to bring it back into a reusable form, thus requiring more material consumption than the reuse.[79]

Although, as mentioned, in a logic inspired by sustainability, repair is preferred to replacement, undoubtedly in this order of ideas the best option could be the repair with 'renewed' or 'remanufactured' goods. Remanufacturing is the process

[74] The reference is to Greece, Portugal and Slovenia.

[75] E. Terryn, n 42 above, 857-858.

[76] ibid 854; as well as V. Mak and E. Terryn, 'Circular Economy and Consumer Protection' 43 *Journal of Consumer Policy*, 235-248 (2020); cf J.M. Carvalho, 'The premature obsolescence of the new deal for consumers' III(10) *Journal of European Consumer and Market Law*, 87 (2021), which highlights how no element in the directive would favor repair with respect to the other remedies.

[77] This is the famous case of the Court of Justice, Case C-404/06 *Quelle AG* v *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, [2008] ECR I-2685.

[78] *United Nations Environment Programme* (2011), 'Recycling of Materials: A Status Report', available at https://tinyurl.com/yhb2pxjd(last visited 30 September 2024).

[79] E. Terryn, n 42 above, 853.

whereby a used product is returned into the 'like-new' condition: it includes sorting, inspection, disassembly, cleaning, reprocessing and reassembly and may involve a combination of old and new components.

However, it is a practice that is not yet very widespread in our area, also due to the lack of trust placed by users in the opportunity and convenience of this technique and which can lead to controversial profiles in terms of consumer rights.[80]

A compromise solution, which would require a new intervention by the EU legislator, could be to allow the seller to the replacement of a defective product with another reconditioned (regenerated) good, forcing him to provide to the consumer a new, additional warranty period.

This could overcome the consumers lack of trust in remanufactured goods. This requirement is already known to several EU Member States, as some of them already provide a new extended warranty period after repair or replacement.[81]

The tendency to repair also involves the removal of the obstacles that really prevent the possibility of resorting to do-it-yourself ('DIY') or independent repair.

These obstacles can be of practical and/or legal nature: they range from the lack of spare parts availability to the unreasonable price of the missing parts to the presence of glued components or by items impossible to be disassembled.[82]

Furthermore, the lack of technical sheets availability in the form of manuals or repair notes is particularly challenging for electronic devices. The 'reverse engineering', that is the dissimulation of an item to extract the knowledge needed, is considered only a stopgap solution because of its costs and time-consuming, especially due to the huge number and variety of electronic devices.

In addition, companies often invoke intellectual property rights to prevent consumers and independent repairers from accessing their electronic devices.

Recourse to the remedy could also be stimulated through tax incentives. Several options can be considered: such as a differentiated withdrawal according to reparability; tax deductions for repair costs or a reduced Value added tax (VAT). In Sweden the latter two options have already been adopted.[83]

[80] In the USA, the problem arose regarding the terms of Apple's commercial guarantee. A collective action has been started for the replacement of defective products with reconditioned products where this would not have been clearly indicated in terms of the commercial guarantee.

[81] This is the case of Austria, Croatia, Denmark (3 years after repair), Estonia, Greece. Other countries include a new guarantee period in the event of a replacement (Hungary, Poland, Portugal, Slovakia, Spain).

[82] Apple's patented 'pentalobe security screws' are a notorious example in this regard. These 'security screws' require special screwdrivers to open the device thus hindering independent or DIY repair.

[83] In 2017, Sweden adopted a series of tax measures aimed at strengthening the techniques of repair, recycling and circular economy in general. Specifically, these measures are aimed at decreasing the cost of repairs by reducing the VAT rate on certain goods (including bicycles, shoes and clothes) from 25 per cent to 12 per cent and are aimed at allowing consumers who choose to repair their appliances to deduct from taxes 50 per cent of the cost of labor.

VII. Right to Repair: A New Legislative Framework

If this is the framework resulting from the advent of Directive 2019/771/EU, the result of the related Commission proposal dating back to 2015, it can be confirmed that recently times and in particular after the pandemic crisis, the European institutions seems to have accepted the criticisms from the literature having considered seriously the objective, stated in the Treaties, of establishing a sustainable single market.

To better understand this change of pace, we can move on from the resolution of the European Parliament Resolution 2020/2021 of 25 November 2020 on the theme 'Towards a more sustainable single market for business and consumers',[84] which provides a clear example of the role that private law covers in the establishment of such a market and which intends providing indications for the already announced revision of Directive 2019/771/EU. Since the first recital, the resolution places in the middle the objective of sustainable development: it states that

> 'whereas dwindling natural resources and the proliferation of waste make it essential to establish sustainable patterns of production and consumption which are commensurate with planetary boundaries and focus on a more effective and sustainable use of resources'.

The strategy suggested by the European Parliament to the Commission for the establishment of a sustainable single market relies on various aspects, such as the durability, reparability and reusability of products, which affect contract law on several occasions.

Two private institutes are the most involved: guarantees and information. With regards to guarentees, sustainability is relevant to the extent that longer warranty periods correspond to longer-lasting goods. As regards to the last, the assumption – typical of market regulation – is that in order to establish a sustainable market, characterized by efficient resources management, it is necessary to put the consumer in a position to evaluate a product also bearing in mind its expected life and its reparability.

A crucial point of the strategy aimed to establish a sustainable market as outlined by the Parliament is related to the so-called right to repair. Once again, the resolution deals with the issue of information. It states that information related to spare parts availability, software updates and product reparability should be given to the consumer in a clear and easily readable manner at the time of purchase. By information on the product reparability, the Parliament means information related to the estimated availability period from the date of purchase, the average spare parts price of at the time of purchase, the recommended approximate times for delivery and repair, information on repair and maintenance services, if applicable.

[84] European Parliament Resolution (2020/2021(INI)) of 25 November 2020.

Furthermore, the resolution suggests that the Commission makes this information available even after the purchase, including it in the documentation together with a list of the most frequently encountered breakdowns and how to repair them (Art 10). Again, in order to encourage the repair, the resolution envisages free access to the information needed for the asset maintenance, free of charge for consumers and operators – including independent ones – available in the repair sector (Art 11, (a)) and mandatory for all sellers the information about the repair possibility (Art 10, (e)).

Even more recent and targeted is the resolution of the European Parliament of 7 April 2022[85] concerning the right to repair.

Recital (H) states that

> 'a number of obstacles prevent consumers from opting for repair, including unavailability of information, lack of access to spare parts, lack of standardization and interoperability, or other technical barriers, and the costs of repair'.

Furthermore, the European Parliament encourages the Commission to require manufacturers to design their products in order to last longer and that can be repaired safely and that their components are easily accessible and removable; it also emphases the need to ensure that end-users and independent repair service providers have better access to spare parts and instruction manuals within a reasonable time and at a reasonable cost; it claims that an adequate 'right to repair' should provide repair industry actors, including independent repairers, and consumers with free access to the information needed to maintenance and repair; it emphasizes that while consumers have the right to choose between repair and replacement of defective goods under the Sales of Goods Directive, in practice, consumers usually opt for replacement over repair, often due to the high cost of the repair; therefore would the Commission provide, in its initiative on the right to repair, a set of measures to promote and encourage consumers, producers and traders to opt for repair rather than replacement; it notes that the forthcoming revision of the Sales of Goods Directive could include, *inter alia*, measures addressed to encourage consumers to choose repair rather than replacement, such as an obligation to provide for a replacement product when repairing certain products.

Ultimately, effective relevance is given to the sustainable remedy par excellence, ie the restorative one, prompting a revision of the remedy plan in the direction of a hierarchy of remedies.

On a closer inspection, it can be confirmed that the big technology giants[86] have often expressed their disagreement on the right to repair. And all lows approved in Europe and in the UK have aroused quite a few criticisms from consumer

[85] European Parliament Resolution (2022/2515(RSP)) of 7 April 2022 on the right to repair [2022] OJ C 434/81.

[86] Such as Microsoft, Apple, Amazon.

associations, because considered inadequate.[87] First of all because these standards can be applied only to some equipment. Secondly, because there is no way to prevent manufacturers from making overly expensive repairs by charging higher costs for parts or bundling parts so that sections have to be replaced together.

The first pioneer was Apple. The Cupertino company has announced the 'Self Service Repair' (self-service repairs) allowing customers, Italians included, to fix an issue, to access to the original spare parts of the devices using Apple tools.[88]

Microsoft, right after, announced that would have studied ways and methods to reduce its environmental impact, making its products easier to repair.

As above-mentioned, because the Euro-unitary legislator was not ready in implementing a remedial policy fully in line with the sustainable nature that the Treaties imposed on the single market, national legislators adopted some protection forms consistent with the objective of the sustainable market. In particular, the French legal system has adopted a law which, by intervening on the *Code de l'Environnement* (Environment Code) and on the *Code de la Consommation* (Consumer Code), introduces different significant disciplines in the regulation of the sustainable market.

Among the various provisions introduced by the *Loi* (French Law) no 2020-105[89] in the *Code de l'Environnement* of particular interest is the new Art Legge 541-9-2 which introduces the reparability index ('*indice de réparabilité*'), suitable to inform consumers about the possibility of good repair. All producers, importers, distributors or other subjects involved who are introducing electrical products on the market are therefore obliged to communicate this index to the seller (as well as the parameters used for the determination), which will then be communicated, by labeling and at the time of purchase, from the seller to the consumer. Starting from January 2024, this obligation will be changed: reference will have to be made to a sustainability index ('*indice de durabilité*'), and not to the reparability index, suitable to represent asset features related to the reliability and product hardness.

With reference to the various rules introduced by the *Loi* no 2020-105 in the *Code de la Consommation* (Consumer Code), it is worth recalling the provisions on repair. In order to facilitate the use of this remedy, the French legislator has

[87] On 1 March 2021, the Regulation (EU) 2021/341 entered into force. It stipulates that washing machines, dishwashers, refrigerators and screens (including televisions), light sources and separate control equipment must be manufactured to be more easily repairable and have a longer life (requiring manufacturers to provide professional repairers spare parts and repair manuals). From 1 September 2021, external power supplies, light sources and control equipment are also subject to these obligations. The UK was one of the first states to align substantially with these EU measures. The provisions of the Ecodesign Directive for energy-related products and the Energy Information Regulations 2021, also known as the 'Right to Repair' regulations, were ratified by the Government of the United Kingdom of Great Britain (UK) on 1 July 2021.

[88] The change is effective from 6 December 2022. Customers in Belgium, France, Germany, Italy, Poland, Spain, Switzerland and the United Kingdom can purchase original Apple parts and tools as well as have direct access to repair manuals.

[89] *Loi no 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire* (available at https://tinyurl.com/5f3ad4s8) (last visited 30 September 2024).

established, on one hand, that to all products repaired under the legal guarantee is applied a six-month extension and, on the other hand, that, if the repair cannot be carried out by an expert, the good given in replacement of the defective one is covered by an annual guarantee (Art Legge 217-9). Secondly, the *Loi* no 2020-105 has been also applied in the discipline on planned obsolescence envisaged by the *Code de la Consommation*, introducing a specific prohibition for manufacturers from making it enable to be repaired or regenerated (Art Legge 441-3). This prohibition has the clear intention to allow the asset repair even outside the official circuits of the subject who placed the asset on the market.[90]

VIII. Looking for a New Balance

It is undeniable that the current European Union law is seriously behind in terms of the targets aimed to put in place a sustainable single market.

The time is ripe for the regulation of employment between consumer and trader to be implemented part of the doctrine itself. In other words, the search for a new 'equilibrium' is finally imposed, which no longer requires exclusively an equivalence of services. A balance that, regardless of market valuations related to the good or service, considers the consumer's non-patrimonial interests as well.[91]

It is exactly what the consumer law needs to take the path towards sustainability: wider-ranging remedies to be incentivized with respect to protection devices still modeled on individual interests, therefore incapable of activating those broader dynamics to which the 'ecological consumer' aspires.

In this regard, the enhancement of the durability, reparability and reusability of the product should encourage investments aimed at ensuring the repair interventions not only physically feasible, but also economically sustainable for the seller who, therefore, would prefer an intervention on the *res* (item), already delivered, instead of its replacement with another. In the same direction, an expression of general preference for the selected remedy could in turn promote the goods production much more easily repairable or updatable to the detriment of disposable or planned obsolescence products.[92]

[90] D. Imbruglia, 'La sostenibilità' n 65 above, 365-366.

[91] P. Perlingieri, 'Equilibrio normativo e principio di proporzionalità nei contratti' *Rassegna di diritto civile*, 348-356 (2001); Id, *Il diritto dei contratti tra persona e mercato* (Napoli: Edizioni Scientifiche Italiane, 2003), 305-317; Id, 'L'interesse non patrimoniale e i contratti' *Annali della Facoltà di Economia di Benevento*, 19-45 (2012).

[92] A. Barenghi, n 44 above, 812, who observes that the parameters of the durability and sustainability of the product could be included among the elements that the seller could cite to refuse the replacement in favor of the repair. However, the Author also notes that, despite the importance attributed by the Recitals (nos 32 and 48) to the durability of the product and the sustainability of the remedy, 'the circumstance that the Art 13, para 2, does not contain any reference to this aspect is therefore an indication of the only declamatory nature of this reference, as it is at least doubtful whether the interpreter can leverage the clarifications of the recital to also introduce the reference to these elements in the evaluation of the conduct and of the parties' claims'.

A future-proof consumer law can no longer exclusively focus on the economic consumers interests of but should also be aimed at the sustainability in order to reconcile the objectives of Art 11 TFEU (sustainable development) and Art 12 TFEU (consumer protection).

The inseparability between individual and common interests should inspire the pursuit of this new balance.

Cross-Examination in Italian Criminal Procedure: The Bumpy Road to Due Process

José Rafael Gómez Biamón*

Abstract

During the last three decades, Italian criminal procedure has been steadily going through substantial changes. The most notable transformation has been brought forth with the introduction of a new Code of Criminal Procedure (1988) that among other things, changed criminal procedure from an inquisitorial system into a so-called predominantly adversarial system. Adding to this, the incorporation of other fundamental substantive rights as well as procedural protections to the Code of Criminal Procedure has been essential to this evolution; such as the presumption of innocence (2021), the standard of proof that a person can only be found guilty beyond any reasonable doubt (2006), due process of law (1999), and the right to cross-examination (1999).

Specifically, cross-examination is a procedural guarantee, incorporated in the body of the Italian Constitution that is often applied in the Code of Criminal Procedure as a requirement for evidence and testimonies admitted in a trial hearing to comply with due process of law. Notwithstanding the rules about how to conduct the cross-examination are not fully specified in detail within the law. Furthermore, there is scarce jurisprudence and different points of view within the legal doctrine on its application during a trial hearing, thus making it an interesting issue for a critical legal analysis. Unquestionably cross-examination has great importance in criminal procedure; therefore, any legal issues and challenges that emerge in a trial are susceptible to a certain degree of interpretation from the judge in the application of this constitutional right.

The judge wrote on and then he folded the ledger shut and laid it to onside and pressed his hands together and passed them down over his nose and mouth and placed them palm down on his knees.

Whatever in creation exists without my knowledge exists without my consent.[1]

In loving memory of my mother,
Ana Enriqueta Biamón González.

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[1] C. McCarthy, *Blood Meridian or the Evening Redness in the West* (New York: Vintage International, 1992), 198.

I. Historical and Constitutional Context of Cross-examination: The Big Change in Criminal Procedure

During the fascist period in Italy, criminal procedure was different than nowadays; trials were ruled with the 1930 Criminal Procedure Code, *Codice Rocco*, that granted ample prerogatives to judges during the trial in the gathering of evidence and sentencing decisions. The inquisitorial system, as it is known, was characterized by an accumulation of functions by the judge, also known as inquisitorial judge, with several procedural functions, such as: investigating, evaluating the evidence, and exercising the so-called criminal action (*azione penale*). Thus, the judge had the power to form all the evidence during the trial and also give a judgment. Moreover, the judge operated in secret and the defendant had no presumption of innocence, consequently not having space for a dialectic process during the trial.[2] Judges for example could ask a witness to freely describe an incident without a subsequent cross-examination.[3] A practice nowadays prohibited by Art 499, para 1, of the Code of Penal Procedure (CPP), approved in 1988: 'Witness examination is carried out through questions on specific fact'.

As far as witness examinations were concerned during that period, they were made directly by the judge and the prosecution, having the defendant's defense attorney only allowed to formulate questions to the judge and not to the witness. Furthermore, when judges examined witnesses, they had the criminal investigation file (*istruttòrio)* at their disposal, evidence that nowadays is not allowed for the judge to evaluate during the trial hearing. In other words, during a criminal trial the defense had to plead for the admission of the questions that would be used during their witness examination; that if admitted, would be reformulated by the judge and usually changed in context. A situation that the defense was constrained to accept.[4] Accordingly, under the *Codice Rocco* (1930) a judge's sentence was constructed in a way to accept the results of the criminal investigation without any critical and/or autonomous consideration.

It is noteworthy that the 1988 Code of Penal Procedure reforms regarding witness examination were not an improvisation from the legislature of that period. Instead, two historical precedents that influenced guarantying the pertinence of the trial process and the respect toward the parties during the criminal procedure.[5] The first was from prominent law professor, Francesco Carnelutti's 1962 treatise on reforming criminal procedure.[6] Then, the law that enacted the creation of a new code of criminal procedure, legge 3 April 1974 no 108, that laid the groundwork,

[2] 'Dialectics is a term used to describe a method of philosophical argument that involves some sort of contradictory process between opposing sides'. On 'Hegel's Dialectics' *Stanford Encyclopedia of Philosophy*, available at https://tinyurl.com/2jk6xr63 (last visited 30 September 2024).

[3] E. Stefani, *L'accertamento della verità in dibattimento* (Milano: Giuffrè, 1995), 87.

[4] G. Bianchi, *L'ammissione della prova nel dibattimento penale* (Milano: Giuffrè, 2001), 12-13.

[5] M. Pisani, *'Italian Style': Figure e forme del nuovo processo penale* (Padova: CEDAM, 1998), 86.

[6] F. Carnelutti, *Verso la riforma del processo penale* (Napoli: Morano, 1963).

as established in Art 2:

> 'The Code of Penal Procedure must implement the principles of the Constitution and adapt the rules of international conventions ratified by Italy, relating to the rights of the persons and criminal trials. It must also implement in a criminal trial the characteristics of the accusatory system'.

Subsequently, a new criminal procedural code was implemented, the so-called *Codice Vassalli* (1988), currently in use, that reformed the inquisitorial system to a more adversarial procedure. Incontrovertibly, at the center of the reforms is the right to a public criminal trial, guaranteed in the Constitution by way of popular sovereignty, which the administration of justice has to comply with, as established in Art 1, para 2, of the Constitution, approved in 1947: 'Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution'.[7] Furthermore, Art 101, para 1, of the Constitution, states that: 'Justice is administered in the name of the people'. Hence, Art 1 of CPP states that: 'Criminal jurisdiction is exercised by the judges provided for by the judicial system laws according to the provisions of this code'. Implicitly referring to what is established in Art 102 of the Constitution:

> 'Judicial proceedings are exercised by ordinary magistrates empowered and regulated by the provisions concerning the Judiciary.
>
> Extraordinary or special judges may not be established. Only specialized sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the Judiciary.
>
> The law regulates the cases and forms of the direct participation of the people in the administration of justice'.

Forasmuch as the innovations of the CPP regarding the admission of evidence and witness examinations in criminal trials introduced a new so-called predominantly adversarial system, done by the Italian legislator to change the inquisitorial system,[8] also warranted by the Constitution itself. Evidence is henceforth admitted at the request of the parties, brought forth by the defendant's defense or by the public prosecutor. Consequently, this evidence becomes essential for the judge in knowing the facts of the case and giving a valuable juridical qualification. Very different than with the inquisitorial system before, where evidence was formed and evaluated in secret by the judge, as explained before.

Accordingly, the CPP has two (2) cardinal points that strive towards the adversarial principle (*principio del contraddittorio*). First, the new code establishes

[7] C. Morselli, *Esame controesame, riesame: prova penale: dal predibattimento al dibattimento* (Pisa: IUS Pisa University Press, 2021), 16.

[8] G. Bianchi, n 4 above.

that evidence is formed not in secret but in the presence of all parties, as established in Art 190, para 1, of the CPP:

> 'Evidence shall be admitted upon request of a party. The court shall decide without delay by issuing an order, excluding any evidence that is not allowed by law or manifestly superfluous or irrelevant'.[9]

A right warranted by the constitutional amendment of due process of law in Art 111 of the Constitution, approved in 1999.[10] Specifically, it is established in Art 111, para 3, of the Constitution that: 'In criminal law proceedings, the formation of evidence is based on the principle of adversary hearings (…)'. Therefore, the procedural truth comes forth after a dialectic process with subjects that have antagonist interests. Second, criminal procedure is based on orality, immediacy, and the impartiality of the judge, which is assured by the fact that the judge of the trial hearing (*dibattimento*) cannot base his decision on evidence or on the outcome of the previous phases of the criminal investigation and/or pre-hearing phases (*predibattimentale*), as established in Art 526, para 1, of the CPP that reads: 'For the purposes of deliberation, the judge shall not use evidence other than that lawfully gathered during the trial hearing (*dibattimento*)'.[11] Even though, oral testimony (*prova dichiarativa*) is understood by the legal doctrine as both natural and essential to the criminal procedure, regardless of an inquisitorial or adverbial legal system.[12] In contrast, under the Code of Penal Procedure of 1930 (*Codice Rocco*) criminal trials were mostly based on the reading of statements and judicial acts prepared during the criminal investigation during the earlier stages of the procedure, conducted by the public prosecutor and not during the *dibattimento*. Nowadays the impartiality of the judge is based on his ignorance of almost all the statements and sources of evidence from the public prosecutors' file.[13] Furthermore,

[9] In Corte di Cassazione-Sezioni unite 21 April 2010 no 15208, *Rivista Penale,* 7-8 (2011), note by G. Domenico, the court established that the right to present evidence is subject to verification from the judge: 'The right of evidence recognized to the parties implies the corresponding attribution of the power to exclude manifestly superfluous and irrelevant evidence, according to a verification under the exclusive competence of the judge of merit which escapes the review of legitimacy where it has been the subject of specific reasoning free from logical and legal'.

[10] Legge costituzionale 23 November 1999 no 2 and legge 1 March 2001 no 63.

[11] In Corte di Cassazione-Sezione penale I 1 February 1995 no 1079, the court established that witness statements during the investigation phase could be admissible in the trial file if acquired in a lawful manner: 'In accordance with the Art. 526 CPP, all the evidence acquired during the dibattimento can be used for the purposes of the decision, including the evidence not admitted during the trial, but acquired in the trial file. The legitimate acquisition in the trial file of testimonies made during the preliminary investigation phase therefore entails their use for evidentiary purposes'. For example, if a previous witness statement from the investigation phase is found in the trial file and the defendant's defense fails to notice it and raise the timely objection, it could be lawfully used by the judge in his motivations for the sentence.

[12] R. Casiraghi, *La prova dichiarativa* (Milano: Giuffrè, 2011), 2.

[13] L. Liguori, 'Istruzione dibattimentale', in F.G. Catullo ed, *Il dibattimento* (Milano: Wolters Kluwer Italia, 2006), 125.

the Constitution requires that the judge maintain an impartial position during the *dibattimento*, as established in Art 111, para 2:

> 'All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position'.

Impartiality is also established in the form of prohibiting outside interference from the judge's decisions, particularly in Art 101, para 2, of the Constitution the prohibition of interference from any other State power: 'Judges are subject only to the law'. In this sense, the *Corte Costituzionale* has defined an impartial trial as having '*the preventive force*' (*forza della prevenzione*), being free from the natural tendency of maintaining a judgment based on a previously resolved issue on another phase of the criminal procedure.[14] Furthermore, in this Sentence, the *Corte Costituzionale* defined the so-called doctrine of the unprejudiced judge (*impregiudicatezza*) as: 'absence of a pre-judgement concerning the object of the proceeding'. In synthesis, the so-called predominantly adversarial system is safeguarded in the Constitution by the right of the defendant to examine during a public and oral trial the evidence against him, subject to direct and cross-examination; and also, to have the evidence admitted and adjudicated before an impartial judge.

1. The Outset of Cross-examination

An important change in Italian criminal procedure came with legge costituzionale 23 November 1999 no 2, the so-called due process reform and the creation of the right of cross-examination in Art 111, para, 3 of the Constitution:

> 'In criminal law trials, the law provides that the alleged offender shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defense. The defendant shall have the right to cross-examine or have to cross-examine before a judge the persons making accusations and to summon and examine persons for the defense in the same conditions as the prosecution, as well as the right to produce all other evidence in favor of the defense. The defendant is entitled to the assistance of an interpreter in the case that he or she does not speak or understand the language in which the court proceedings are conducted'.

In this regard, cross-examination became secured as a constitutional right with Art 111 of the Constitution, even though it was previously incorporated as a procedural right one year earlier in Art 498, para 2, of the CPP: 'Subsequently, further questions may be asked by the parties who have not requested the

[14] Corte Costituzionale 15 September 1995 no 432, *Foro italiano*, 3068 (1995).

examination, following the order specified in Article 496'. Meaning that after the direct examination, the other party has the right to cross-examine the witness previously examined, if he decides to do so because it is not required. Thus, as a result of legge delega 16 February 1987, no 81 the legislator conceived and based the CPP with the adversarial principle (*principio del contraddittorio*), where the judge could reach a decision based on the evidence admitted during the *dibattimento*, brought forth and equally cross-examined by all the parties, as established in Art 498, para 1, of the CPP: 'Questions shall be asked directly by the public prosecutor or the defense lawyer who required the examination of the witness'. Therefore, for the first time in Italy, the public prosecutor and the defense attorney became in a position of parity during a criminal trial; another defendant's right secured by the Constitution in Art 111, para 2, referred to as parity of arms (*parità delle armi),* cited earlier.

Undoubtedly, the introduction of cross-examination has brought influences from common-law criminal procedures.[15] Also, it recalls the VI Amendments of the United States Constitution,[16] regarding the position of the defendant during the *dibattimento*.[17] Other influences from movies, TV shows, and books have also worked themselves in the legal culture. Nevertheless, the statute that proposed the current CPP, legge 16 February 1987 no 81 on Art 1, specifically states that:

> 'The code of criminal procedure must implement the principles of the Constitution and adapt to the rules of the international conventions ratified by Italy and relating to personal rights and criminal proceedings. Furthermore, it must implement the characteristics of the accusatory system in the criminal trial'.

Therefore, it should be clear that even though the right to cross-examination resembles somewhat that of the criminal procedures in the United States, the Italian legislator is not repeating or copying the United States Constitution, statutes, rules, or codes. But in fact, is applying Art 6, para 3, of the European Convention on Human Rights (ECHR), ratified by Italy in 1955, which reads that the defendant shall have the right:

> 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same

[15] C. Morselli, n 7 above, 120.

[16] United States Constitution, VI Amendment: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence'.

[17] R. Bin and G. Pitruzzella, *Diritto costituzionale* (Torino: Giappichelli, 2021), 318.

conditions as witnesses against him'.

The ECHR represents a non-exhaustive catalog of due process of law that is regarded as minimum rights and a bridge between the continental criminal procedure and common law.[18] Another important difference with common law criminal procedures is that witnesses that undergo a cross-examination are under the protection of the judge that: '(…) guarantee that the witness examination is conducted without harming the person's dignity', as established in Art 499, para 4, CPP. Therefore, demolishing the witness from the other party during cross-examination to make him look not credible to the eyes of the jury, like it's done in common law criminal procedures is not allowed. In this sense, Italian criminal procedure is ruled by the right of human dignity, which is assured to the witness and cannot be compromised even when searching for the truth during the trial.[19]

Subsequently, after years of criticism and resistance from several sectors of the Italian legal community, including the magistrate, the CPP was implemented and accepted based on the adversarial principle (*principio del contraddittorio*).[20] This model, through a reconstructive metamorphosis, marks a fundamental change in Italian criminal procedure; and also, a victory for Italian defense attorneys. After the reform, criminal trials became free from the monolithic inherence of the judge, having a different way of seeing and approaching witness declarations under the scrutiny of due process of law and a cross-examination that emphasizes its value on evidence. The force that caused these constitutional reforms was the due process of law principles from the European Community now the European Union that gave it political validity. In this sense, Art 6 of the European Convention on Human Rights, cited earlier, gave the blueprint for Italian constitutional reform.[21] Even

[18] P. Raucci, *La valenza autonoma della formula "Giusto Processo" in Costituzione* (Milano: Wolters Kluwer, 2023), 35-36.

[19] See R. Casiraghi, n 12 above, 449.

[20] A. Gaito and E. La Rocca, 'Vent'anni di "giusto processo" e trent'anni di "Codice Vassalli" quel (poco) che rimane' *Archivio Penale*, 1-14 (2019).

[21] Art 6, Council of Europe. 'Convention for the Protection of Human Rights and Fundamental Freedoms' *Council of Europe Treaty Series 005*, 1950.

'1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defense; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and

though the new criminal procedure is tendentially accusatory it does not have the force to grant equality between all parties, being called by some critics as an *Italian-style* adversarial system.[22] An example of this is how the public prosecutor's office and the judicial police (*polizia giudiziaria)* have at their disposal much more time than the defense to investigate a case, with numerous means at their disposal, provided the state to gather sources of evidence; including interception of communications and preliminary seizures (*misure cautelari*), to name a few, before the *dibattimento*. Adding to this there is no option for the defense to interview a prosecution witness, before taking the witness stand.[23] Therefore the defense cannot know in advance the content of the certain testimony or prepare for possible surprises from the prosecution's witness testimonies, as established in Art 430 *bis*. CPP:

> 'The public prosecutor, the judicial police, and the defense are prohibited from obtaining information from the person admitted under Art. 507 or indicated in the request for probative evidentiary hearing (*incidente probatorio*) (…)'.

Contrarily, even though the defense has the right and ethical duty to investigate on behalf of the defendant, it cannot compare with the unlimited resources of the state. Furthermore, there is fierce resistance against private investigations done by the defense, seen by many as invasive and polluting to the witness's sincerity.[24] Nevertheless, from the defense's strategy having a deposition from their witness before the *dibattimento* can be useful if the witness later changes the facts during his testimony, this could later be to be used to challenge the veracity of his testimony in a *contestazioni* during the cross-examination, explained in detail in part II of the Art.

As far as the admission of evidence during the trial, the due process reforms to the Constitution regarding criminal procedure have also democratized the Italian legal system. Some academics[25] argue that it is evident that these reforms were influenced by the V and XIV Amendments of the United States Constitution.[26]

examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

[22] C. Schittar, *Dal colloquio informativo al controesame: la prova orale dalle indagini al dibattimento* (Milano: Giuffrè, 2010), 6.

[23] E. Amodio, 'L'arte del controesame e le anomalie dell'Italian style' *Sociologia del diritto*, 155-168 (2008).

[24] E. Randazzo, *L'esame incrociato* (Milano: Giuffrè, 2011), 9.

[25] C. Morselli, n 7 above, 112.

[26] United States Constitution, V Amendment: 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be

Thus, bringing a cardinal principle from common law in the form of the impartial judge deprived of a progressive knowledge of the facts and object of his decision. Nevertheless, there are notable differences in comparison with the United States criminal procedure. Whereas, the Italian judge for the *dibattimento* begins the trial with the creation of the trial file, as established in Art 431, para 1, of the CPP: 'Immediately after the decree for committal to trial has been issued, the Judge shall proceed with the production of the trial file after hearing the parties (…)'. Henceforth gathers the evidence at the request of a party during the *dibattimento* as established in Art 190, para 1, of the CPP, cited earlier. In synthesis, with the principle of orality and immediacy, evidence that comes before a judge for the final verdict has to be gathered during the *dibattimento*, for that reason any declarations not subject to cross-examination cannot be admitted in the trial file, a right secured by the due process procedural guarantees in Art 111 of the Constitution. However, it should be emphasized a substantial difference between the United States criminal procedures whereas there is no trial by jury in Italy, and the procedure where the witness makes its statements, thus forming the evidence, is presided over by a judge who in the past had a monopoly over the trial hearing under the inquisitorial system and in practice still tends to gravitate there. Another difference is that during a criminal trial, a jury may have a natural sympathy for the defendant, whereas the Italian judge is distrustful of the defendant when testifying because there is no penalty for false testimony by the defendant. Art 497, para 2, of the CPP requires the judge to warn the witness to tell the truth before giving a testimony, under penalty of law; nonetheless, the defendant, when testifying in the capacity of a defendant, and not as a witness is exempt from this obligation of telling the truth: 'Before the examination begins, the president warns the witness of the obligation to tell the truth (…)'. This specific right of the defendant during the criminal procedure is often referred to by the legal community as the right to lie (*il diritto di mentire*).[27]

taken for public use, without just compensation (added emphasis)'.

United States Constitution, XIV Amendment, Section 1: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (added emphasis)'.

[27] In Corte di Cassazione-Sezione penale V 5 February 2014 no 15654, *Repertorio Foro Italiano*, Falsità personale, no 10 (2014), the court clarified that even though the defendant has the right to lie when testifying, this right does not extend to false testimony regarding his personal details: '(…) the conduct of the suspect who, subject to an international arrest warrant, provides false personal details to the judicial police who proceed with his identification in affirming the indicated principle, the court specified that the suspect cannot invoke the justification of the exercise of a legitimate faculty because, despite having the right to silence and the faculty to lie, it has the obligation to provide its personal details according to the truth (added emphasis)'.

In Corte di Cassazione-Sezione penale V 7 February 2021 no 4264, the court further explained that: 'the right to silence and the right not to make statements by the accused, the suspect, or

2. The Introduction of Beyond any Reasonable Doubt and the Presumption of Innocence

More recently in 2006, the Italian legislature approved legge 20 February 2006 no 46, introducing the standard of proof beyond any reasonable doubt (BARD) in criminal procedures for establishing a judgment of conviction. Notably a right not included in the European Convention of Human Rights, but adopted in Italy. Consequently, Art 533 of the CPP was amended to read:

> 'The court shall deliver a judgment of conviction if the accused is proven to be guilty of the alleged offense beyond a reasonable doubt. Using the judgment, the court shall apply the penalty and any security measures'.

It has to be noted that the way that the BARD norm is canalized in the criminal procedure is with a final balance of not having enough evidence for a conviction, as established in Art 125 and Art 425 of the CPP. Based on Art 125, para 1, the public prosecutor can present to the judge a request to file the case and not proceed with the criminal charges, because of unfounded evidence and elements that cannot sustain a criminal indictment during a trial beyond any reasonable doubt: 'The cases in which the court issues either a judgment, an order or a decree are established by law'.[28] Also, based on Art 425 of the CPP, during the preliminary hearing the judge can emit a ruling of no grounds to proceed (*sentenza di non luogo a procedere*) when there are insufficient and contradictory elements to prove the crime to sustain a conviction in a trial beyond any reasonable doubt:

> 'Should there be a cause which extinguishes the offense or which should have prevented commencement or continuation of the criminal prosecution, or the act is not deemed an offense by law, or the act did not occur or the accused did not commit it, or the act does not constitute an offense or the person is not punishable for any reason whatsoever, the judge shall deliver a ruling of no grounds to proceed, indicating the cause in the operative part of the judgment'.

On all considerations, the BARD rule has added an important element for the judge in the evaluation of evidence admitted during the *dibattimento*. Therefore, it may be regarded that the public prosecutor has fulfilled this burden of proof

anyone who must be considered as such already when evidence of criminality emerges against him, does not include the possibility of not reporting or of reporting falsely when declining his personal details to the investigator or public official who requests them'.

On a recent Sentence, the Corte di Cassazione-Sezione penale II 5 December 2023 no 48444, established that the obligation to provide true information of one's personal details, excludes information regarding the owner of the SIM card of a seized mobile phone: '(…) it must be however excluded that this obligation also includes that of indicating oneself as the user of a telephone card in the name of others, since this is data which is completely unrelated to the person's personal details'.

[28] See C. Schittar, *Dal colloquio* n 22 above, 5-6.

when any different explanation of the alleged fact, based on the evidence, appears unreasonable; vice versa the public prosecutor has not fulfilled its burden when the procedural findings are not capable of excluding a reasonable reconstruction proposed as an alternative by the defense based on admitted evidence.[29]

Another important and recent change to the CPP is the adoption of the presumption of innocence in criminal trials, incorporated from the European Union Parliament directive 9 March 2016 no 343 and passed into law by the decreto legislativo 8 November 2021 no 188 that created Art 115 *bis*, para 1, of the CPP:

> 'Except as provided for in paragraph 2, in measures other than those aimed at deciding on the criminal responsibility of the accused, the person subjected to investigation or the accused cannot be indicated as guilty until guilt has been established by sentence or irrevocable criminal decree of conviction. This provision does not apply to acts of the public prosecutor aimed at proving the guilt of the person under investigation or the accused'.

Concisely, both the BARD rule and the presumption of innocence are defendant's rights that are protected by the CPP but are not regarded by the doctrine as constitutional rights, whereas cross-examination and due process are rights secured by the Constitution. In this sense, it should be clear, that the presumption of innocence, from Art 115 *bis* CPP, cited earlier is not the same as the so-called presumption of not guilt in Art 27, para 2, of the Constitution: 'A defendant shall be considered not guilty until a final sentence has been passed'. As legal scholar Paolo Tonini explains, in 1947, the Constitutional Assembly wanted to affirm the presumption of innocence but instead chose a formula that satisfied the politicians of the period, not resolving the ambiguity that created the phrase presumption of not guilt in the Constitution, that carried a negative connotation towards the defendant.[30] Previously, before Art 115 *bis* CPP, the presumption of innocence was best interpreted by the legal doctrine under Art 6, para 2 of the European Convention on Human Rights: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.

II. Cross-examination *all'Italiana*: Theory and Practical Issues

As far as cross-examination in criminal procedure it is guaranteed as a defendant's right in Art 24, para 2, of the Constitution: 'The defense is an inviolable right at every stage and instance of legal proceedings', and also in Art 111, para 3, of the Constitution, cited earlier.[31] It should be mentioned that cross-examination

[29] P. Tonini, *Manuale di procedura penale* (Milano: Giuffrè, 2018), 258.

[30] Id, *Lineamenti di diritto processuale penale* (Milano: Giuffrè, 2019), 142.

[31] Even though Art 111, para 2, of the Constitution, could give the impression that the accused can personally execute a cross-examination during the dibattimento, legal doctrine has clarified that in the judicial process the defense's attorney is the only person that conducts the examination of

is unique to criminal procedure because it is not guaranteed during a civil case. The foundation for this constitutional norm lies in the fact that criminal procedure forms evidence in the adversarial system. Thus, the accused person cannot be found guilty based on statements by witnesses of their own free choice who have voluntarily refused to undergo a cross-examination by the defense.[32] Also, the norm is based on the principle of parity between the parties involved in a criminal procedure before an impartial judge, Art 111, para 2, also cited earlier.

With this in mind, during the *dibattimento*, cross-examination is done by the party that has an opposite interest to the other party that called the witness to the examination. Its main purpose is to cast doubt on the version of the facts testified during the direct examination.[33] The cross-examination can be on facts, on the credibility of the witness, or both. When it is about credibility it tends to make the witness declare facts that demonstrate the non-credibility of him. When the cross-examination has to do with facts it tends to make the witness declare a different fact or a contradiction to the testimony given during the direct examination or to obtain an admittance of a contradiction. On the other hand, the party that has not asked for the witness cannot ask questions on different issues than those testified during the direct examination. The Corte di Cassazione has clarified that the party that has not asked for the witness, during the cross-examination cannot ask questions on circumstances different from those specified in the direct examination; if this was allowed, said the court, it would: 'frustrate terms or procedures with the limit of admissibility established by the code for admitting evidence'.[34] Nevertheless, the legal doctrine is divided with this issue, with the more accepted interpretation that questions that allow the clarification of dark or obscure facts should be admissible during the cross-examination, even if the object of the questions was not mentioned during the direct examination.[35] In practice, if the question is pertinent and clarifies an important issue, the judge tends to allow such questions.

In this context, cross-examination should not be seen only as a way to discredit a witness; it can also be used as a way of obtaining more support for the defense theory that may not be obtained through a direct examination. Thus, the introduction of cross-examination was the crucial passage towards an adversarial criminal

witness, based on his professionality that is a guarantee of tutelage for his client. That is why the term technical defense is used (*difesa tecnica*).The reasons why the accused should not do the cross-examination are: '1- Does not have the judicial know how, 2-There is difference between the lawyer and the accused in the sense that the lawyer is registered to the bar and has an obligation to comply with a code of ethics, 3- It is against common sense that the accused be able to cross-examine the victim of a crime (*persona offesa*), and 4- There are no rules establishing how a defendant could execute a witness examination, in which case it should be elaborated on a case basis by the judge'. See L. Liguori, n 13 above, 288-289.

[32] G. Illuminati, 'Ammissione e acquisizione della prova nell'istruzione dibattimentale', in P. Ferrua ed, *La prova nel dibattimento penale* (Torino: Giappichelli, 2010), 115.

[33] P. Ferrua, *La prova nel processo penale* (Torino: Giappichelli, 2017), 140-141.

[34] Corte di Cassazione-Sezione penale I 5 November 1996 no 2037, *Repertorio Foro Italiano - Dibattimento penale* no 124 (1998).

[35] See P. Tonini, *Manuale* n 29 above, 727.

procedure.[36] Nonetheless, there is a fallacy around cross-examination that it is the golden key that opens the triumphant door during the trial, when in reality only a small number of testimonies amount to a resolution of the central issue based on the cross-examination.[37] Also, in some instances, it is said that the best cross-examination is the one that is not done by the defense.[38]

Even though cross-examination is a right guaranteed by the Constitution, there are three (3) exceptions when it is not required during the criminal procedure. First, when evidence is formed outside the *dibattimento* with the consent of all the parties and the defendant, like for example during the so-called brief trial (*giudizio abbreviato*), where the public prosecution can agree with the defense to a reduction of the penalty in exchange for renouncing the *dibattimento*. This is generally done when the defense's strategy chooses an alternative procedure that omits the *dibattimento* to get the benefit of a reduced sentence. Second, a written testimony can be admitted due to the impossibility of having the witness testify. For example, a statement testimony can be admitted from a deceased person. Third by establishing that the witness's testimony is the result of a previously proven illegal activity; for example, when a witness is bribed to testify. Furthermore, a judge can limit a cross-examination with an ordinance if it is used as a dilatory tactic, as established in Art 499, para 6, of CPP:

> 'During the examination, the president of the bench shall intervene, also of his own motion, to guarantee the appropriateness of the questions, the truthfulness of the answers, the loyalty in the examination and the correctness of the objections and shall order, if necessary, that the parties show him the part of the record including the statements that have been used for challenging the oral evidence'.

Another important exception is the so-called special evidentiary hearing (*incidente probatorio*). During this procedure cross-examination is done by the judge, with the questions submitted by the defense or the public minister. A particular characteristic of the *incidente probatorio* is that it is held before the *dibattimento* by another judge. It stands as an exemption because the general rule for sentences during a criminal trial is ruled by the principle of immediacy (*principio di immediatezza*), establishing that sentences have to be passed by the same judge that presided during the dibattimento. Hence, Art 525, para 2, of the CPP establishes:

> 'Under penalty of absolute nullity, the same judges who participated in

[36] S. Ramajoli, *Il dibattimento nel nuovo rito penale* (Padova: CEDAM, 1994), 90-91.

[37] M. Stone and E. Amodio, *La cross-examination: strategie e tecniche* (Milano: Giuffrè, 1990), XIV.

[38] E. Randazzo, *Insidie e strategie dell'esame incrociato: con le linee guida e il vademecum del laboratorio permanente esame e controesame* (Milano: Giuffrè, 2012), 115.

> the trial shall be concur at the deliberation. Judges that cannot concur must be temporarily substituted by other judges and the decisions which have already been issued shall maintain their effectiveness, unless they are expressly revoked'.

Furthermore, criminal procedure sentences are ruled by the adversarial principle (*principio del contraddittorio*), as established in Art 111 of the Constitution, explained earlier. Accordingly, Art 526, para 1, CPP states: 'For the purposes of deliberation, the court shall not use evidence other than that lawfully gathered during the trial'. Nevertheless, it is not always the case when the acquisition of evidence is not possible during the *dibattimento*. For that the reason the *incidente probatorio* was established to gather evidence in a previous hearing.

Therefore, cases that are considered justified are cases with vulnerable witness, outside those with threats or great impediments which are also allowed. Accordingly, Art 392, para 1 bis, CPP establishes:

> 'In the proceedings for the crimes referred to in Articles 572, 600, 600-bis, 600-ter and 600-quater, also concerning the pornographic material referred to in Articles 600-quater. 1, 600-quinquies, 601, 602, 609-bis, 609-quater, 609-quinquies, 609-octies, 609-undecies and 612-bis of the Penal Code, either the public prosecutor, also upon request of the victim, or the defendant may request the testimony of either any underage person or the victim that is of age by means of a special evidentiary hearing, also in cases other than those provided for in paragraph 1. The victim's testimony by means of a special evidentiary hearing may be requested by the public prosecutor, also upon request of the victim, or by the suspect whenever the victim needs specific protection'.

Once the request is accepted by the judge, a court order is sent to the parties involved instructing that before the date for the *incidente probatorio* they must get the copy of the declaration made by the witness who will testify.[39] Previous knowledge of the declarations is fundamental to efficiently conduct the *incidente probatorio* and to conduct the cross-examination and also to ascertain the credibility of the witness.[40] The incidente probatorio is held without public access in the council chamber (*camera di consiglio*), with the participation of the defense and the public minister. Evidence is recorded and one-way mirrors are used with minors or an adult with mental disabilities. It is important to note that the judge asks the questions to the witness not the parties' attorneys using the form established

[39] In Corte di Cassazione-Sezione penale III 18 October 2021 no 37605, *Repertorio Foro Italiano - Incidente Probatorio* no 12 (2021), the court clarified that the *incidente probatorio* can provide to safeguard the physical and psychological integrity of the victim, but it does not provide for the evidence be admitted just based on its mere request.

[40] P. Tonini, *Lineamenti* n 30 above, 344.

in the *dibattimento*; when witnesses are called to testify using the direct and cross-examination. Wherefore the defense's role is fundamental, submitting the questions to the judge to ask; and also, in order to latter use the evidence gathered during the *incidente probatorio* during the *dibattimento*, that can only be admitted as evidence against the defendant if the defendant's attorney is present. In practice if the defendant does not have a defense attorney, the court names one before the proceedings. It is essential that during the examination of a minor the evidence admitted is absolutely necessary; justified with concrete and specific evidence, in order to avoid unnecessary repletion during the *dibattimento*. Hence, it's production during the *dibattimento* should be justified with concrete and specific evidential needs that make it indispensable.[41] The *incidente probatorio* has the function of anticipating the evidence, while guarantying the right of the defendant against evidence that could later be read during the *dibattimento*, Art 511 CPP: 'The judge, ex officio orders that the documents contained in the trial file be read, in whole or in part'. It is well established within the legal doctrine that the *incidente probatorio* is admissible and compatible with due process of law.

1. Witness Examinations During the Trial Hearing (*Dibattimento*)

The search for the truth is a center point during the *dibattimento*, a notably subjective concept, like in the samurai film Rashomon (1950), where a man's murder and the rape of his wife are told by four persons, each one with a different version of the facts of the crime. Adding to this, the general assumption that evidence is exclusively formed during the *dibattimento* is greatly watered down by the current Italian legal culture.[42] Nonetheless, under Art 1, para 1, of the Constitution cited earlier, the administration of justice is a power of the people. Therefore the judicial truth (*verità giudiziale)* is characterized by being both contextual and functional, commanding a factual reconstruction that underlines a just decision that confirms a truth that will be respected throughout the entire criminal procedure and also guarantees the *people's* consent.[43] Wherefore facts elucidated in the Italian criminal process, specifically during the *dibattimento* have to pass through the impartiality of the judge, with a methodology of neutrality that balances the findings of the first judge who viewed the case in an earlier phase, while approaching the facts in a new way.[44] It is important to note that the judge who will finally decide the verdict cannot take into consideration previous criminal investigations, and should also have limited initiatives regarding evidence, in comparison with the parties in the procedure that are entrusted with requesting the admittance of the evidence, as established in Art 190, para 1, CPP:

[41] E. Randazzo, *L'esame* n 24 above, 101.

[42] G. Carofiglio, *Il controesame: della prassi operative al modello teorico* (Milano: Giuffrè, 1997), IX.

[43] G. Ubertis, *La prova penale: profili giuridici ed epistemologici* (Torino: UTET, 1995), 7.

[44] See G. Bianchi, n 4 above, 36, 40.

> 'Evidence shall be admitted upon request of a party. The court shall decide without delay by issuing an order, excluding any evidence that is not allowed by law or manifestly superfluous or irrelevant'.

Parties through their discussions will indicate the evidence and arguments to the judge (*argumentum*), which gives the parameters of a cognitive nature for evidence to be admitted into the trial file, finding them suitable in demonstrating the innocence or guilt of the defendant. Moreover, during the *dibattimento* the hypothesis of the criminal indictment cannot be accepted with automatism; instead, it has to be carefully examined and it is also susceptible to opposition from the defendant. For example, demonstrating the falsity and/or absurdity of the public prosecutor's theory, opposing lies with the truth, in a method of syllogism, typical of deductive reasoning.[45] This dialectic is regarded by the Italian legal system as a fundamental passage in the criminal process based on orality, and it is well established as the right of orality (*principio di oralità*).

Therefore, it is logical to assume that the most important evidence during the *dibattimento* is witness testimonies. In this context, the CPP includes testimonies as a source of evidence, but the legislator did not explain specifically how they should be carried out, limiting it only to the technical aspects.[46] For instance, during cross-examination suggestive questions are allowed with the object of verifying the reliability of the testimony, they can also be used as a method of weakening the testimony. Nevertheless, suggestive questions are not allowed during the direct examination, Art 499, para 3, of the CPP establishes:

> 'In the examination by the party who requested the subpoena of the witness and the party who has a common interest, questions that tend to suggest answers are prohibited'.

Accordingly, during the cross-examination, suggestive questions are needed when it is necessary to prove a lie or an error in the evidence.[47] Even so, there is no specific ban established in the CPP on so-called *suggestive objections* by the parties. A practice that is widely diffused and harmful is a leading question during the direct examination.[48] It also harmful an objection to a question that contains useful information the opposite party is looking to have confirmed, for example: - *The witness has already said that* or – *The question is not admissible because it tends to confuse the witness by challenging what he did not report*. Thus, it is a true inadmissible question masked as an objection that even though is an incorrect behavior from the attorney, since it is not regulated by the CPP could provoke in the worst-case scenario a reprimand from the presiding judge.

[45] See C. Morselli, n 7 above, 96-97.
[46] L. Grilli, *Il dibattimento penale* (Padova: CEDAM, 2007), 257.
[47] See G. Illuminati, n 32 above, 119.
[48] See E. Randazzo, *L'esame* n 24 above, 13.

On the other hand, so-called *insincere questions* are not allowed during the cross-examination, as established in Art 499, para 2, of CPP: 'During the examination, questions which may compromise the sincerity of the answers are not allowed'. So, it leaves, ample space for judicial interpretation, because it is widely accepted that remembering a fact by itself does not produce a reconstruction of an event. Furthermore, what people remember is a mental mixture of a production and a reconstruction. Thus, reconstructive memory is characterized by the fusion of different elements. An example of an *insincere question* that is ambiguous could be the following: - *Did you become aware of the (xyz) fact during the police interrogation?* This wording could motivate the witness to spontaneously remember the *xyz* of fact during the examination; or instead, the same *xyz* fact could have been suggested by the police officer to the witness earlier during the investigation, which in any case would result in neither a positive nor negative answer, thus would leave unresolved the dilemma of what happened in reality.[49]

Consequently, the *dibattimento* is a place of confusion, proving the falsehood of the investigation, when the defendant is exonerated. On the other hand, it is also the place where the criminal accusation hypothesis is demonstrated publicly. Therefore, during the *dibattimento* evidence is organized in different so-called stadiums. The first stadium is when the evidence is announced for the first time, during the *discovery* with the deposit of the witness list. It is organized and introduced during the pre-trial stage (*predibattimentale*). The second stadium comes when the evidence is admitted and acquired in the trial file (*fascicolo per il dibattimento*), thus elaborated and formed. The third stadium is when the evidence is screened, reorganized, and synthesized to a definitive procedural position, (*reductio ad unum*), that justifies and confers the foundation for the conclusions (*discussione finale*). Hence, the third stage is the climax for the evidence on which the hypothesis was based; normally no new evidence is admitted and it is oral, except for the victim's party (*parte civile*) that submits its conclusion in written form. To that effect Art 523, para 1, of the CPP states:

> 'After gathering evidence, the public prosecutor and, thereafter, the lawyers of the civil party, of the person with civil liability for damages, of the person with civil liability for financial penalties, and the defendant, shall make and describe their respective conclusions, also concerning the cases provided for in Article 533, paragraph 3-bis'.

Based on this enumeration of different so-called stadiums with their corresponding concepts establish a progression of judicial acts (*sequenza probatoria*) for the acquisition of evidence with its vertex given to the cross-examination.[50] Therefore the validity of the hypothesis in the accusation is not a

[49] See P. Ferrua, n 33 above, 143-144.
[50] C. Morselli, n 7 above, 92-93.

guarantee of truth by itself, but instead, it is truth that can only exist with its verification. Witness examination is composed of three phases: direct examination, cross-examination, and redirect examination. Only the direct-examination should be authorized by a ruling from the judge and the cross-examination is not conditioned by a previous request. In that sense, in a recent sentence from the *Corte di Cassazione*, it is reaffirmed that the right of the defense to cross-examine witnesses is a fundamental competence of the accused party.[51]

Because of this, the legislator inspired by the adversarial system provided witness examination (*istruzione dibattimentale*) as the central phase of the *dibattimento*, like a filter for the truth. During this phase, the parties through their witness or the examinations of the defendant establish facts and circumstances in a dynamic sequence to reconstruct in the most possible precise way what happened in reality. Thus, the public prosecutor and the defense use questions during their witnesses' examinations that are a fundamental part of the total acquisition of information for the *dibattimento*. It is the moment when the evidence is admitted into the trial hearing file, under Art 187 CPP:

> '1. Facts concerning accusations, criminal liabilities and the determination of either the sentence or the security measure are facts in issue.
> 2. Facts on which the application of procedural rules depend are also facts in issue.
> 3. Facts concerning the civil liability resulting from an offense are also facts in issue if a civil party joins the criminal proceedings'.

It has been well established that there is no existing procedural instrument compared to the cross-examination capable of distinguishing truth from false. In this sense, American law professor, Irving Younger's new commandments of cross-examination have been diffused into legal culture:[52]

> 'Be brief as you can under the circumstances; ask only short questions using plain words, except when making a speech; use the most profitable methods of cross-examination available given the specific situation; do not ask a question if you don't know the answer unless the situation dictates otherwise; listen to and watch the answer and then follow up on what you hear and see; argue with the witness whenever the jury would deem it to be appropriate; do not rehash damaging direct testimony without a good reason; if you know what a witness's explanation will be, or that a different explanation will expose the witness to impeachment, you can further your personal advocacy objectives without sacrificing the quality of the cross-examination; learn the facts of the case well enough to develop a plausible theory of the defense so that you never ask one question too many; get only what you

[51] Corte di Cassazione-Sezione penale IV 22 September 2023 no 35684.
[52] L. Liguori, n 13 above, 269.

need, and then stop and sit down'.[53]

That being so, when cross-examination is practiced correctly it offers control and verification of the different hypotheses of the truth in the procedural dispute, making adjustments to them if necessary.[54] Cross-examination also has an important duality in the sense that is the only way to arrive at the judicial fact (*fatto storico*) while at the same time being a means of protection (*mezzo di tutela*).[55] The *Unione Camere Penali Italiane*, the foremost criminal defense organization in Italy, has defined this duality in its 2019 *Manifesto* as:

> 'The cross-examination for evidence is at the same time an individual right and, in its epistemic force, a condition of the regularity of the trial. It is a general rule that an accusation cannot be validated by evidence formed unilaterally by the same person who raised it'.[56]

Another Italian organization that has dedicated a great deal of effort to education regarding cross-examination is the *Laboratio Permanente Esame e Controesame* (LAPEC), which published its eight guidelines for witness examination, where it is possible to gleam into some of the predominant legal controversies surrounding cross-examination:

> '1. The witness list must contain a specific indication of the circumstances covered by the examination.
>
> 2. The question that is prohibited and inadmissible cannot be re-proposed by the party who formulated it, even if correctly reformulated.
>
> 3. If prohibited questions are repeatedly formulated, although expressly censured, or objected to because they suggest the answer to the person examined, the judge warns the party by recording this in the trial file.
>
> 4. The expert witness and technical consultants are not asked to make a declaration of commitment telling the truth regarding their assessments within their competence, if not limited to the facts directly learned during their activity.
>
> 5. The expert witness and technical consultants may participate in every hearing of the trial, both before and after their examination.
>
> 6. The judge cannot intervene during the examination conducted by the parties, except in the cases expressly provided for by law.
>
> 7. The judge cannot ask questions that tend to suggest the answer to the person being examined.
>
> 8. Before proceeding with the direct examination of witnesses, expert

[53] H.W. Asbill, 'Ten Commandments of Cross-Examination Revisited' *Criminal Justice*, 1-6, 51-54 (Winter 1994).

[54] See G. Carofiglio, n 42 above, 4.

[55] See C. Morselli, n 7 above, 34-35.

[56] Unione Camere Penali Italiane, 'Manifesto del diritto penale liberale e del giusto processo', 10 May 2019, 39.

> witnesses and, technical consultants, the judge must indicate to all parties the topics of evidence that he deems relevant and useful for a complete examination and for the initiatives that they may deem appropriate to adopt. (added emphasis)'.[57]

Notwithstanding, some critics have argued that in Italy there is no cross-examination in the proper sense because the possibility of a witness examination is not given only to the opposite party or antagonist, it is also given to the victim (*parte civile*) during the *dibattimento*.[58] Regarding the *parte civile* there is a prohibition against suggestive questions by the victim's attorney specified in Art 499, para 3, of the CPP, cited earlier.[59] Nevertheless, some attorneys for the *parte civile* tend to ask suggestive questions to the witness brought by the public prosecutor, therefore defense attorneys should be vigilant to this type of witness examination and raise objections when needed. Even though Art 499 prohibits suggestive questions in certain witness examinations, the only procedure sanction for this norm is found in Art 191, para 2, CPP: 'Evidence gathered in violation of the prohibitions set by law shall not be used'. So, in practice, after the objection almost systematically the judge consents the part to reformulate the question. Because of that, the defense attorney also has the possibility of after objecting verbally a question during *dibattimento*, having his arguments put in written form with the so-called defense's memoir (*memoria difensiva*), as established in Art 121, para 1, of the CPP: 'At any stage and instance of the proceeding the parties and the lawyers may submit briefs or written requests to the court by filing them with the Court Registry'. Regardless, the CPP is not explicit on all the types of questions that are allowed during a witness examination, Guglielmo Gulotta's recommendations on the admissibility of different types of questions during examinations have ingrained themselves in the legal culture:[60]

[57] LAPEC, 'Linee guida per l'esame incrociato nel giusto processo', 5 March 2010, available at https://tinyurl.com/znrmk2y2 (last visited 30 September 2024).

[58] See G. Illuminati, n 32 above, 114.

[59] See P. Ferrua, n 33 above, 147-148.

[60] G. Gulotta, *La investigazione e la cross-examination* (Milano: Giuffrè, 2003), 125.

Type of Question	Direct examination and redirect	Cross-examination	Example
Recall: tends to bring out memories	*Admitted*	*Admitted*	*Was it dark when you left the house?*
Elaboration: tends to produce judgments	*Admitted only if dissociable from the facts*	*Admitted only if dissociable from the facts*	*Did he seem like a good person to you?*
Closed: limits the range of possible responses	*Admitted*	*Admitted*	*Have you ever moved?*
Open: allows for a wide range of responses	*Admitted*	*Admitted*	*Why did you change your citizenship?*
Connecting: it is linked to the previous answer	*Admitted*	*Admitted*	*And then what happened?*
Guided: leads the topic of the answers, not the content	*Admitted*	*Admitted*	*Now that you have described the place, can you tell me how you were dressed?*
Luring: contains assumptions that are made up or known to be false	*Admitted*	*Not Admitted*	*What did the dog do when you heard the shot? (we know there was no dog)*
Leading: when it presupposes undisputed facts	*Admitted*	*Admitted*	*How many times did you shoot? (Witness previously confessed)*
Leading: that presupposes disputed facts (suggestive)	*Not Admitted*	*Admitted*	*Why do you beat your wife?*
Leading: that presupposes non-essential facts	*Admitted*	*Admitted*	*Where did you go to school?*
Argumentative: that presupposes essential facts	*Not Admitted*	*Admitted*	*Have you ever returned to the scene of the crime?*
Speculative: deductive type	*Admitted*	*Admitted*	*You said that you only saw men in the bar: so the accused wasn't there?*
Speculative: conjecture type	*Not Admitted*	*Admitted*	*You said that you only saw men in the bar: so, it wasn't frequented by women?*

2. Confrontation with Previous Statements (*contestazioni*) During Cross-examination

An important part of cross-examination is the confrontation of the witness with his previous statements. If the witness gives a testimony that is incompatible with a previous statement, the attorney conducting the cross-examination can use these statements to refresh the witness's memory.[61] These contradictions raised during the cross-examination are known by the name *contestazioni* and originate from a previous statement during the direct examination or a document from the public prosecutor's file, that the defense can investigate before the trial hearing. The *contestazioni* can only be used when there is a previous statement from the same person testifying and cannot be brought forth if the witness has not declared first. In this sense, a judicial decision based on evidence from a previous statement where there was an absence of the written record of the circumstances when the declaration took place or that omits parts of the previous statement would be unconstitutional since it admitted evidence that was formed outside the trial without being subject to cross-examination.[62] So when a *contestazioni* is being elucidated, the judge can interfere through its discretionary power asking for the previous declaration from the public prosecutor's file as established in Art 499, para 6, of the CPP, cited earlier. In this case, the previous declaration is admitted, but the only part of the statement that will be used is that regarding the contradiction and the entirety of the statement will not be determinant in the sentence, as established in Art 500, para 2, of the CPP: 'The statements that are read for challenging purposes may be used to ascertain the witness's credibility'. Moreover, the *Corte Costituzionale* has established that it is unconstitutional for a judge to attach in the trial file only the summary of the statements that will be used in the *contestazioni*, done by the public prosecutor and/or the judicial police (*polizia giudiziaria*), leaving out the previous statements made by the witness contained in the public prosecution file.[63]

It is well established that the complaint (*querela*), accusation (*denuncia*), or written statements from the public prosecutor's file can be used by the judge to the end of establishing witness credibility, as established in Art 500, para 2, of the CPP, cited earlier. Evidence can be disputed by the witness because of Art 194 para 2, CPP, establishes that the examination can be extended to the circumstances whose verification is necessary to assess credibility: 'The existence of a fact cannot be inferred from circumstantial evidence unless such evidence is serious, precise and consistent'. Hereinafter, the dispute of statements or documents different from the precedent declarations, imposes to the witness the pressure of admitting to have committed an error, thus by following Art 192, para 1, of the CPP the judge

[61] D. Schittar, *Esame diretto e controesame nel processo accusatorio* (Padova: CEDAM, 1989), 110.

[62] See P. Ferrua, n 33 above, 156.

[63] Corte Costituzionale 3 June 1992 no 255, *Il Foro italiano*.

should always include in their motivations the reason that he considers the evidence to the contrary and unreliable: 'The court shall evaluate evidence specifying the results reached and the criteria adopted in the grounds of the judgment'.

Furthermore, the *contestazioni* has a double purpose, first to attack the credibility of the witness that makes the contradictory testimony; and also, to allow a recalibration or clarification of his testimony during the *dibattimento*. Hence, a previous declaration from a third party is inadmissible. It must also relate to the facts and circumstances of the testimony that the witness is testifying. The way for the attorney examining to raise the *contestazioni* during the *dibattimento* is to read the previous declaration, so the witness can rectify his declaration. Another possibility is that the witness remains firm on his testimony during the *dibattimento* or that refuses to answer the attorney's questions. In the case that the previous declarations cannot be used because they are inadmissible evidence, the judge has to consider them only for the credibility of the witness and the previous declaration cannot constitute a proven fact. There are some exceptions when a previous declaration can constitute a fact, the first is when a witness is subject to threats or bribes to testify a lie (Art 500, para 4, CPP). In this case, when there is evidence of threats and money offers in the public prosecutor's file it is reasonable to assume that the declaration done by the witness during the *dibattimento* is not genuine.[64]

In this regard, previous statements made by the witness to the *polizia giudiziaria* are only attached to the trial file if they were done with all the legal warranties; they must have a delegation from the public prosecutor to proceed with the interrogation, and also, the person during the moment of the statement was free and not detained.[65] Only if those two requirements are met, they can be considered as a spontaneous declaration, as established in Art 503, para 4, CPP:

> 'Without prejudice to the prohibition to read and produce statements, the public prosecutor and the lawyers may challenge, in whole or in part, the content of the testimony by using the out-of-court statements previously made by the witness and contained in the investigative dossier. Such right may be exercised only if the party has already testified on the facts and circumstances to be challenged'.

In any case, the *contestazioni* should be accepted or denied by the judge, as established in Art 504 CPP:

> 'Unless otherwise provided by law, the President of the bench shall decide immediately and without any formality on the oppositions submitted during the examination of witnesses, experts, technical consultants, and private parties'.

[64] See P. Tonini, *Manuale* n 29 above, 743.
[65] L. Liguori, n 13 above, 321.

Likewise, it cannot conclude by itself that the witness' testimony during the *dibattimento* is false, whereas it can only consider the testimony as insufficient evidence. The reason is that the previous statement does not disqualify the testimony during the *dibattimento*; instead, it makes it uncertain, inconsistent, and elusive thus discrediting the credibility of the witness.[66]

3. The Judge's Cross-examination

After the conclusion of the cross-examination, the parties can have a redirect examination of the witness and then the judge is allowed on his initiative (*d'ufficio*)to examine the witness and ask new questions, in what can be considered a tangling of both the inquisitorial and adversarial systems.[67] It could be categorized as a *sui generis* cross-examination, that is not specifically regulated by the CPP, and where jurisprudence and the legal doctrine are divided on the role of the judge. The CPP does establish that the judge can ask direct questions to the witness and the parties, after the direct and cross-examination from the defense and public prosecutor, but it does not specify the type of questions allowed, Art 506, para 2, CPP states:

> 'The President of the bench, also upon request of a different member of the bench, may ask questions to the witnesses, experts, technical consultants, as well as to the persons referred to in Art 210 and to the parties who have already been examined, only after the examination and cross-examination have been carried out. The right of the parties to conclude the examination following the order referred to in Arts 498, paras 1 and 2, and 503, para 2, remains in force (added emphasis)'.

Whereas, some judges, often interrupt the examinations by asking questions to the witness before the examination and cross-examination have been concluded, a situation that is reminiscent of the inquisitorial system and that puts the defense in an awkward and delicate predicament of potentially questioning the actions of the judge during the *dibattimento*. It is quite clear that judges can ask about new things, not addressed during the direct and cross-examination, a prerogative not given to the parties, as established in Art 506, para 1 CPP: '(…) the President of the bench may indicate to the parties new or broader topics of evidence, useful to carry out an exhaustive examination'. Nevertheless, the legal doctrine is unquestioned that this can only be done after the conclusion of the direct and cross-examination of the parties during the *dibattimento*.[68] Therefore an objection in these circumstances serves to make the rules of the procedure respected; and also, stops the witness from saying something contrary to the version of the facts of the party that brought

[66] See P. Ferrua, n 33 above, 160.

[67] See C. Morselli, n 7 above, 115-116.

[68] F.R. Dinacci, 'Cultura dell'esame incrociato e resistenze operative', in D. Negri and R. Orlandi eds, *Le erosioni silenziose del contraddittorio* (Torino: Giappichelli, 2017), 97.

that witness. Likewise, it helps the witness in a difficult moment, giving him time to relax. Objections based on this are legitimate and could be in the form of: - *I oppose the question because it is not clear; or because it confuses the witness; or because it forces the witness to give a hypothesis*'.[69]

Despite that, the CPP does not specify if the judge can ask suggestive questions.[70] In this sense, Art 499, para 3, of the CPP, cited earlier does not allow leading/ suggestive questions from the party that requested the witness, and also to the party having a common interest, like the victim (*parte civile*), as I explained earlier. Accordingly, the CPP has a *vacatio legis* on the issue of whether the judge can or not propose suggestive/leading questions to a witness. Not surprisingly, in a system that is influenced by the inquisitorial system, most judges tend to examine witnesses with suggestive questions. In this respect, legal scholar, Paolo Tonini describes this as a temperate accusatory prerogative; with a balance of functions and the power of the judge's initiative (*d'ufficio*).[71] These initiatives from the judge should be done after the culmination of the direct examination and cross-examination not before. Also, the judge's initiative should be limited to assuming evidence that is only necessary for the clarification of facts regarding the elements of the crime and also the innocence. Therefore, the judge cannot invert the order of the examination and cross-examination. During the cross-examination, the judge should refrain from cumbersome interventions that stray from the evidential objective that the parties propose. Furthermore, a direct examination from a judge's initiative (*da ufficio*) without allowing a cross-examination should be considered unusable.[72]

Some recent jurisprudence from the *Corte di Cassazione* tends to favor the power of judges making suggestive questions:

> '(…) the premise that the prohibition on suggestive questions given the clear literal tenor which refers the prohibition itself to the examination conducted by the party who requested the summons of the witness and by the party who has a common interest does not operate in concerns the judge, who can ask the witness all the questions he deems useful for clarifying the fact (added emphasis)'.[73]

Another recent sentence clarifies that there is no prohibition for suggestive questions by the part of the judge:

> 'Nonetheless, the exception relating to the prohibition on asking suggestive questions is manifestly unfounded. The prevailing teaching of this Court is, contrary to what the appellant demonstrates to believe, in the sense that this

[69] See G. Gulotta, n 60 above, 125.
[70] See E. Stefani, n 3 above, 111.
[71] See P. Tonini, *Manuale* n 29 above, 757, 759.
[72] See G. Illuminati, n 32 above, 123.
[73] Corte di Cassazione-Sezione penale IV 2 August 2023 no 33917.

> prohibition on asking suggestive questions is not addressed to the judge, who, in the exercise of the powers attributed to him by Art. 506 CPP, (…) there is indeed an isolated ruling to the contrary, but on closer inspection it concerns the particular hypothesis in which the judge himself proceeds with the direct examination in cases where this is provided for by procedural law and which does not occur in the case of species.'[74]

Despite that, the *Corte di Cassazione* in 2020 decided a leading case where Art 111 of the Constitution was brought as an argument against the monopoly of the judge regarding witness examination, determining that:

> 'During the witness examination, the prohibition on asking harmful or suggestive questions to the witness applies not only to the party and to the subjects who requested the examination, under Art. 499, paragraph 2 of the Code of Criminal Procedure, but also to the judge, who must instead ensure the authenticity of the answers within the proceedings.'[75]

In this case, the court applied the prohibition of asking suggestive/leading questions, in Art 499 of the CPP, cited earlier, not only to the party that had brought the witness to testify in the direct examination but also to the judge during his witness examination. Commenting on this decision from the *Corte di Cassazione*, legal scholar Carlo Morselli is also of the opinion that the prohibition to formulate suggestive or harmful questions by the judge could damage the sincerity of the responses to the questions, which is an inherent competence of the judge.[76] In this case, the judge examined the victim (*parte civile*) of a sexual crime a 14-year-old female with certain suggestive force, ending up manipulating the witness testimony and obtaining slavish answers that were in contrast with the authenticity of the facts, hence distorting them.

Even though the legal doctrine is divided on whether a judge is allowed to make suggestive questions to the witness, some exceptions are undisputed (*pacifica*) by the legal doctrine as in the case of minors and sexual crimes. Therefore, the *Corte di Cassazione* understands that in certain cases, while examining a minor. the judge is allowed to ask suggestive questions but not harmful questions, establishing an important distinction in cases that deal with sexual crimes:

> 'The prohibition on asking suggestive questions in the witness examination does not apply to the judge, who, acting from a perspective of impartiality, can ask the witness all the questions deemed useful to contribute to ascertaining the truth, except for harmful ones specifically in the field of sexual crimes, in which the court ruled out that the question posed by the judge to the

[74] Corte di Cassazione-Sezione penale V 20 July 2023 no 26761.
[75] Corte di Cassazione-Sezione penale IV 19 May 2020 no 15331, *Anpp 4/2020* (2020).
[76] See C. Morselli, n 7 above, 191.

offended person had a suggestive nature, having to be understood as a mere request for clarification on the modalities of the crime.'[77]

Furthermore, in the case of a hostile witness, it has also been established by the *Corte di Cassazione* that because the judge is required to search for the substantial truth, therefore suggestive questions were allowed,[78] however barring any harmful questions.[79] In another scenario, in a case with a minor, the judge was allowed to make suggestive questions because there were difficulties in finding the substantial truth of the case.[80] In this regard, the highest court tends to favor the judge in making suggestive questions.

In conclusion, given the ambiguity of judges' cross-examination of witnesses, the main criteria for the judge not to allow judicial errors or a misjudgment in the evidence with the standard of proof beyond any reasonable doubt is paramount. Therefore, if suggestive questions are asked by the judge, they should be influential in his final verdict of guilt or absolution and not on the hypothesis or counterhypothesis of the parties in the trial hearing.

[77] Corte di Cassazione-Sezione penale III 15 April 2015 no 21627, *Repertorio Foro Italiano* (2015).

[78] Corte di Cassazione-Sezione penale III 8 March 2010 no 9715.

[79] L. Fedalti, *La testimonianza penale* (Milano: Giuffrè, 2012), 231.

[80] Corte di Cassazione-Sezione penale III 28 October 2009 no 9157, *Repertorio Foro Italiano 2010, Dibattimento penale*, 68 (2010).

Essays

The Regulation of Cultural Meanings Through Sponsorship Contracts

Manlio Lisanti*

Kennst du das Land, wo die Zitronen blühn...?

J.W. von Goethe, *Wilhelm Meisters Lehrjahre*
(Berlin, 1795)

Abstract

This paper analyses the potential negative repercussions of sponsorship contracts. It assumes that cultural heritage has both a tangible value, a *corpus mechanicum*, and an intangible value, pertaining to identity and historical aspects, representing a *corpus mysticum*. With this combination of identity, historical aspects may make a tangible part of cultural heritage a testimony of civilization. Sponsorship contracts influence the intangible value of the cultural asset. The paper starts by analysing some appropriative dynamics in the field of distinctive signs which have a precise cultural or political meaning, and which, through registration, remain mainly available to private individuals. Similarly, in the event that the sponsor performing the restoration of the property brands the cultural asset, albeit for a limited time, appropriation can use the identity and inner value of the property itself. It then seems crucial to find alternative means by which to reconcile the economic support, which is necessary to protect cultural property, with the material value and intangible meaning of the cultural property.

I. Introduction

Cooperation between public entities and private individuals[1] in the care and enhancement of cultural heritage is certainly not an innovation within legal theory. For years, the legal theory of cultural heritage law has dismissed its original top-down nature,[2] which was originally based on the primary purpose of legislation,

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[1] The role of private individuals has been evolving over the years, moving from an initial phase of 'opposition' between the public interest in the preservation of the property and the interest of the individuals, to the social function of cultural heritage, which is enshrined in Art 9 Italian Constitution. Indeed, the formerly dual (public-private) relationship has now become trilateral: public instances, private instances and the interests of the community. The third phase involves other interests as well, such as those of private financiers or patrons. On this point, see L. Casini, *Ereditare il futuro. Dilemmi sul patrimonio culturale* (Bologna: il Mulino, 2016), 110.

[2] The legislation on cultural heritage has had an evolution for two centuries from pre-unification states' legislation, with legal instruments that, over time, stratified and have been reused to ensure

that is, restricting the circulation[3] of 'things of art'.[4] The public-private theory of cooperation that now more fully characterizes cultural heritage law serves as a starting point for examining the spillover effects of this relationship between the public and private in sponsorships.

The concept of valorisation should mainly concern the intangible value expressed by cultural assets. This aspect could be in conflict with the protection that is focused on the material support of the asset.[5] The function of valorisation aims at allowing the use and the enjoyment of cultural assets and the largest dissemination of its intangible value. Nowadays, the original sense of valorisation

the protection of cultural heritage. For example, the declaration on cultural interest originated in the eighteenth century but, after three centuries, is still a crucial legal instrument. See A. Emiliani, *Leggi, bandi e provvedimenti per la tutela dei Beni Artistici e Culturali negli antichi stati italiani 1571-1860* (Bologna: Edizioni ALFA, 1978), 100-101; L. Casini, '«Giochi senza frontiere?»: giurisprudenza amministrativa e patrimonio culturale' 3 *Rivista Trimestrale di Diritto Pubblico*, 914 (2019). The democratisation process of the cultural heritage, started after World War II, has shifted the focus on its use, allowing the creation of 'theories inspired by medieval conception of 'divided' ownership, aimed at exercise several rights, by different subjects, on the same property'. See, L. Casini, 'Patrimonio culturale e diritti di fruizione' 3 *Rivista Trimestrale di Diritto Pubblico*, 657 (2022).

[3] Two theories revolve around the circulation of cultural property. The former ('cultural nationalism') considers cultural property as part of a global heritage of humanity. The latter ('cultural internationalism') emphasizes the link between cultural property and the culture of the nation in which the property was created and allows a State to demand the return of illegally exported property. See J.H. Merryman, 'Cultural Property Internationalism' 12 *International Journal of Cultural Property*, 11 (2005); Id, 'Two Ways of Thinking About Cultural Property' 80 *American Journal of International Law*, 831 (1986); L. Casini, 'La globalizzazione giuridica dei beni culturali' 2 *Aedon, Rivista di arti e diritto online*, (2012). Even more relevant than legislation, about circulation, seems to be the work of administrative courts. Not only have they interpreted the legislation, but they have also outlined criteria to identify the cases in which works of art may or may not leave Italy, upholding protectionist measures to protect cultural heritage, laying the groundwork for the development of regulations and guidelines, as happened with the Ministerial Decree of 6 December 2017, on the criteria underlying the issuance of the certificate of free exportation. On the key function of administrative courts in the field of cultural heritage protection, see Id, '«Giochi senza frontiere?»' n 2 above, 914.

[4] An expression used by M. Grisolia, *La tutela delle cose d'arte* (Roma: Società editrice del Foro Italiano, 1952), 252, a work in which the foundations were laid for the autonomy of the law of cultural property, developed in the following years by the contributions of M.S. Giannini, 'I beni culturali (1975-1976)', in Id, *Scritti* (Milano: Giuffrè, 2005), VI, 1003, an essay described by Sabino Cassese using words borrowed from Cervantes '*todo es peregrino y raro, y lleno de accidentes que maravillan y suspenden a quien los oye*': S. Cassese, 'I beni culturali da Bottai a Spadolini', in Id, *L'Amministrazione dello Stato. Saggi* (Milano: Giuffrè, 1976), 175. On Massimo Severo Giannini's contribution to the development of cultural heritage law, see L. Casini, '«Todo es peregrino y raro...» Massimo Severo Giannini e i beni culturali' 3 *Rivista Trimestrale di Diritto Pubblico*, 987 (2015). According to Sabino Cassese, Giannini, after a long period of study on cultural heritage, reached the conclusion that in a cultural asset there are, at the same time, property rights and public functions on which the public power exercises its prerogatives. See, S. Cassese, 'Marco Cammelli e i beni culturali', Speech held during the workshop 'L'opera e il contributo scientifico di Marco Cammelli', Bologna 28 November 2011, available at https://tinyurl.com/z46khps3 (last visited 30 September 2024).

[5] L. Casini, *Advanced Introduction to Cultural Heritage Law* (Cheltenham, UK – Northampton, MA, US: Edward Elgar, 2024), 59. About the dual function of protection and valorisation, see also Corte costituzionale, 9 June 2020, no 138, ECLI:IT:COST:2020:138.

is moving in a market-oriented meaning,[6] with not necessarily negative effects to reject in any case. But it must be considered that behind this change of views hides risks about the devaluation of the sense held by the cultural asset.[7] During these years, the purposes of conservation and protection were placed side by side and overlapped with the purposes of use and enjoyment of cultural property, pursuing the goal of its enhancement.[8] In Italy, the first pivot point originating the concept of valorisation was not, as one might believe, the moment at which the Ministry of Cultural Heritage and Environment was established. Indeed, this Ministry merely brought together different departments, having powers that already existed,[9] which had been exercised, mostly, by the Ministry of Education. Rather, this concept evolved thirty years later with the adoption of the Urbani Code, that was also meant to convey a new way of understanding cultural heritage, seeing it as an economic resource.

Valorisation does not only treat cultural property as an economic resource. In addition to being simplistic, it represents a nonsense, considering cultural assets to be regarded only as an economic resource. The scope of valorisation does not pertain only to an economic exploitation of the cultural assets; it should be only an aspect of this function, but not the core component of valorisation; that is about increasing the knowledge of cultural heritage.[10]

The double function of protection and valorisation introduces to the overlapped meaning of cultural assets: on the one hand, stands the physical materiality of the asset and, on the other, ranks the intangible value of its inner meaning, which is imbued with its own specific identity and symbolic value. Cultural identity is deeply evocative and recognizable, but also commercially exploitable,[11] which is caught up

[6] According to Sabino Cassese, the meaning of valorisation changed, acquiring a commercial significance. The exploitation of cultural heritage is possible but 'not in the way that the cultural intent is transformed into economic management for income-generating but allowing greater income that ensures better protection and better fruition of cultural heritage'. See S. Cassese, 'I beni culturali: dalla tutela alla valorizzazione' 7 *Giornale di Diritto Amministrativo*, 674 (1998).

[7] J.-M. Pontier, *La protection du patrimoine culturel* (Paris: L'Harmattan, 2019), 24.

[8] Valorisation is not limited to the material nature of cultural property but extends to its intangible features. See M. Dugato, 'Strumenti giuridici per la valorizzazione dei beni culturali immateriali' 1 *Aedon, Rivista di arti e diritto online*, (2014). Moreover, the idea that a latent value lies in the cultural asset comes from the words of Feliciano Benvenuti about historic centres, accordingto whom, 'the historic centre is much more than a landscape or an environment: it is the landscape of man or, to use terms that might seem poetic, the environment of the soul' (author's translation): F. Benvenuti, 'Introduzione', in G. Caia and G. Ghetti eds, *La tutela dei centri storici. Discipline giuridiche* (Torino: Giappichelli, 1997), 2.

[9] In this regard, it should be remembered that Sabino Cassese described the newly established Ministry as 'an empty box' (author's translation). See S. Cassese, 'I beni culturali' n 4 above, 173.

[10] The relationship between protection and valorisation should be considered not only osmotic, but protection represents the core concern of the legislator. The protection must be applied impartially and by different administrative offices from those involved in urban-territorial development or economic-production activities of an area, distancing itself from profit-driven needs. See S. Settis, *Italia S.p.A.: l'assalto al patrimonio culturale* (Torino: Einaudi, 2002), 103; M. Cammelli, 'Italia Spa: sul saggio di Salvatore Settis (e dintorni)' 3 *Aedon, Rivista di arti e diritto online*, (2002).

[11] The institutions have increasingly become aware of the economic potential behind a careful

in its 'intangible value'.[12] This is all the more true when considering that legislation allows public administrations to register, as trademarks, distinctive elements drawn from cultural, environmental, historical or ethno-anthropological heritage.[13]

Against this background, private investors have targeted the intangible value of cultural assets, seeing in this dynamic an opportunity to emphasize their brands and raise their profits[14] using sponsorship contracts. In this way, the administration owning the cultural asset, usually lacking the financial means to protect and

and respectful management of cultural heritage. For some years, they have been adapting to the business world. For an examination of the role played by the Ministry, whether of simple protection or collaboration with private partners, and with a view to making cultural heritage usable by as many people as possible, see M. Cammelli, 'Il diritto del patrimonio culturale: una introduzione', in C. Barbati et al, *Diritto del patrimonio culturale* (Bologna: il Mulino, 2017), 17; R. Cavallo-Perin and G.M. Racca, 'Caratteri ed elementi essenziali nelle sponsorizzazioni con le pubbliche amministrazioni' 4 *Diritto amministrativo*, 583 (2013).

[12] S. Fantini, 'Beni culturali e valorizzazione della componente immateriale' 1 *Aedon, Rivista di arti e diritto online*, (2014).

[13] As provided, in fact, by Art 19, para 3, of decreto legislativo no 30 of 10 February 2005, as amended by decreto legislativo no 131 of 13 August 2010 that says 'The administrative bodies of the State, the Regions, the Provinces and the Town and City Councils can also register their trademark, whether or not having as its object distinctive elements having as their object distinctive graphic elements drawn from cultural heritage, historic, architectural or environmental heritage of their respective territory; in this case, profits from the economic exploitation of the mark, including the profits from grants of licences and merchandising, are to be used for financing institutional activities or covering deficits of the administration'. This article transposed what, years ago, some administrations put into practice. The Municipality of Assisi, for the year 2000 Jubilee, licensed a mark with its own name to a private party; in this way, its financial situation turned round. See G. Caforio, 'La tutela delle tipicità appartenenti alla pubblica amministrazione' 1 *Aedon, Rivista di arti e diritto online* (2014). This involves the same risk of appropriation of intangible value of a cultural asset but, this time, by an administration that has few powers to inhibit a misuse of the mark when it is licensed to a private party. An administration can crystallise a cultural asset in a mark, with all the problems that this entails about the distinctiveness of the mark but, on the other hand, the risk of a misuse of the mark still stands. The Michelangelo's David case should be noted, reinterpreted by an Italian publisher as if a real model. Within the judgment no 1207 of 2023, the Tribunal of Florence stated that the publisher 'insidiously and maliciously juxtaposed David's image to that of a human model, debasing, blurring, mortifying, humiliating the high symbolic and identitarian value of the cultural asset and subjugating it by promotional and commercial purpose'.

[14] With regard to traditional dishes, artisanal knowledge, and traditional celebrations, according to some scholars, certain appropriative risks might arise also for this particular kind of intangible cultural heritage, because the 'ICH inscriptions such as the Mediterranean diet provide opportunities not for the democratization of elite heritage but, instead, for synergistic appropriation thereof by political, economic, and academic elites'. See H. Deacon, 'Safeguarding the Art of Pizza Making: Parallel Use of the Traditional Specialities Guaranteed Scheme and the UNESCO Intangible Heritage Convention' 25 *International Journal of Cultural Property*, 515-542 (2018). According to Richard Pfeilstetter there is a 'complementary relationship between ethnic identity discourse (exploited politically), the nutritional – environmental discourse (exploited economically) and the heritage discourse (exploited academically)'. R. Pfeilstetter, 'Heritage Entrepreneurship: Agency-Driven Promotion of the Mediterranean Diet in Spain' 21(3) *International Journal of Heritage Studies*, 215-231 (2014). That might endanger practices of transmission of the original practices. In this regard, see M. Forsyth, 'Lifting the Lid on 'the Community': Who Has the Right to Control Access to Traditional Knowledge and Expressions of Culture?' 19 *International Journal of Cultural Property*, 1-31 (2012).

enhance it, allows the private party, in exchange for money or for the restoration at its own expense, to associate the name of the sponsor with the cultural asset for a longer or shorter time.

Over the years, sponsorship has encountered minimally detailed regulation, especially considering the 2016 Public Contracts Code, replaced by the new 2023 Code. The sponsorship's rules focus on the provision of an economic threshold above which the administration is bound to one duty only, that is, publishing on its website, for at least thirty days, a notice announcing its search for sponsors or that it has received a sponsorship proposal, briefly indicating the nature of the content of the proposed contract. Once the thirty-day publication period has expired, the contract can be freely negotiated, in accordance with the principles of impartiality and equal treatment.[15]

A more detailed definition emerged from the Ministry of Cultural Heritage's Circular no 28 of 9 June 2016, which outlined guidelines for making an overall assessment of the proposal and laying down first procedures.

It is not clear, in case law, what rules should apply to sponsorship, namely, whether or not to include it among the public contracts awards[16] and thus make it subject to the Public Contracts Code, or if it amounts to a 'concession contract',[17] or if it should be considered to be a 'passive contract'[18] (and, consequently, the

[15] The risk of such sparse regulation lies in the possibility that the administration may choose sponsorship criteria that are entirely arbitrary. There are numerous cases examined by administrative judges in which the administration has confused procedural simplicity with arbitrariness in selection; see Consiglio di Stato, 14 June 2024, no 5367, available at www.giustiziamministrativa.it. The main issue is the uncertainty surrounding the legal institutions that should guarantee certainty; see G. della Cananea, *Al di là dei confini statuali. Principi generali del diritto pubblico globale* (Bologna: il Mulino, 2009), 69.

[16] Most recently, in this regard, a ruling was delivered by the TAR (Regional Administrative Tribunal) Lazio, Rome, no 519/2014, available at www.giustizaamministrativa.it, which held that disputes about sponsorship of cultural property are subject to procurement judicial procedure. As its starting point, it was found that, in any technical sponsorship, an economic operator is entrusted to perform works or provide services at his care and expense, 'in consideration of an economic advantage resulting from the publicity given by the association of its name/brand/image with an event or asset, namely a cultural asset, while still aiming to satisfy an overriding public interest' (author's translation). Based on this, the TAR applied the criteria laid down by the Plenary Council no 22/2016 to define the scope of application of the Public Contracts Code. In fact, where it is necessary, on the one hand, to define what 'entrustment procedures' are and, on the other, to abide by a literal interpretative criterion, an all-encompassing notion should be adopted, to bring all types of contracts in which an 'entrustment' is feasible under the scope of the special 'procurement' judicial procedure.

[17] The principal characteristic of the concession contract lies in the transfer of operational risk to the concessionaire. In this manner, the concessionaire does not receive compensation from the administration, which remains 'indifferent' to the private party's ability to recoup their investment. However, the concessionaire will be able autonomously to manage the service entrusted to them. It is precisely the management in favour of the users that will compensate the private party. As to this kind of contract, see A. Botto and S. Castrovinci Zenna, *Diritto e regolazione dei contratti pubblici* (Torino: Giappichelli, 2020), 222-223.

[18] Passive contracts are those that entail a cost for the administration, while active contracts are defined as those contracts that solely result in financial income for the administration.

Public Contracts Code would not apply).[19]

While sponsorship can pursue goals that fit well with preserving and protecting cultural heritage, it is necessary to consider that this instrument always depends on the scarcity of economic resources by the public administration, which are insufficient to cope, in most cases, with conservation work. In a nutshell, sponsorship depends on a situation of imbalance, between a 'need' of the administration and a 'willingness' of the sponsor, who, attracted by a benefit to their image, stemming from the 'social' nature of his activity, makes a real marketing investment.[20]

This arrangement is likely to weaken the original scope of the identity of cultural property, through a mechanism of 'resignification'[21] of its own historical-artistic meaning.

A similar dynamic appears, in an entirely different context, ie in the evolving forms of 'complexification'[22] of the meaning attributable to given trademarks, which, as will be seen, relates to the value (social, political or artistic) underlying some of them. It is a fact that the essential and original purpose of a brand has gradually evolved. A brand's trademark is no longer about an exchange of products, that is, a useful tool for preserving competition and correcting information on the market. A brand's trademark may now have totally different meanings, which point to, thanks to the processes of branding, the world of communicative (expressive) meanings. Brands convey messages pertaining both to the objects to which they refer – the product – and to multiple other meanings underlying the feelings, values and ways of appearing, which, in a cyclical motion, act on culture and society and, conversely, are fed by them.[23]

[19] Consiglio di Stato 31 July 2013 no 4034, available at www.giustiziamministrativa.it. This thesis has also been embraced by M. Cammelli, 'Pluralismo e cooperazione', in C. Barbati et al eds, *Diritto e gestione dei beni culturali* (Bologna: il Mulino, 2011), 190.

[20] For a disenchanted reading of sponsorships, see S. Valaguzza, 'Le sponsorizzazioni pubbliche: le insidie della rottura del binomio tra soggetto e oggetto pubblico e la rilevanza del diritto europeo' *Rivista Italiana di Diritto Pubblico Comunitario*, V, 1381 (2015).

[21] C. Crea, *Segni sociali e proprietà escludente. Per una critica del mercato delle appropriazioni comunicative* (Napoli: Edizioni Scientifiche Italiane, 2022), 33. The processes of signification and resignification are part of a legal proceeding that unfolds from trademarks, through which language control is exercised. This control, with the exclusivity protections that characterize it, can impact the usage, creation, and alteration of meanings of expressive signs.

[22] ibid 34. Crea's work is essentially concerned with the risk of appropriation by private individuals of distinctive symbols or signs holding other meanings, relevant from a social or cultural point of view. Due to the strengthened protection of registration, these symbols would remain stably drawn into a market-based and appropriative dynamic, triggering a crystallization of the meaning of the sign/mark, such as to prevent its social re-appropriation or, at any rate, to hinder its use of a common matrix.

[23] Against the cultural appropriation problem, Native Americans have brought claims under a variety of laws, from trademark and copyright to the First Amendment and Fifth Amendment, see A.R. Riley and K.A. Carpenter, 'Owning *Red*: A Theory of Indian (Cultural) Appropriation' 94 *Texas Law Review*, 859-931, 860 (2016). This cyclical dynamic, affecting culture and society, in its turn is a result of society itself and of a given culture. This reasoning can be further explored, from the point of view of industrial property, by seeing G.B. Dinwoodie and M.D. Janis, *Trademark Law and Theory. A Handbook of Contemporary Research* (Cheltenham-Northampton: Edward

In this way, a coincidence of meanings responding to marketing strategies appears and cannot do without the creation of a '*communicative surplus value*'[24] which, in turn, overlaps with pre-existing meanings, appropriating them.

Against this backdrop, just as it happens in the world of brands, the sponsorship of cultural assets may result in some forms of appropriation of the asset's value meanings. The transfer of meaning from one ambit (a purely cultural one) to another (the association of the value with a brand)[25] is a corollary and effect of the appropriative mechanism, which results in a commoditization of value impinging on cultural assets.[26]

II. The Appropriation of Cultural Meaning in the Universe of Social Signs: The Idea

The problem of attributing a commercial meaning to a cultural sign pertains to the phenomenon of secondary meaning,[27] wherein a different semantic content indicating a particular product or service is overlaid onto a pre-existing cultural meaning. In this way, the new meaning appropriates the previous one. Simultaneously, it borrows from the cultural value that affects that particular sign to generate an economic surplus.

These dynamics primarily concern an area lying midway between public domain and trademark law. However, what is interesting to analyse is the mechanism of appropriating meanings. In sponsorship, similar forms of appropriation of valuable meaning can be observed. When a cultural asset is covered under the sponsor's mark, the original value of the asset is accounted for by the commercial aspect, that takes over against the intangible meaning, exploited

Elgar, 2008), 42.

[24] C. Crea, n 21 above, 38; P. Gulasekaram, 'Policing the Border Between Trade Marks and Free Speech: Protecting Unauthorized Trade Mark Use in Expressive Works' 80 *Washington Law Review*, 887-942, 931 (2005).

[25] The reverse process, associating cultural meaning with a brand, is much more difficult. Some scholars attribute a primacy to the creation of meaning at the level of categories or objects produced rather than at the level of the brand. Additionally, the rapid pace at which brands gain or lose relevance today does not help in consolidating any potential cultural significance which they might have. For an analysis of the cultural resonance of brands, see S. Fournier and C. Alvarez 'How Brands Acquire Cultural Meaning' 29(3) *Journal of Consumer Psychology*, 519-534 (2019).

[26] In fact, 'the enhancement of the semiotic-expressive function of signs cannot result in a counter-appropriation, that is still individual and mercantile, of economic benefits, although ennobled by the narrative from non-economic interests' (author's translation): C. Crea, n 21 above, 176. This expression, borrowed from the field of private law, well summarizes the appropriative mechanism behind the value meaning of cultural assets. This method, articulated by Crea, can be used from time to time, changing its factors, to analyse issues arising from different branches of law.

[27] J. Jacoby, 'The Psychological Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion and Dilution' 91 *Trademark Rep*, 1013 (2001); R.H. Stern and J.E. Hoffman, 'Public Injury and the Public Interest: Secondary Meaning in the Law of Unfair Competition' 110 *University of Pennsylvania Law Review*, 935 (1962).

for a commercial purpose. In this sense, a sponsorship contract can facilitate the appropriation of cultural meanings by private actors. Originally, secondary meaning allows a weak brand to acquire, over time and with intense use, another meaning in the market, through a symbol. In this way, the mark becomes recognizable to the public and takes on a specific connotation.

Secondary meaning plays a particularly significant role in the area of what are at first weak trademarks, ie, those trademarks that are purely descriptive, presenting a low distinctive capacity when they are registered. In the cases of a descriptive mark, secondary meaning can be used to consolidate mark protection and increase a brand's commercial value.

At the end of the commercial re-signification process,[28] the new sense attributed to the brand is now foreign to the meaning of that sign; the former replaces the latter and confers distinctive capacity to the mark.

The process of commercial redefinition of a sign entails the risk of appropriation of expressions which, instead, should remain within the scope of freedom of political or cultural expression or, in any case, social discussion.[29] This, for example, happened in the United States under the motto 'Black Lives Matter'. Many have attempted to appropriate this expression for commercial use. This was done through applications for registration of the motto as a trademark.[30]

If this is true of social meanings, the same reasoning applies to those of figurative nature belonging to cultural heritage. In this case, the purpose is to 'cage' the cultural meaning, perhaps previously protected by copyright, to continue to exploit economic advantages after the expiry of the protection period. This confusion between cultural and commercial meaning consists precisely in the transformation of the original message and in the appropriation of the cultural value immanent in the property. Who would link today, at first glance, the 'NIKE'

[28] C. Crea, n 21 above, 33, 146, 157, 184.

[29] The issue of risks associated with the registration of cultural signs is also addressed in Italian cultural heritage legislation. Arts 107 and 108 of the Cultural Heritage Code provide specific regulations for the commercial use of cultural assets. For non-profit uses or purposes of study, research, free expression of thought or creative expression, and the promotion of cultural heritage knowledge, no applications or payments of concession fees to the custodial structures are required. Conversely, the reproduction of artworks for commercial purposes, in addition to being authorised, must be compensated. Consider the cases of *Uffizi* v *Gaultier*, discussed in https://tinyurl.com/25mutv5k (last visited 30 September 2024), and Tribunale di Venezia, *Accademia di Venezia* v *Ravensburger*, ordinanza 24 October 2022, available at dejure.it.

[30] See R. Stronach, 'Trademarking Social Change: An Ironic Commodification' 96 *Journal of the Patent and Trademark Office Society,* 567, 569-595 (2014); A. Hernandez, 'Tribal Trademark Law' 76 *Stanford Law Review*, 689, 661-702 (2014) pointing out that during these years, since 2013, the year of the movement's inception, there have been at least fifty attempts to register the trademark 'Black Lives Matter', the first in 2015, rejected by the US Patent and Trademark Office (USPTO) because: 'the public would not perceive the slogan Black Lives Matter as source-identifying matter that identifies applicant as the source of the goods but rather as an expression of support for anti-violence advocates and civil rights groups'. See, for a full discussion of the outlined dynamics, C. Crea, n 21 above, 147.

brand to the winged goddess of victory?[31] And who would link the image of the Starbucks mermaid to Greek mythology[32] first, and then to the Norse mythology from which the trademark is drawn? These are examples of elements that populate the cultural imagination of entire social groups, which have been frozen within a mark that initially exploited and then stripped them of their primary meaning. Sponsorship does the same, associating a commercial meaning with an asset that has a completely different significance. This is precisely what happens in processes of secondary meaning, where symbols, signs, or even colours become distinctive and identify a brand through prolonged use.

The mechanism of meaning overlap is the same, with all the risks of altering the intangible value, ie, the *corpus mysticum*, that this entails for cultural heritage.

This dynamic is also observed when a design or the shape of an accessory, such as a handbag, becomes recognisable through the demonstration of its iconicity,[33] thereby associating it with a secondary meaning. Thus, there is a connection between creative works and the acquisition of distinctiveness, with the consequence that a handbag can be registered, as has happened with the 'Birkin' by Hermès or the 'Baguette' by Fendi.[34]

If a design object can be registered through the instrument of secondary meaning, because its particular form is immediately associated with the brand, this confirms worries about the appropriative risks of the meanings of cultural assets through the superimposition of commercial marks. In this way, an association does exist between different meanings of artistic or cultural value and an economic activity, appropriating that message to overturn and weaken it. The result is that cultural meaning is completely unusable in the processes of cultural creation and communication.[35]

III. Two Case Studies on the Relevance of Intangible Value

In the first instance, it is beneficial to explore what happens when symbols

[31] K. Assaf, 'Der Markenschutz und seine kulturelle Bedeutung: Ein Vergleich des deutschen mit dem US-amerikanischen Recht' 1 *GRUR International*, (2009).

[32] M. Phillips and A. Rippin, 'Howard and the Mermaid: Abjection and the Starbucks' Foundation Memoir' 17(4) *Organization*, 481 (2010); C. Crea, n 21 above, 36.

[33] For a significant work about the interweaving between secondary meaning and cultural meaning and for a distinction between cultural heritage and brand heritage. In particular 'while brand heritage is usually marketed to consumers and places primacy on facts about the brand, and creates myths, cultural heritage is defined by its interest in communities beyond consumers. The two can, of course, overlap. Items of brand heritage become relevant to a wider audience for their cultural value. In these circumstances, the divide between culture (primarily expressive uses) and commerce (primarily information about production that is relevant on the market) is particularly hard to identify'. See F. Caponigri, 'Iconic Copies™' 23(2) *Chicago-Kent Journal of Intellectual Property*, 24-25 (2024).

[34] ibid 49-50.

[35] M. Senftelen, 'A Clash of Culture and Commerce: Non Traditional Marks and the Impediment of Cyclic Cultural Innovation', in I. Calboli and M. Senftelen, *The Protection of Non Traditional Trademarks. Critical Perspectives* (Oxford: Oxford University Press, 2018), 309.

or signs with cultural value undergo a type of commercial appropriation through trademark registration, for example, when artworks like Rembrandt's 'The Night Watch' or sculptures by Gustav Vigeland, one of Norway's foremost sculptors between the 19th and 20th centuries, are registered and used exclusively as trademarks. In the latter case, the City of Oslo intended to register some of Vigeland's works as trademarks, mistakenly conflating copyright with trademark usage rights.

The case involves a legal dispute between the City of Oslo and the Norwegian Industrial Property Office (NIPO), regarding the registration of Gustav Vigeland's statues as trademarks. The dispute concerned the interpretation of trademark laws as to whether or not public artworks could be registered as trademarks.

Following NIPO's rejection of the application, the City of Oslo appealed to the EFTA Court, claiming a right to the sculptures based on the economic efforts made by the administration, even after the expiration of copyright, to publicise and make Vigeland's statues known to a wide audience.

The EFTA Court's decision, in its reasoning, unfavourable to the City of Oslo, revolves around two moral premises. Firstly, it considers that a certain audience might find the trademark registration offensive, as these works hold a distinct status within Norwegian cultural heritage. Secondly, registering artworks as commercial trademarks would amount to an appropriation of the artwork itself and a trivialization of the inherent cultural value.[36]

The decision significantly impacts the concept of appropriating artistic meaning, using morality as a tool whenever trademark registration corresponds to a redefinition of its meaning in the commercial context.[37] The risk perceived is substantial; by registering the image of a cultural asset as just another trademark, its significance may be obscured, and its ability to convey an artistic message weakened or entirely lost.[38]

According to the EFTA Court decision, a true monopoly of use and exploitation might arise, akin to that provided for by copyright law, which would definitively solidify the possibility of reuse or reinterpretation of the artistic message.[39] The

[36] EFTA Court, 6 April 2017, Case E-5/16 *Municipality of Oslo*, § 92, available at www.eur-lex.europa.eu.

[37] While some authors have enthusiastically embraced the EFTA Court's decision, like M.R.F. Senftleben, *The Copyright/Trademark Interface – How the Expansion of Trademark Protection Is Stifling Cultural Creativity* (Alphen aan den Rijn, The Netherlands: Wolters Kluwer, 2021), 25, other authors have criticised the morality-linked approach, finding instead applicable reasoning in the criterion of lack of distinctiveness. On this topic, Y. Basire, 'Public Domain Versus Trade Mark Protection: The Vigeland Case' 13 *Journal of Intellectual Property Law and Practice*, 434 (2018).

[38] M. Senftleben, 'Der kulturelle Imperativ des Uhreberrechts', in M. von Weller et al eds, *Kunst im Markt – Kunst im Recht. Tagungsband des Dritten Heidelberger Kunstrechtstags am 9. und 10. Oktober 2009* (Baden-Baden: Nomos, 2010), 75.

[39] The public interest criterion could be used precisely to refuse registration as a trademark of an artistic expression, so as to exclude any possibility of use, creative evolution and re-signification of the work. S. Dusollier, 'A Positive Status for the Public Domain', in D. Baldiman ed, *Innovation, Competition and Collaboration* (Cheltenham, UK – Northampton, MA, USA: Edward Elgar, 2015), 135.

appropriative dynamic underlying the EFTA Court's decision to apply criteria of public policy and morality in the Vigeland case stems from a sociological perspective. For cultural evolution to occur, the positions taken in cultural and artistic fields must represent potential lines of development towards a new culture and art.[40] Otherwise, by constraining the meaning of these social or cultural expressions, processes of reinterpretation could not take place.

Another important case is the US Supreme Court decision in *Dastar* v *Twentieth Century Fox*.[41] Dastar Corp. released a video collection, with public domain images, on World War II campaigns. Previously, Twentieth Century Fox had produced the film 'Crusade', for which it held the copyright that expired in 1977. Dastar recompiled some of the original footage, modified a scene and made further cinematic additions, all without referencing Twentieth Century Fox's series or the book by General Eisenhower, which inspired the original series.

Twentieth Century Fox sued Dastar, alleging copyright infringement and a violation of para 43 of the Lanham Act, which emphasises the 'origin' of the 'goods'. The US Supreme Court interpreted this expression as referring to the producer of the tangible goods, ie, the videotapes, but did not extend it to the originator of the idea behind the creation of the tangible goods, as this domain is covered by copyright.

Thus, when something falls into the public domain, there are no further protections available, and a statement, idea or creation in the public domain can be freely reused. Similarly, the message conveyed by cultural assets, an artist's worldview, their religious, philosophical, or aesthetic beliefs, fall into the public domain and cannot be constrained by a trademark (nor by copyright).

It is evident that in both cases, the EFTA Court and the US Supreme Court placed significant importance on the risk of monopolistic use of artistic expressions that must remain in the public domain to be reused and reinterpreted in new artistic messages.

IV. Applying the Results of Secondary Meaning to Sponsorship Contracts

At this stage, it is imperative to ascertain whether or not the dynamics of

[40] P. Bourdieu, *Die Regeln Der Kunst: Genese und Struktur des Literarischen Feldes* (Frankfurt am Main: Suhrkamp, 1999), 370, who bases his theory on the value production of the work of art and not so much on its materiality. The decision under review has a certain relevance to the so-called Rogers test. See *Rogers* v *Grimaldi*, 875 F. 2d 994, 999 (2d Cir. 1989). This mechanism, devised to protect free speech in the realm of trademarks, applies based on two coinciding possibilities: 1) whether or not the use of another's trademark in an expressive work has some 'artistic relevance' to the underlying work and 2) whether or not the use 'explicitly misleads as to the source or the content of the work.' In the Vigeland case, the artwork itself risked being registered as a trademark, and the EFTA Court identified this as a risk to the artistic significance of the works, which would be excluded from the normal processes of cultural evolution.

[41] *Dastar Corp.* v *Twentieth Century Fox Film Corp. et al*, 539 U.S. 23, 26 (2003), available at https://supreme.justia.com/cases/federal/us/539/23/ (last visited 30 September 2024).

appropriation and recontextualization of signs, as described thus far, can extend to the realm of cultural sponsorships and if they yield similar effects in this domain. Examining two landmark cases that have stirred discussion in this field will provide the best means to verify the validity of this assertion.

The first seminal case concerns a sponsorship agreement signed by the Tod's brand to fund restoration work on the Colosseum. On one side, the private party providing funding; on the other, the Superintendency,[42] which, in exchange for a donation of twenty-five million Euros, granted a profitable communication plan, consisting in the opportunity to promote and gain national and international visibility for the restoration work.

The agreement stipulated that the sponsor could manage communication dynamics directly or through the 'Friends of the Colosseum' Association to promote and provide widespread visibility, nationally and internationally, to the restoration work, aiming to make the Colosseum 'increasingly accessible to young people, differently-abled individuals, retirees, and workers'.[43] The sponsor was a member of the Association tasked with publicising the initiative.

The communication plan involved establishing a temporary or permanent structure near the Colosseum, where the sponsor could display its distinctive trademarks throughout the restoration and for the following two years. Within that structure, the Association could run communication campaigns jointly with foundations, research institutions, universities or other public or private entities with similar aims. The sponsor had exclusive rights over the use of the photographic images and filming of the restoration work to be done.

Additionally, the Association was granted the exclusive right to use a logo depicting the Colosseum, with the option to register it as a trademark for use in printed material '*and in any promotional or advertising initiative*'.

Furthermore, Tod's was permitted to use the phrase 'Sole sponsor for the restoration of the Colosseum based on the intervention plan'; to use the Association's logo representing the Colosseum on its letterhead; to place its brand on the back of the Colosseum admission tickets; to advertise its contribution on the construction site fencing, in forms compatible with the historical and artistic character and decorum of the Colosseum; to advertise its contribution to the restoration works; to use material and documentation produced by the Association, including projecting images within its spaces or on its website.

From this controversial case, it seems that companies can purchase usage rights

[42] The Superintendencies are peripheral bodies of the Ministry of Culture scattered throughout the national territory. Their purpose is to safeguard the cultural heritage falling within their jurisdictional area, which includes both cultural assets and the landscape.

[43] Of key importance is point 4.1 of the sponsorship agreement, for which see P. Rossi, 'Partenariato pubblico-privato e valorizzazione economica dei beni culturali nella riforma del codice degli appalti' 2 *federalismi.it*, 17 January 2018, 10-11. Extensive excerpts from the communication plan are also given in the judgment of Consiglio di Stato, 31 July 2013, no 4034, available at www.giustiziamministrativa.it.

of cultural heritage to advertise their commercial activities. Even if the advertisement is in line with the decorum of the cultural asset, there remains an overlap of meanings; on one side, the original historical-artistic significance and on the other, a mark that uses a cultural asset for commercial purposes, even if representative of globally recognized know-how and part itself of the Italian cultural heritage.

The rights granted to the sponsor would be exercised for the duration of the restoration work and for the following two years. However, the Association would enjoy the rights specified in the communication plan for fifteen years, '*potentially extendable through a separate agreement signed by the parties*.'[44]

It is important to remember that private investment makes possible all these conservation interventions on the property, considered in its materiality, that otherwise could not take place.

Nevertheless, this type of contract, advantageous for both parties and without which the cultural asset would not be restored at all or would not receive the necessary interventions, in light of the considerations made and the case cited, raises a significant question.

Is there a form of appropriation of the meaning of the cultural asset on which sponsorship is carried out in these circumstances? If so, can we contemplate the risk of a diminution of the cultural asset's intrinsic value, once it is temporarily associated with a brand? Sponsorship contracts risk forfeiting the intrinsic value of the artwork and the intangible value that accompanies and characterises a cultural asset. Often, there is much more concern about how to finance the preservation of the asset rather than genuinely enhancing it, allowing the cultural asset to be fully enjoyed and appreciated. It must not be forgotten that a cultural asset is intended for public enjoyment and is offered for the benefit of all its users. Sponsorship contracts, through purely economic utilisation, jeopardise the very essence of cultural assets, undermining their intangible value, which is universal and thus the heritage of all humanity.[45]

Another more recent case study further emphasises the risk that given assets, particularly the most representative ones in cultural heritage, may be used to promote a positive commercial image of the sponsor without a corresponding enhancement of the intrinsic value of the asset.

The case concerns the restoration intervention sponsored by a fashion house, Diesel, on the Rialto Bridge.

The amount invested by the company was five million Euros, in exchange for a communication plan[46] through which the company could, initially, use the scaffolding erected during the restoration for its promotional campaign, personalize some water-buses with its brand linked to the restoration work and display banners,

[44] See Consiglio di Stato, 31 July 2013, no 4034, n 43 above.

[45] A. Bartolini, 'L'immaterialità dei beni culturali' 1 *Aedon, Rivista di arti e diritto on line* (2014).

[46] Reference is made to the Communication Plan of the Department of Public Works of the City of Venice, available at https://tinyurl.com/3yz4nyrk (last visited 30 September 2024). See also, P. Somma, *Privati di Venezia, La città di tutti per il profitto di pochi* (Roma: Castelvecchi, 2021).

at two docks, with its logo.

Additionally, it could use Ca' Vendramin Calergi, Ca' Rezzonico (home to the Museum of 18th Century Venetian Art), the Doge's Palace and St. Mark's Square for private company events.

The logical-legal mechanism observed in this case perfectly aligns with the overlap of meanings, where the expressive function represented by the brand overshadows that represented by the immaterial and intrinsic value of the cultural asset. The recontextualization mechanism of the cultural asset, through association with the promotional message, cannot translate into

> 'a counter-appropriation, albeit still individual and commercial, of economic advantages, although ennobled by the narrative of self-appropriation and by non-economic interests.'[47]

Therefore, the regulation of sponsorships must ensure that the overlay or association of the sponsor's name with the cultural asset occurs in a manner respectful of the asset itself. However, the preservation of the cultural asset is not only a 'material' necessity, connected to avoiding the asset's deterioration or demise, and so its unavailability to future generations.[48] It is also an urgent priority to prevent the private party from appropriating the cultural identity and deriving far greater profit therefrom than the economic sum offered, thereby diminishing the historical and artistic significance of the cultural property.

Another issue arising in sponsorship concerns the image of the granting administration. This aspect cannot be overlooked, as the decision to enter into a sponsorship agreement, for a public administration, has direct implications for its image, depending on whether the sponsor shares a leading role with the administration. However, this does not put the administration and the private entity on the same contractual level. The sponsor meets the administration's requirements,[49] thereby conditioning the relationship and placing the public

[47] C. Crea, n 21 above, 176. The expression, fitting perfectly in the present case, is contextualised and gains significance within the broader framework of the public domain, a phenomenon concerning both material and immaterial things, characterised by a space of free use for anyone. This space is endangered by appropriative processes described by J. Boyle, *The Public Domain – Enclosing the Commons of the Mind* (New Haven, USA: Yale University Press, 2008), 43, where he highlights and criticises the *enclosure* dynamics related to immaterial assets. The interpretation of the public domain in French scholarship more overtly pertains to the concept of *chose commune*, as referred to in Art 714 of the Code civil, as noted by S. Dusollier, 'Domaine public (Propriété intellectuelle)', in M. Cornu, J. Rochfeld and F. Orsi eds, *Dictionnaire des biens communs* (Paris: Presses universitaires de France, 2021), 413.

[48] The expression is borrowed from that literature that has endeavoured to examine the legal aspects of the phenomenon – not new – of the alteration and erosion of resources to the detriment of future generations. The cultural origin of the need to protect resources arises in the field of the environment and natural resources. Consider the concept of Earth's inhabitants as usufructuaries: 'the Earth belongs in usufruct to the living', T. Jefferson, *The Writings of Thomas Jefferson* (Washington, DC: A.E. Bergh, 1907), VII, 456.

[49] S. Valaguzza, n 20 above, 1381.

party in a disadvantaged position.

Control over the association of the promotional message with the monument is entrusted to the Superintendencies, which can make assessments to prevent certain advertising messages from being conveyed through the cultural asset under restoration. The most common cases occur in sponsorship contracts between the administration and companies operating in the business of advertising billboards. Not only do these contracts concern the sponsor's advertising exploitation but advertising exploitation overall. Specifically, the exhibition spaces granted by the administration on the cultural asset are occupied by advertising unrelated to the sponsor.

Based on the practice of using scaffolding to advertise not only the sponsor but other brands that purchase advertising space from time to time, another consideration arises. By its nature, the advertising message must reach the highest number of potential consumers, which means that the location of the cultural asset on which intervention is carried out must be strategic for advertising purposes. This assumption arises from observing which cultural assets have been able to benefit from sponsored restoration; either they are culturally representative (the Colosseum or Rialto Bridge have always been associated with Italy's image abroad) or they are strategically located cultural assets allowing for the widest dissemination of the promotional message.[50]

This reasoning can naturally lead to one conclusion, that the market determines which assets are 'worthy' of accessing recovery through sponsorship and which instead may continue to deteriorate, given their 'marginality' from the perspective of advertising exploitation. It is normal for a church façade opening onto a busy road in cities like Rome or Milan to be much more attractive than an historically interesting cultural asset in a provincial city, far from the circuits of tourists, especially foreign ones. Quite different from sponsorships, are the activities of patronage which in Italy can be carried out through the 'Art Bonus' initiative. This is a tax tool that generates a tax credit for those who make charitable donations to support Italy's public cultural heritage, amounting to 65% of the donated sum. Through this mechanism, entirely different from sponsorships, it has been possible to raise nearly three million Euros for the safety and restoration of the Torre Garisenda[51] and the maintenance of the Torre degli Asinelli, in Bologna. It has also enabled Ferragamo to restore the Fountain of Neptune by Ammannati in

[50] It's important to consider the case before the TAR Lazio Rome arising from two technical sponsorship procedures on five Roman churches belonging to the FEC – 'Fondo Edifici di Culto' and on the headquarters of the National Roman Museum. See TAR Rome, 15 May 2023, no 8586 and TAR Rome 10 January 2024, no 519, available at www.giustiziamministrativa.it.

[51] The connection between tangible and intangible value, in this specific case, is further heightened by the fact that even Dante Alighieri mentions the Garisenda Tower in his Inferno, likening it to the Giant Antaeus who is about to grasp him. Through the Art Bonus scheme, donations from many active and aware citizens will fund the restoration and consolidation of this 'fragile giant' that belongs to all humanity, just as the literary work in which it was used as a metaphor.

Florence.

On these considerations, the basis of sponsorship contracts lies in reciprocity,[52] which quite explicitly points to the concept of cost-effectiveness, ie, the necessary proportion which must be balanced between the contract performances. It often happens, however, that in sponsorship contracts, the revenue from publicity activities is far greater than the amount offered.

The Court of Auditors has focused on this aspect,[53] identifying an element of financial liability in the described imbalance.

V. Alternative Tools to Sponsorship, not only of a Public Nature

The appropriative risks and commercial re-signification inherent in sponsorship contracts could be mitigated through the increase and development of alternative contractual tools, which envisage greater involvement of economic operators, animated by a spirit of patronage[54] and active citizenship.

A primary administrative solution that could reconcile the advantage of cost savings for administrations and the demands for fair gains for private entities could be identified in public-private partnership contracts.

Firstly, through public-private partnership contracts, the issue of overlapping meanings is weakened. In fact, partnerships typically do not involve any reference to a communication plan, which is characteristic of sponsorships and is the counterpart to restoration or monetary donations. Therefore, the risks of appropriating the intangible value underlying the tangible asset are absent.

Secondly, partnership contracts can be considered more suitable for the valorisation of cultural assets. Indeed, valorisation involves various additional activities such as ticketing, restaurants, bookshops, guided tours that explain the artworks,[55] all of which can be managed by private entities without compromising

[52] Refer to A. Montanari, 'Il sostegno dei beni culturali: riflessioni per una strategia "altruistica"' 2 *Aedon, Rivista di arti e diritto on line* (2021).

[53] The Italian Corte dei conti, in its report on 'Public-Private Partnership Initiatives in Cultural Heritage Enhancement Processes', noted that 'in exchange for a certain over twenty-year exclusive, the consideration paid by the sponsor amounts to €1,250,000 per year,' a notably low amount when compared to the priceless value and international visibility of the monument in question. It is precisely in this aspect that the contractual imbalance and the element of financial liability were identified. Reference is made to the Court of Auditors' report of 4 August 2016, no 8/2016/G, Chapter III, §7, available at https://tinyurl.com/y7ecunym (last visited 30 September 2024).

[54] Regarding private involvement in the management of cultural heritage, the British experience stands out as a model of particular interest. Indeed, within the British Museum, various Boards of Trustees are established to play an operational role, while planning and control over private activities remain firmly in the hands of the administration. Moreover, one must also recall the work of Arts & Business, which has served as an institutionalized link between administrations and private entities since 1976. In 2005, Arts & Business published the fifth edition of the Sponsorship Manual, a reflection of the approach with which the United Kingdom has provided its response, distinct as always, to the issue of preservation and enhancement.

[55] For an examination of the practical aspects of the enhancement function, see L. Casini, n

the inherent message of the asset.

Other key aspects that should incline administrations towards favouring the conclusion of partnership contracts over sponsorship contracts are essentially twofold. The first relates to the duration of the contractual relationship between the administration and private entity. In this way, intervention on the cultural asset will not be a mere 'hit and run' but will entail a series of obligations that the private party must fulfil in anticipation of its economic return and, as seen, without a communication plan that weakens the intangible value of the cultural asset. Private entities can comprehensively care for cultural assets, alleviating the financial burden on public administration, but without compromising its intangible value by overlapping their marks on the cultural asset itself. The second relates to risk allocation, which will burden – at least the demand-related risk – directly on the investor, thereby holding the administration harmless, resulting in significant cost-savings without compromising the immaterial value underlying the cultural asset.

The reform of public contracts law, carried out by the new Public Contracts Code,[56] has disclosed a new perspective, ie, the centrality of the public role as an indispensable tool for economic[57] policy, innovation development and a means by which also achieving established goals –[58] and especially – at the European level.[59]

5 above, 58.

[56] With the new Public Procurement Code, decreto legislativo 36/2023, an attempt has been made to provide a regulatory system in order to increase the use of this particular contractual instrument inspired by shared administration logic and a conception of collaboration between the public and private sectors. It is precisely on the possibility of public-private collaboration and the phenomenon of the 'administrativisation' of private law that reference is made to S. Cassese, 'Verso un nuovo diritto amministrativo? Lezione per festeggiare il 60° anniversario della Scuola di specializzazione in studi sulla pubblica amministrazione - Spisa', Bologna, 26 October 2015, available at www.irpa.eu; Id, *La nuova Costituzione economica* (Bari: Laterza, 2008), 7. Due to its intrinsic characteristic, the public-private partnership, even within the national framework, has begun to assume increasing importance following the pandemic events and the ensuing economic crisis. This has had the effect of restoring to the public administration a centrality that had gradually been eroding, through the implementation of certain political-economic choices to which it seemed to have, by now, abdicated. On this point see F. Bassanini, G. Napolitano and L. Torchia, *Lo Stato promotore. Come cambia l'intervento pubblico nell'economia* (Bologna: il Mulino, 2021), passim.

[57] For a comprehensive examination of the connection between public contracts and technological innovations, their function as wealth attractors and their use as an economic policy tool, see V. Lember, R. Kattel and T. Kalvet, *Public Procurement, Innovation and Policy. International Perspectives* (Berlin-Heidelberg: Springer, 2014), 2. More recently, F. Decarolis, 'Il contributo dell'analisi economica nei contratti pubblici', in R. Chieppa et al eds, *Il nuovo codice dei contratti pubblici. Questioni attuali sul D.Lgs. n. 36/2023* (Piacenza: La Tribuna, 2023), 63.

[58] In the new Public Procurement Code, there has been a reversal in the hierarchy of the main objectives to be pursued. This is clearly stated in Art 1, para 1, of decreto legislativo 36/2023, which establishes, as a fundamental principle of the Code, the principle of outcome, which becomes the focal point around which the principles of competition, legality, transparency, environmental and social protection must nevertheless revolve. For a more in-depth examination from a scholarly perspective, see M. Cammelli, 'Amministrazione di risultato', in M. Immordino and A. Police eds, *Principio di legalità e amministrazione di risultati. Atti del Convegno, Palermo 27-28 febbraio 2003* (Torino: Giappichelli, 2004), 122.

[59] The reference is obviously to the NRRP.

Partnership presupposes a contractual mechanism that potentially could give a significant boost to the economy, taking advantage of its 'leverage effect'.[60] In this way, the administration can benefit, on the one hand, from private capital, expanding its economic resources for the protection of cultural interests, while on the other, it can integrate, as a medium-to-long-term benefit, its own know-how, through the knowledge and experiences made available by the private partner.

The regulatory enhancement of partnership represents an opportunity to allow significant economic savings for administrations, along with the possibility of ensuring efficient maintenance of cultural heritage,[61] that is, it should not be limited only to the recovery of the property but should allow the property to express its significance in modernity, to make it usable in a stable and prolonged manner.

This is possible only if partnership contracts are long-term and entail responsible use of the assets entrusted by private operators (or the third sector) and appropriate profits. These profits should not derive from the mere overlay of a commercial name on a cultural asset, but from 'equal' management of the asset between private actors and a public administration. This way, services will be left to the creativity of the private party and its entrepreneurial risk, while the administration will have to oversee the correct use of the asset.

Another reason that should drive administrations towards the more difficult – but also more suitable – partnership agreements is their capacity to involve civil society in development-oriented choices.[62]

If all those identified aspects are essential for the successful outcome of the partnership agreement, the true linchpin of the relationship is the correct allocation of risk. This is a particularly complex burden, especially for the administration, which consists of the need to identify, at the conclusion of the contract, the correct allocation of those risks falling on the administration and those falling on the private investor. Their correct redistribution is the true secret to the success of public-private collaborations and to making the service supplied truly efficient.

In public-private partnership risks must be allocated to those who can handle them. The administration will certainly be better equipped to manage the issues

[60] The significance of the public-private partnership instrument as productive of a beneficial 'leverage effect', namely understood as a 'multiplier of public resources invested', is well expressed in A. Moliterni, 'Le prospettive del partenariato pubblico-privato nella stagione del PNRR' 2 *Diritto amministrativo*, 442 (2022); in the economic literature see E. Iossa and D. Martimort, 'The Simple Microeconomics of Public-Private Partnership' 17(1) *Journal of Public Economic Theory*, 4-48, 48 (2015).

[61] This is due to the connection existing between conservation and valorisation, a connection that must be traced back to the constitutional provision contained in Art 9 of the Italian Constitution, which is outlined in its first paragraph. Also, Art 118 of the Italian Constitution stimulates activities, useful to enhancing cultural heritage, understood as research, study, and dissemination of knowledge. All those activities are assigned and distributed, according to subsidiary criteria, among the Ministry, regions and other local authorities. Protection, on the other hand, which is based on conservation, remains firmly under the State's control. According to Art 117 of the Constitution, only the State can legislate in the field of protecting cultural assets.

[62] A. Moliterni, n 60 above, 450-451.

arising from regulatory changes, compared to the private party, which will be able to solve technical and construction-related issues, thanks to its know-how.

This is a particularly difficult operation,[63] especially when it comes to demand risk. Depending on the different factual circumstances, these burdens – which should generally be borne by the private party due to its entrepreneurial nature, especially in the case of 'hot' contracts – could also be shared by the administration, in the event that the cultural heritage partnership contract concerns 'warm' operations.[64]

A tangible example of what has been discussed so far concerns the 'Azienda Agricola Pompei' project, which involves the possibility of establishing agricultural crops such as olives, vines, and flowers in the uncultivated areas of the Archaeological Park.

Through several public notices, the Archaeological Park has sought economic operators interested in managing, under the administration's supervision, the cultivation of the green areas that are not affected by archaeological excavations and hold no cultural interest. The plants must be grown organically and with ancient methods. The aim is to enhance the archaeological site by restoring certain areas to agricultural use, in the interest of the Archaeological Park, using the resulting production for self-promotion and to earn a percentage on the sale of those pruducts. The involvement of private entities is not confined to the cultivation and processing of the products but also includes the participation of non-profit organisations dedicated to the integration of disadvantaged individuals into society, with positive implications for the whole area.[65]

The possibilities of avoiding a commercial branding of monuments do not end here. Collaboration agreements, as happened in the case of the City of Bologna, are the result of the involvement of civil society and active citizens in administrative decisions. The paradigm on which collaboration agreements are based does not refer, as seen for sponsorships, to a 'need – availability' dynamic, but is instead attributable to a subsidiary mechanism. This presupposes the involvement of citizenship, since the stage of identifying the public interest to be protected.

[63] The difficulty and high costs of designing a public-private partnership are briefly discussed by F. Decarolis, n 57 above, 65, who recalls the literature from across the Channel regarding the cost-effectiveness ratios for launching a public-private partnership. According to this economic orientation, now outdated, projects that are financed with less than twenty million Pounds Sterling would not be suitable for partnership. For a comprehensive examination, including the Italian experience, see C. Giorgiantonio, 'Infrastructure and PPP in Italy: The Role of Regulation' 3(2) *Journal of Infrastructure, Policy and Development*, 204-219, 207 (2019).

[64] Public-private partnership contracts can be divided into 'hot', 'cold' and 'warm'. In the case of a cold partnership, the administration pays a fee to the private party for the management of a service or asset. On the other hand, hot contracts involve revenues exclusively derived from users of a particular asset or service entrusted by the administration to the private party. Warm contracts represent a balance between the first two, where a portion of the revenue comes from users and a portion from the administration.

[65] About this particular and successful experience, see https://tinyurl.com/2xfhnk22 (last visited 30 September 2024).

The distinguishing and valuable element of this tool concerns co-design activity, carried out jointly by the citizens who will sign the agreement, and the administration. When the agreement is signed, the citizens exercise their freedom,[66] recognized by Art 118 of the Italian Constitution, representing the tangible application of the principle of horizontal subsidiarity.[67] It should be noted that even in the case of sponsorships, it is still an initiative originating from a private party, suggesting that the flow of power,[68] information and decisions is reversed, moving from citizens to administration. However, this is partly untrue, regarding the phenomenon of appropriating the intangible value of cultural assets.

Sponsorships, despite being a private initiative, are regulated like licensing. The flow of power does not move directly from citizens to private parties; this happens apparently. While collaboration agreements involve administrations and citizens on an equal footing, as parties to a contract, sponsorships involve procedural phases culminating in an adjudication by the administration.

Furthermore, whether or not sponsorship is an expression of horizontal subsidiarity, it would not be sufficient to eliminate the risks of dilution and appropriation of the intangible significance of the cultural asset for marketing purposes on the part of the sponsor.

In this particular form of relationship, consideration is totally absent, and the underlying collaboration agreement can be justified by a donation.[69] However, the problem with this approach lies in the potential lack of liability in case of non-compliance by the citizen party (who naturally may also be an entrepreneur). This circumstance is particularly difficult to address and raises serious doubts about the actual scope of the instrument, which would not contemplate any form of contractual sanction. On the other hand, providing for it could hinder its use, considering its purely gratuitous nature.

[66] G. Arena, *I custodi della bellezza. Prendersi cura dei beni comuni. Un patto per l'Italia fra cittadini e istituzioni* (Milano: Touring Club, 2020), 147.

[67] Horizontal subsidiarity, introduced into the Italian Constitution in 2001, pertains to the relationship between 'the whole of political power with the whole of civil society', according to S. Cassese, 'Il nuovo Titolo V della Costituzione Stato/Regioni e Diritto del Lavoro' 5 *Lavoro nelle Pubbliche Amministrazioni*, 677-679 (2002). Regarding horizontal subsidiarity, mention should be made of the interpretation provided by the Constitutional Court in judgment no 131 of 26 June 2020, in www.cortecostituzionale.it, which held that co-design is one of the aspects most closely related to horizontal subsidiarity. See also G. Arena, 'L'amministrazione condivisa e i suoi sviluppi nel rapporto con cittadini ed enti del Terzo settore' 3 *Giurisprudenza Costituzionale*, 1449 (2020).

[68] G. Arena, 'Il principio di sussidiarietà orizzontale nell'art. 118 u.c. della Costituzione' *Studi in onore di Giorgio Berti* (Napoli: Jovene, 2005), 179-221, 182.

[69] Collaboration agreements have attracted the attention of scholars, who are beginning to study them, especially following the surge in the number of agreements entered into by Italian municipalities. Their main purpose is associated with the care of common urban assets and is articulated in more detail compared to cases of urban regeneration. Among the most significant collaboration agreements, the City of Bologna one stands out, as being subject to detailed examination. In particular, see P. Michiara, 'I patti di collaborazione e il regolamento per la cura e la rigenerazione dei beni comuni urbani. L'esperienza del Comune di Bologna' 2 *Aedon, Rivista di arti e diritto on line* (2016).

Hence, if a private law interpretation were given to the collaboration agreement,[70] it could be framed as a donation with a burden.[71] However, this requires a genuine awareness that cultural assets are 'testimonies having value of civilization'[72] and that the private operator's recovery does not correspond to the need for economic growth of the sponsoring company, but to true patronage.

The significant aspect is that the creation of alternative legal mechanisms can certainly, over time, be central to the creation and development, in the field of cultural assets, of groups of citizens taking care of the common heritage in an economically disinterested manner.

However, the time required to achieve full awareness of the importance of such involvement by the population can only be quite long.

For this reason, one possibility, in order to make the overlapping of meanings operated by sponsorship more acceptable, might lie in the extension of the applicability of ministerial decree DM 161 of 2023, which defined the guidelines to determine the minimum amounts envisaged, as consideration or fees, for the use or reproduction of cultural assets.

The direction outlined by the ministerial decree is that of adequate economic valorisation,[73] which would allow, at least, to align sponsorships with the path laid out by the Court of Auditors, which had already ruled on the case of the Colosseum sponsorship. In that ruling, the Court of Auditors highlighted how the contributions made by private parties in return for the advertising exploitation of cultural assets should be commensurate with the value of the asset itself. This operation would require particular skill on the part of administrative staff and would, in any case, be extremely difficult because it involves jointly assessing the value of the cultural asset, which is often invaluable, the actual cost of restoration activities and the proceeds from the advertising campaign conveyed by the notoriety and prestige of the asset. In this way, it becomes clear that the publication period of the public announce cannot ensure the necessary balance

[70] An approach stemming from the fact that collaboration agreements would not be the result of authoritative administrative activity and therefore could not be subject to the law of administrative procedure. In this regard, see A. Giusti, 'I patti di collaborazione come esercizio consensuale di attività amministrativa non autoritativa', in R.A. Albanese, E. Michelazzo and A. Quarta, *Gestire i beni comuni urbani: modelli e prospettive: atti del convegno di Torino, 27-28 febbraio 2019* (Torino: Quaderni del Dipartimento di Giurisprudenza dell'Università di Torino, 2020), 27.

[71] 'Donation with a burden' allows for the inclusion of a clause in the contract that provides for a burden on the donee, failure to comply with which results in the termination of the contract. See A. Montanari, n 52 above.

[72] As stated in the second paragraph of Art 2 of decreto legislativo no 42 of 22 January 2004, in which the definition dating back to the Franceschini Commission of 1964 has been almost literally transposed. The Franceschini Commission transformed the conception underpinning the legislation on works of art, found in the Rosadi and Bottai laws and based on the aesthetic philosophy of Benedetto Croce, into a historicized concept. On this point see A. Bartolini, 'Il bene culturale e le sue plurime concezioni' 2 *Diritto Amministrativo*, 223 (2019).

[73] G. Piperata, 'I beni del patrimonio culturale tra canoni e corrispettivi' 3 *Aedon, Rivista di arti e diritto on line* (2023).

required by the Court of Auditors in this matter. Such balance should be achieved through contractual means.

The establishment of a 'tariff schedule', as happened for the fees for the use and reproduction of images of cultural assets, would be extremely useful to allow administrations to discern the quality and effectiveness of the offer made by the interested sponsor. With the introduction of the tariff scheme, other problems arise, adding to that of the overlap of meanings, and bringing back the age-old dichotomy public *vs* private, between the proprietary rights over the use of images derived from cultural heritage and the free use of what falls within the public domain.[74]

Certainly, this possibility is a palliative compared to the complex problem of the appropriation of the immaterial value of cultural assets. In this case, it is the public party that appropriates the intangible value of cultural assets to exploit them economically. This cannot fix the problem of sponsorships and the connected risks of appropriation of the intangible value of cultural assets.

These forms of commercial appropriation contradict the proper use that should be made of cultural heritage, one that, because of its meanings and intrinsic values, should remain available to humanity, serving to the spiritual progress of the people.

On the contrary, forms of cultural appropriation of the intangible value of cultural assets should always be considered permissible. In this regard, the Italian State plays a dual role, that of protecting the dignity, integrity and authenticity of cultural assets and promoting the development of culture.[75] By another point of view, the rules governing the commercial use of the image of a cultural asset could limit a cultural appropriation, avoiding new forms of cultural heritage.[76]

This awareness only confirms that cultural assets can be subject to dynamics of change or evolution of their meaning. The risk to avoid is that this occurs in a purely commercial sense.

In conclusion, it does not provide any indication on the dilemma between favouring the economic exploitation of cultural heritage, albeit with the aim of reinvesting the proceeds in the care of the asset or expanding the categories of gratuity and free enjoyment of cultural assets. Perhaps these categories would be more suitable for the social purpose behind cultural assets (ie, the spiritual growth of the individual and the improvement of society), in the face of a chronic lack of funds constantly putting them at risk.

Ultimately, the objective to pursue should be to cast this issue, as is the case with the use of images of cultural heritage, less in a mercantilistic way and more in a prospective strategy for cultural development.[77]

[74] G. Sciullo, 'Il d.m. 161 del 2023: un'analisi giuridica' 2 *Aedon, Rivista di arti e diritto on line* (2023).

[75] See F. Caponigri, 'An Italian Style of Cultural Appropriation?' *Notre Dame Journal of International and Comparative Law*, available at https://tinyurl.com/25hna563 (last visited 30 September 2024).

[76] ibid.

[77] The belief in the necessity of an 'education' about cultural assets has always been widespread

VI. Conclusions

As analysed, when a sponsorship contract is concluded, what is transferred, albeit temporarily, is a right of commercial exploitation of the artistic asset, which is inexorably linked to the image of the asset itself. As has also been observed, this type of exploitation linked to the image of a monument not only finds its way in the Public Contracts Code and is regularly admitted in the legal system but is also a very useful tool for channelling financial resources towards the preservation of assets, amid a general shortage of funds, the latter being a well-known fact. A peculiar aspect of sponsorship has been highlighted by the Court of Auditors, which, as seen, has identified the crux of the issue in the possibility of balanced remuneration even for the public administration, recognising a loss to public funds whenever the obligations undertaken by the private party in favour of the administration and the positive image return for the sponsor are unbalanced, compared to the value of cultural assets

Furthermore, drawing inspiration from the re-signification processes identified in the world of brands, appropriative phenomena can also be traced in other branches of law. This is possible because the fundamental issue always revolves around the overlapping of meanings. Under the guise imposed by the sponsor, who conveys a commercial message – promoting themselves or even other brands – the meaning of the cultural asset is modified and commercialised, just as happens in the processes of mercantile appropriation examined in the world of social signs. In this way, the meaning of the cultural asset, which can be reinterpreted and used for artistic and cultural purposes, can be damaged, once it is associated with an advertising initiative.

Branding, the commodification of signs having cultural or social meanings, represents the manifestation of an appropriation. Similarly, this appropriation occurs when, for commercial purposes, the image and underlying value of a cultural asset are appropriated.

Linking a cultural asset to a marketing campaign can be interpreted as an 'evolved form of use'[78] of the asset, which requires the control of the administration entrusted with the care of the asset itself and, even before that, a broadly discretionary authorization power, considering the artistic or historical nature of the asset. This nature of the asset should guide the pace of conservation and

in academia, considering the pioneering approach of Massimo Severo Giannini in his teachings. For further insights, see M.S. Giannini, 'I beni culturali' 1 *Rivista trimestrale di diritto pubblico*, 3 (1976). The awareness of the instrumental role of cultural heritage as an indispensable element to accompany the civil and economic development of the country has been expressed by S. Baia Curioni, 'Rompere lo specchio di Narciso. I diritti di immagine relativi al patrimonio culturale come occasione di imprenditorialità, autonomia e decentramento' 2 *Aedon, Rivista di arti e diritto on line*, 203-207, 205 (2023).

[78] With regard to this aspect, see P.F. Ungari, 'I beni immateriali tra regole privatistiche e pubblicistiche – Atti del Convegno di Assisi (25 – 27 October 2012). La sponsorizzazione dei beni culturali' 1 *Aedon, Rivista di arti e diritto on line*, (2014).

valorisation, and opportunities for commercial overlap should be limited. Consequently, it is crucial to ensure not only the preservation of the asset in its materiality but also protection of its 'identity significance',[79] looking at its 'aesthetic-perceptive' scope.[80]

In sponsorship, the utility derived by the sponsor party comes from the connection established between the economic operation and the positive significance attributed to it, in terms of promotional impact on their own brand. It is precisely in this passage that the immaterial aspect of the cultural asset, a component inseparable from the thing, is temporarily appropriated by the sponsor.

On the other hand, the idea of incorporating an immaterial element into a thing, especially if the latter coincides with a cultural asset, leads to the belief that the asset, if economically exploited in a manner inconsistent with its nature, is endangered under its connotation as a cultural testimony.[81]

The incorporation of the values and identity significance – immaterial – into the *res* is a direct consequence of the assumption that the cultural asset amounts to a testimony of civilization, and precisely this testimony represents the immaterial value that adheres to and 'vivifies' the physical entity: the cultural asset.[82]

Upon this theoretical premise, economic use phenomena are then grafted, which, as seen, closely concern the problem of protecting and valorising cultural assets and the related dilemma existing between managerial use of cultural heritage and choices for free and consciously gratuitous use of cultural heritage.

The appropriative process of surplus value, be it social or cultural, be it a symbol or any other entity bearing identity values, even if temporary, still entails the risk that on certain categories of assets, conceived to be available to the

[79] ibid

[80] ibid. The Author outlines the issue for which possible solutions have been sought through various tools offered by the Public Procurement Code and beyond, summarizing it as a kind of warning when he cautions, 'it is necessary to avoid that the use by the sponsor spills over into a form of ideal appropriation, subtracting from a good, which by definition belongs to everyone, its identity value' (author's translation).

[81] The already cited theory of incorporation has been used to highlight the relationship between the *res* and its immaterial value in the context of changes of use. This operates on the asset but, if it concerns a cultural asset, also on its incorporated historical-artistic value. Furthermore, the instrument of incorporation has been used to legitimize the duplication of constraints on certain assets. Indeed, on a property already subject to artistic constraint, a specific destination can also be imposed. For example, in the 'Il Vero Alfredo' case in addition to the artistic constraint imposed on sculptures and the commercial space of this famous restaurant in Rome, the Consiglio di Stato decided that in this case 'a different use than the current one is not allowed, in order to protect the cultural assets and the values embedded in them'. See the Adunanza Plenaria, 13 February 2023, no 5, available at www.giustizia-amministrativa.it. For a careful examination of the theory of incorporation, see G. Morbidelli, 'I confini della tutela: il vincolo culturale di destinazione d'uso. Della progressiva estensione della componente immateriale nei beni culturali e dei suoi limiti' 1 *Aedon, Rivista di arti e diritto on line*, 53-57, 54 (2023).

[82] It is necessary to quote the words of Massimo Severo Giannini, who conceived the concept of cultural assets as immaterial goods, based on the fact that 'a testimony with civilizational value is an immaterial entity inherent in one or more material entities, but legally distinct from them, in the sense that they are physical supports but not legal assets'. M.S. Giannini, n 77 above, 24.

community, 'excluding properties' may be conferred.[83] The exploitation of cultural heritage in these terms, 'branding' the façades of monuments with the logo of those who have provided, not for philanthropic but for commercial purposes, for the payment of their conservation, pertains to an 'extractive'[84] paradigm carrying the contrast between a certain value apparatus and economic exploitation logic. This contrast of difficult harmonization can find a solution in alternative forms of private involvement, preferably through the dissemination of participatory tools that have already demonstrated their effectiveness.[85]

[83] A type of ownership that would lead certain expressive forms to crystallize when they are transformed into commercial objects, thereby affecting the processes of 'codification of social signs relevant to public discourse,' and which finds its rationale in the private individual's desire to monopolise communication on the sign for purely economic purposes. The meaning of the expression is the subject of analytical study by C. Crea, n 21 above, 146.

[84] The view of an extractive mechanism concerning cultural assets, considered the 'oil' of Italy, is found in U. Mattei, 'Beni culturali, beni comuni, estrazione', in E. Battelli et al eds, *Patrimonio culturale. Profili giuridici e tecniche di tutela* (Roma: Roma Tre Press, 2017), 147.

[85] A fine example is the architectural and functional restoration of Casa Bossi in Novara, a splendid example of nineteenth-century architecture by the architect Alessandro Antonelli. Through the 'Love Committee for Casa Bossi', efforts were made to create a cultural space within the residence for the recovery of local artisanal knowledge, as well as a co-working space, thereby becoming the focal point of the 'Piemonte Antonelliano' project.

Essays

Imprisonment or Detention for Inability to Fulfil a Contractual Obligation or Pay a Debt(s)

Jamil Mujuzi*

Abstract

Art 11 of the International Covenant on Civil and Political Rights (ICCPR) provides that '[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation'. The drafting history of Art 11 shows that state delegates were divided on whether the prohibition should apply to any contractual obligation(s) between private individuals or should also extend to contractual obligations between private individuals and the state. The delegates, especially from Spanish and French speaking countries, argued that Art 11 should only be limited to civil obligations and should not cover contractual obligations between individuals and the state. Some delegates also argued that Art 11 should only be limited to prohibiting imprisonment for inability to pay debts and should not extend to all contractual obligations. However, most of the delegates rejected the proposal that Art 11 should only be limited to contractual obligations between individuals. They also rejected the view that it should be limited to inability to pay debts. In this article, the author analyses the jurisprudence and practice of the international (United Nations) and regional (inter-American, European, Arab and African) human rights bodies to demonstrate how this right is protected. The author also analyses the constitutions of over 190 countries and case law from many countries to show how this right is protected. A combined reading of the international, regional and national practice shows that most countries have prohibited imprisonment for inability to pay a debt. Very few countries have prohibited imprisonment for inability to fulfil a contractual obligation. This implies that the prohibition on imprisonment for inability to pay a debt has attained the status of customary international law.

I. Introduction

Art 11 of the International Covenant on Civil and Political Rights (ICCPR) provides that '[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation'. During the drafting of Art 11, state delegates were divided on whether the prohibition should apply to any contractual obligation (between private individuals and the state) or should only be limited to contractual obligations between individuals. The delegates, especially from Spanish and French speaking countries, argued that Art 11 should only be limited to civil obligations and should not cover contractual obligations between individuals and the state. Some delegates also argued that Art 11 should only be limited to prohibiting imprisonment for inability to pay debts and should not extend to all contractual

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obligations. However, these proposals were opposed by the majority of the delegates (especially from English-speaking countries) and Art 11 was adopted in its current form – applicable to all contractual obligations. One of the delegates (from Sweden) also argued that Art 11 was vague because it was not clear whether it prohibited imprisonment as a sentence or any form of deprivation of liberty. His concern was not addressed by the other delegates. Subsequent developments at regional (American, European, Arab and African) and national levels show that countries have limited the scope of Art 11 in two different ways. First, at the regional human rights level, the American Convention on Human Rights and the Arab Charter on Human Rights only prohibit imprisonment for inability to pay debt. In other words, they don't prohibit imprisonment for inability to fulfil all contractual obligations. A survey of the constitutions of 193 countries (173 of which have ratified or acceded to the ICCPR) shows that the same approach has been followed by the majority of the countries. Second, unlike Art 11 which prohibits 'imprisonment', the European Convention on Human Rights and Arab Charter on Human Rights prohibit 'detention'. A similar approach is followed in the constitutions of many countries. The drafting history of the Protocol no 4 to the European Convention on Human Rights and of the American Convention of Human Rights shows that 'detention' is broader than imprisonment.[1] Only three countries – Seychelles, Rwanda and Zimbabwe have directly 'transplanted' Art 11 of the ICCPR in their constitutions. Jurisprudence from international human rights bodies such as the Human Rights Committee and the Working Group on Arbitrary Detention shows, inter alia, the measures that state parties are required implement to give effect to Art 11 of the ICCPR. The Working Group on Arbitrary Detention has argued, without explanation, that the prohibition of imprisonment for inability to pay a debt under Art 11 of the ICCPR has attained the status of jus cogens. In this article, it is argued, amongst other things, that although every prohibition under Art 11 of the ICCPR has not acquired the status of *jus cogens*, the prohibition of imprisonment for inability to pay a debt has acquired the status of customary international law. This is for two reasons. First, Art 11 is not transplanted in any of the three regional human rights instruments. Second, Art 11 has been transplanted in the constitutions of only three countries. Even in these three countries, legislation does not prohibit imprisonment for inability to fulfil a contractual obligation generally. It only prohibits imprisonment for inability to pay a debt (in Seychelles and Zimbabwe) or is silent on this issue in Rwanda. Thus, although the prohibition for inability to fulfil a contractual obligation is absolute (as per Art 4 of the ICCPR), it has not

[1] For the purpose of this article, 'imprisonment' means confining a person in facility (prison or correctional centre) for the purpose of serving a sentence imposed by a court or a quasi-judicial body. 'Detention' means confining a person in a facility (for example, a police cell, a hospital, a prison or correctional centre) whether or not pursuant to a court order before or without the imposition of a sentence of imprisonment. 'Arrest' means apprehending or seizing a person who is suspected of committing an offence for the purpose of taking him/her in custody before they are produced before court.

yet attained the status of customary international law. However, although the prohibition against imprisonment for inability to pay a debt has attained the status of customary international law, it has not yet become *jus cogens*. This is so because, since the ICCPR and all regional human rights treaties and the pieces of legislation in countries prohibit imprisonment for inability to pay a debt, this prohibition has attained near universal acceptance and could be classified as customary international law. The article will start by demonstrating the drafting history of Art 11 before dealing with the reservations which countries made to this provision. After that, the author demonstrates case law and practice on Art 11 from international human rights bodies before illustrating how this issue has been dealt with in regional human rights instruments. The author will finally illustrate how different countries have dealt with the prohibition of imprisonment for inability to fulfil a contractual obligation in the constitutions, legislation and case law.

II. Drafting History of Art 11 of the ICCPR

In 1946, the UN Economic and Social Council established the Commission on Human Rights, the Commission, with the mandate 'to submit proposals, recommendations, regarding, inter alia, an international bill of human rights'.[2] The Commission was also asked to suggest ways in which human rights and freedoms would be protected effectively.[3] The Commission, after studying different 'draft bills on human rights and proposals' and after several meetings, prepared the draft ICCPR.[4] In the UN Secretary General's Report to the UN General Assembly to which the draft ICCPR was attached, it was reported that the Commission suggested that Art 11 should be included in the draft ICCPR. The draft Art 11 provided that '[n]o one shall be imprisoned merely on the grounds of inability to fulfil a contractual obligation'.[5] The Secretary General's Report also highlights, not only reasons why the Commission included Art 11 in the ICCPR, but also the circumstances in which it was applicable or inapplicable. The report and the proposed ICCPR provisions were debated by state delegates to adopt the ICCPR. I will start by highlighting the Commission's views on Art 11 before dealing with the state delegates' debates.

1. The Commission's Views

The Commission was of the view that Art 11 should be understood literally and that it was only meant to protect a person who was unable to fulfil a contractual obligation. It explained that Art 11 was not applicable to 'crimes committed through

[2] UN Secretary-General, Draft International Covenants on Human Rights: annotation prepared by the Secretary-General, A/2929 (1 July 1955), 5.

[3] ibid 5.

[4] ibid 5.

[5] ibid 106.

the non-fulfilment of obligations of public interest, which were imposed by statute or court order'.[6] For example, it was not applicable in cases of failure to pay 'maintenance allowances'.[7] The Commission did not agree with the proposal that Art 11 should only be applicable in case of 'inability to pay a contractual debt'.[8] It was agreed that it should have wider application and should 'cover any contractual obligations, namely, the payment of debts, performance of services or the delivery of goods'.[9] An opinion was expressed that inability to fulfil some contractual obligations between the individuals and states which were 'so vital in nature' should justify imprisonment. For example, if the individual had failed to deliver essential food stuffs to the population.[10] However, the Commission did not take a position on that opinion. It just highlighted it. This implies that the Commission did not consider that to be one of the exceptions under Art 11. It was 'pointed out' that in many countries there were laws to the effect that 'persons who were able but unwilling to fulfil contractual obligations might be punished by imprisonment'.[11] This implies that Art 11 was aimed at codifying the principle that a person who is unwilling to fulfil a contractual obligation is liable to punishment. There was a proposal that the words 'unless he is guilty of fraud' should be added at the end of Art 11. However, the Commission did not accept this proposal because it was agreed that the words 'merely on the grounds of inability' made it clear that Art 11 was not applicable to cases of fraud.[12] In other words, a person whose inability to fulfil a contractual obligation is attributable to fraud is not protected under Art 11. His/her involvement in fraudulent activities implies that he/she is unwilling to fulfil a contractual obligation. The report also shows that the Commission rejected the inclusion of a new paragraph to the effect that 'no one shall be subjected to excessive fines'.[13]

2. The State Delegates' Debates on Art 11

The draft Art 11 was debated by state delegates in November 1958. As the discussion below illustrates, the majority of the state delegates were prepared to vote in favour of the text that was proposed by the Commission. However, some of them were of the view that the text could be improved upon to make it clearer. The Colombian delegate was the first to propose an amendment to the draft Art 11. He argued that he supported the inclusion of Art 11 in the ICCPR because it strengthened the protection of human rights and complied with the Columbian constitution 'which prohibited imprisonment for purely civil debts or obligations'.[14]

[6] ibid 106.
[7] ibid 106.
[8] ibid 106.
[9] ibid 106.
[10] ibid 106.
[11] ibid 106.
[12] ibid 106.
[13] ibid 106.
[14] General Assembly, 13th session, official records, 3rd committee, 883rd meeting, Monday,

He added that the Commission's report had indicated that Art 11 covered all contractual obligations.[15] He argued that:

> '[H]e had certain doubts regarding the wording of the article. Assuming that its object was to prohibit any person from being deprived of his liberty merely for inability to comply with a private legal obligation, that is, one not related to public law, it should be noted that such obligations did not always arise out of contracts, and, in addition, that private persons entered into contracts with the State which were contracts not under civil law but under administrative law, and failure to fulfil which might properly, in view of the serious consequences to society that could ensue, be punishable with imprisonment. That was the case with contracts to supply the armed forces in time of war'.[16]

Against that background, he proposed that the word 'contractual' should be replaced with the 'civil' or alternatively, the phrase 'contractual obligation' should be replaced by 'obligation under private law'. He also explained why those amendments were necessary. Since the Committee spent several hours discussing the Colombian proposal, it is important to reproduce extensively the rationale behind the amendment that the delegate had proposed.

He explained that:

> 'Civil obligations could have their origin not only in contracts, but also in the law, as was the case, for example, in so-called quasi-contracts or quasi-delicts. In other words, there were many purely civil obligations not originating in freedom of contract – for example, the obligation of the employer to make good damage which might have been caused through negligence or lack of foresight on the part of his employee. It would be wrong if imprisonment could be imposed in cases such as that and many similar ones. In such cases…there were no contractual obligations. He therefore thought that the word "contractual" might usefully be replaced by "civil", a word which was at once broader and more precise. All civil obligations, regardless of their origin, would then be covered by the prohibition, while all obligations which related to the State, whether contractual or not, would be left out. However, he was afraid that the word "civil" might cause certain difficulties of interpretation in some countries, or that it might be understood in others as excluding certain branches of private law, such as commercial and labour law. Accordingly, he thought that it might be possible to replace the expression "contractual obligation" by "obligation under private law". That formula would establish a sufficiently clear distinction between that type of obligation and obligations under public

17 November 1958 (A/C.3/SR.883), para 12.

[15] ibid para 13.

[16] ibid para 14.

> law, which would be those originating in criminal law, administrative law, constitutional law, and so forth'.[17]

He added that Art 11 was clearly inapplicable to criminal law cases.[18] The Venezuelan delegate recommended that Art 11 should be amended to expressly state that it was not applicable to cases of fraud.[19] However, the Colombian delegate argued that this was not necessary because the Commission's report made it clear that Art 11 was not applicable to cases of fraud.[20] The Venezuelan delegate was convinced that indeed Art 11 did not cover cases of fraud.[21] This view was also endorsed by the Spanish delegate.[22] The Spanish delegate also emphasised that the rationale behind Art 11 'was to ensure that no one should be imprisoned merely for non-compliance with a civil obligation'.[23] He added that this was evident from the use of the

> 'two words in the text: the word "merely", which ensured that no other aspect of the offence should be taken into consideration, and the word "inability", which meant that the person concerned should be unable, not unwilling, to fulfil his contractual obligation'.[24]

He supported Colombia's suggestion that replacing the word 'contractual' with 'civil' would have 'improved' the quality of Art 11.[25] He added that in Spanish law, a person who failed to fulfil government contracts was not imprisoned but rather was disqualified from doing business with government.[26] The Colombian delegate, in response to the Spanish delegate's submission, clarified that although in his country failure to fulfil government contracts was not punishable by imprisonment, there should be cases where such failure could be punished by imprisonment. For example, 'failure to supply foodstuff in war time'.[27] The Pakistan delegate said that he was going to abstain from voting on Art 11 because it was contrary to Pakistan law which provided for the circumstances in which a judgement debtor could be arrested and brought before court which was empowered to order his detention in 'a civil prison or elsewhere' if there was evidence that his refusal to pay the debt was 'in bad faith'.[28] The submissions which expressly objected to the Colombian proposal can be categorised into two groups. The first group includes those

[17] ibid para 15.
[18] ibid para 17.
[19] ibid para 18.
[20] ibid para 23.
[21] ibid para 27.
[22] ibid para 20.
[23] ibid para 19.
[24] ibid para 19.
[25] ibid para 21.
[26] ibid para 21.
[27] ibid para 24.
[28] ibid para 22.

delegates who did not give reasons for their objection to the proposal. The second group includes delegates who explained why they opposed the amendment. Within this second group, there are two sub-groups. The first sub-group just gave reasons for their objection to the proposal. The second sub-group not only gave reasons for their objections, but also proposed alternative amendments. I will start with the discussion of the first sub-group in the second category. The United Kingdom's delegate first explained his understanding of the scope of Art 11.

He stated that:

> '[H]is delegation regarded the article as intended to prevent two things: first, imprisonment for debt without the order of a court at the mere discretion of the creditor and, secondly, imprisonment, even by order of a court, on the ground of mere inability to pay; the words "merely" and "inability", as the Spanish representative had pointed out, were crucial. Many civil and quasi-civil suits were brought before the courts in the United Kingdom every day-for example, by wives seeking the enforcement of maintenance orders. In each case, the court carefully considered whether the defendant was in a position to pay and was willfully neglecting to do so before it made its order. In the case of a judgement debt, referred to by the representative of Pakistan, judgement for the debt was given only if the court was satisfied that the defendant had, or had had at the material time, the means to pay. It was only if the person concerned refused to comply with the order made by the Court that he laid himself open to a sentence of imprisonment; he was therefore sentenced, not for inability to pay, but for willful refusal to obey the court. Such cases were obviously outside the scope of article 11'.[29]

He objected to the Colombian delegate's suggested amendment to Art 11 on the grounds that

> '[t]he term "civil obligation" was much wider than "contractual obligation", and might cover tax cases or even cases of non-compliance with a court order, which would be most undesirable'.[30]

Other countries also opposed the Colombian suggested amendment on grounds that it would broaden Art 11 to cover cases which were beyond its scope;[31] the Commission had, after a lengthy debate, adopted the provision unanimously and it was 'not meant to apply to non-fulfilment of obligations imposed in the public

[29] ibid para 25.

[30] ibid para 26.

[31] General Assembly, 13th session, official records, 3rdcommittee, 883rd meeting, Monday, 17 November 1958 (A/C.3/SR.883), para 28 (Saudi Arabia); General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884), para 2 (India); General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884), para 34 (Saudi Arabia).

interest';[32] the amendment was unacceptable as it 'might give rise to misunderstandings' in different fields of law such as criminal law, civil law, the law of contract and the law of delict;[33] the meaning of Art 11 had been explained by the Commission and there were 'considerable' differences between civil and contractual obligations;[34] and the amendment contradicted the domestic legislation in many countries.[35] The Dutch delegate objected to the proposed amendment because the words suggested were open to various interpretations in different languages.[36] The Chinese delegation argued that he would abstain from voting for the Colombian proposal because it 'had no strong feelings' about it. However, it was prepared to vote for Art 11 as drafted by the Commission 'on the understanding that it did not cover obligations of the individual towards the State'.[37] Some countries opposed the Colombian proposal without detailed explanation. For example, the Japanese delegate pointed out that he was 'unable' to vote for it[38] and the Irish delegate argued that Art 11 as drafted by the Commission was satisfactory.[39] The Swedish delegate argued that he was prepared to vote for Art 11 as drafted by the Commission although he

> 'had some doubts about the meaning of the word "imprisoned", on which the... [Commission on Human Rights' Report] threw no light. It was not clear, for instance, whether it meant "sentenced by a court to a term of imprisonment", or merely "deprived of liberty" '.[40]

Some countries that opposed the Colombian proposal argued that if the delegates did not adopt Art 11 in the format proposed by the Commission on Human Rights, the Article had to be amended further. For example, the United States delegate argued that his delegation was opposed to the Colombian amendment and added that 'the meaning [sic] might be made more explicit by inserting the

[32] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884), para 1 (India).

[33] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884) para 4 (Belgium). See also para 23 where the United Kingdom delegate argued that 'Whatever the meaning of the term for the French speaking and Latin American countries, "civil obligations" would in English have the meaning of obligations other than military obligations. It would thus clearly include any such obligations of the individual towards the State. A contractual obligation belonged in an entirely different category'.

[34] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884) para 31 (USSR).

[35] ibid paras 35 (United States) and 36 (Morocco).

[36] General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday, 18 November 1958 (A/C.3/SR.885) paras 2 (Sweden); 4 (the Netherlands).

[37] ibid para 8 (China).

[38] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884), para 5 (Japan).

[39] ibid para 47 (Ireland).

[40] General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday, 18 November 1958 (A/C.3/SR.885), para 1 (Sweden).

words "*bona fide*" after the words "to fulfil a" '.[41] In other words, had this proposal been followed, Art 11 would have provided that '[n]o one shall be imprisoned merely on the ground of inability to fulfil a *bona fide* contractual obligation'. The Israel delegate suggested that Art 11 should be amended to provide that '[n]o one shall be deprived of his liberty because of his inability to pay a civil debt'.[42] In support of this proposal, he explained that:

> 'The text prepared by the Commission on Human Rights forbade imprisonment for debts, meaning contractual debts and not civil obligations in general. Thus, in common law countries, it did not apply to obligations arising out of a "tort". The reason for that exception was undoubtedly the fact that 'tort' implied an intention to injure, or at least negligence, on the part of its author and could therefore be regarded as to some extent comparable to a criminal offence. It was obvious that a breach of contract was not necessarily the result of malice or negligence, for the debtor under a contract might simply be unable to discharge his obligations. However, there were also instances of wilful and malicious breach of contract, which were then of a grave nature, but that point was not taken into consideration in article 11. On the other hand, a civil offender might commit only a minor misdemeanour yet be convicted and ordered to pay enormous sums in damages. In short, it was difficult to see why the imprisonment of a debtor under contract should be regarded as a violation of human rights, without any distinction being made, if in other circumstances it was permissible to imprison an involuntary offender who was unable to discharge the obligations incurred in connexion with his offence. That argument applied particularly to cases where no offence had actually been committed but a person was held liable for damage caused by others or by some object in his charge'.[43]

He argued that his suggested amendment was necessary because in some cases it might be difficult to determine whether or not the obligation was contractual.[44] However, both the American and Israeli proposals were not discussed by the delegates. The Spanish delegate supported the Colombian proposal but also noted that many delegates were opposed to it.[45] He suggested that another amendment to Art 11 that might strike a balance between the Commission's text and the Colombian proposal. It explained that:

> '[I]n Spanish-speaking countries the phrase "civil obligation" had only

[41] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884), para 35 (United States).

[42] ibid para 41 (Israel).

[43] ibid para 39 (Israel).

[44] ibid para 40 (Israel).

[45] General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday, 18 November 1958 (A/C.3/SR.885), para 6.

> one meaning, namely...an obligation of a private nature, in contrast to... an obligation as between the individual and the State. He wondered whether the difficulty might not be met by replacing the phrase "civil obligation" by the words "an obligation of a private nature" ...Such a wording would cover both contractual obligations and non-contractual obligations of the kind he had described, while excluding the cases referred to by the United Kingdom representative at the 883rd meeting. Moreover, it would broaden the protection provided by article 11 which was much to be desired, as people had many more non-contractual obligations than contractual ones'.[46]

However, the above proposal was not debated by the delegates. This meant that there were only two texts for the delegates to debate and adopt one of them: the initial one which had been proposed by the Commission and the one suggested by Colombia (amending the initial one).

It is evident that many delegates, for various reasons, opposed the Colombian proposed amendment. However, some of the delegates supported it. For example, the Spanish delegate argued that the amendment would have 'improved' the quality of the provision.[47] It was also argued that it complied with France's domestic law which prohibited 'imprisonment for debt in commercial and civil cases' and that the amendment 'would make it clear that no penal proceedings were involved' in any failure to meet contractual obligations'[48] and would be in line with domestic penal law.[49] The Colombian delegate argued that Spanish-speaking countries and France supported his proposal because it would have made Art 11 clearer.[50] The Spanish delegate argued that although the Commission's text was 'generally acceptable' the Colombian proposal raised an important issue to the effect that:

> 'The word "contractual", although correct, did not go far enough. For instance, it did not cover obligations which, although not contractual, were nevertheless binding upon the person concerned. Under the article as it stood, a person who contracted for a loan in writing could not be imprisoned for default, whereas a person liable for damage caused by him or by members of his household for whom he was responsible could be sent to prison for default, no contract being involved. Thus, the word "contractual" only partly covered the obligations to which the article was intended to apply'.[51]

[46] ibid para 6 (Spain).

[47] General Assembly, 13th session, official records, 3rd committee, 883rd meeting, Monday, 17 November 1958 (A/C.3/SR.883) para 21 (Spain).

[48] ibid para 29 (France).

[49] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884) paras 25 and 45 (France).

[50] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884) para 8 (Colombia).

[51] General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday,

A few delegates were 'neutral' and argued that they were prepared to vote for Art 11 whether or not it was amended as suggested by Colombia.[52] This is because, for example, there was 'very little difference' between the words 'contractual' and 'civil'.[53] Since the delegates were divided on the issue of whether to adopt the Colombian proposed amendment, the chairperson put the Colombian amendment to vote. The results show that '[t]he amendment was rejected by 39 votes to 15, with 8 abstentions'.[54] Since the Colombian amendment had been rejected by the majority of the delegates, the Chairperson put Art 11 to vote, as had been drafted by the Commission. It was adopted unanimously.[55]

After casting their votes, four countries explained why they had voted in favour of the text proposed by the Commission. Colombia explained that its proposal had been meant to 'improve Article 11' but this did not mean that it was opposed to the Commission's text.[56] The Iranian delegate explained that it voted in favour of the Commission's text because, unlike the Colombian proposal, 'it was simple, precise and well-worded'.[57] He added that Art 11 should be interpreted in the light of 'reservations' in the Commission's report.[58] The Yugoslav and Philippine delegations explained that they voted in favour of the text because it was in conformity with their domestic legislation.[59] They opposed the Colombian proposed amendment because the word 'civil' was susceptible 'to too many interpretations'[60] and 'would have given rise to many unnecessary problems'.[61]

The following issues should be noted about the drafting history of Art 11. First, there was consensus that the provision applies to all contractual obligations. In other words, it is not limited to failure to pay debts (or loans) only. Implied in this is that the contract giving rise to the obligation should be valid. This is because as a general rule in the law of contract, an invalid contract is enforceable. Second, Art 11 is applicable to a person who is unable, as opposed to one who is unwilling, to fulfil a contractual obligation. Put differently, the Commission and the delegates were of view that Art 11 does not protect persons who are able but unwilling to fulfil their contractual obligations.[62] This means that before a person is sentenced

18 November 1958 (A/C.3/SR.885) para 5 (Spain).

[52] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884) para 43 (Mexico).

[53] General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday, 18 November 1958 (A/C.3/SR.885) para 7 (Greece).

[54] ibid para 9.

[55] ibid para 10.

[56] ibid para 11.

[57] ibid para 12.

[58] ibid para 12.

[59] ibid paras 13 (Yugoslavia) and 14 (Philippines).

[60] ibid para 13 (Iran).

[61] ibid para 14 (Philippines).

[62] General Assembly, 13th session, official records, 3rdcommittee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884) paras 3 (India); 5 (Japan); 30 (Pakistan); General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday, 18 November 1958 (A/C.3/

to prison, the court must be satisfied that he/she is unwilling to pay the debt. Third, there was no consensus amongst the delegates on the issue of whether Art 11 was applicable to all contractual obligations between private individuals and the states. Whereas the majority of the delegates did not object to the argument that it is applicable to any contractual obligation between private individuals (horizontal application) and between private individuals and states (vertical application), a few of them (especially China and those that supported the Columbian proposal) were of the view that it was not applicable to all contractual obligations between private individuals and the state. There was also a general understanding (with the exception of Israel) that Art 11 is not applicable to situations where the obligations had been imposed by statute or 'public law' (for example, maintenance cases). In the two cases above where the delegates disagreed on the scope of Art 11, it is argued that when interpreting the provision, the position of the majority should take precedence. This is because following the minorities' views, would defeat the purpose of the provision. This view is also supported by the fact that after the rejection of Columbia's proposed amendment, delegates voted unanimously in favour of the Commission's proposal. This implies that they agreed with the majority's understanding of Art 11. Otherwise, some would have voted against it or abstained. Therefore, the correct way of understating Art 11 is that it has both horizontal and vertical applications. It is applicable to all to all contractual obligations and not just to debts between private individuals.

An issue that was neither addressed in the Commission's report nor in the majority of delegates' submissions relates to the meaning of 'imprisonment' in the context of Art 11. Whereas there was consensus that Art 11 barred imprisonment for inability to fulfil a contractual obligation, neither the Commission's report nor the majority of delegates' submissions clarified the meaning of 'imprisonment'. This explains why the Swedish delegate argued that he

> 'had some doubts about the meaning of the word "imprisoned", on which the... [Commission on Human Rights' Report] threw no light. It was not clear, for instance, whether it meant "sentenced by a court to a term of imprisonment", or merely "deprived of liberty"'.[63]

As illustrated above, the United Kingdom delegate's view was that Art 11 was intended

> 'to prevent two things: first, imprisonment for debt without the order of a court at the mere discretion of the creditor and, secondly, imprisonment, even by order of a court, on the ground of mere inability to pay'.

SR.885) para 4 (Netherlands).

[63] General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday, 18 November 1958 (A/C.3/SR.885), para 1 (Sweden).

The first scenario above deals with cases, for example, where a creditor asks/pays the police or any other law enforcement officer to arrest and detain a debtor for the purpose of forcing him/her to pay the debt. There is no judicial oversight in such a situation. It is an extrajudicial mechanism. The debtor's ability or inability to pay the debt is irrelevant for the purposes of imprisonment in this context. The second scenario deals with a case where a court orders the imprisonment of a person simply because he/she or she is unable to pay a debt. In simple terms, he/she is being imprisoned for being poor. None of the delegates questioned or objected to the United Kingdom's understanding of the dual purposes of Art 11. This implies that the view that Art 11 was meant to prevent imprisonment in those two situations should not be dismissed lightly.[64] It is more accurate to refer to the first scenario as detention and to the second one as imprisonment. It is against that background that the author's view is different from that adopted by some scholars that 'Article 11 protects against imprisonment as a punishment'.[65] It is worth noting that in some instances, the Human Rights Committee has used the words 'detention' and 'imprisonment' interchangeably without explaining the difference(s) between the two.[66]

The drafting history of Art 11 shows that there are two possible ways in which to deal with a judgement debtor who, although able to pay, refuses to do so. The first 'way' can be inferred from the United Kingdom delegate's submission. In the process of explaining the circumstances in which Art 11 was not applicable to a judgement debtor, the United Kingdom delegate added that if such a debtor had the means to pay and the court ordered him/her to pay but they refused to do so, they had to be imprisoned 'not for inability to pay, but for willful refusal to obey the court'.[67] In other words, the person is being imprisoned for what could be referred to as contempt of court. This means that before the sentence of imprisonment is imposed, it has to be preceded by a court order to pay the debt. If one obeys the court order (fulfils a contractual obligation), he or she is not sentenced to prison. However,

[64] However, the Human Rights Committee uses the words 'detention' and 'imprisonment' interchangeably. For example, *Parkanyi* v *Hungary* (Communication 410/1990, U.N. Doc. CCPR/C/41/D/410/1990) (HRC 1991) para 5.2 the Human Rights Committee held that the application was inadmissible because, inter alia, 'that the author has failed to substantiate sufficiently, for purposes of admissibility, that he was subjected to detention on account of his inability to fulfil a contractual obligation.' The use of the word 'detention' as opposed to 'imprisonment' implies that the Committee considered Art 11 to be broad.

[65] S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights Cases, Materials, and Commentary* (Oxford: Oxford University Press, 3rd ed, 2013, 335.

[66] For example, *Parkanyi* v *Hungary*n 64 above the Human Rights Committee held that the application was inadmissible because, inter alia, 'that the author has failed to substantiate sufficiently, for purposes of admissibility, that he was subjected to detention on account of his inability to fulfil a contractual obligation.' However, in *HS* v *Australia* (CCPR/C/113/D/2015/2010) (HRC, 30 March 2015) para 8.3, the Committee dismissed the author's argument allegating a violation of Art 11 because, inter alia, 'the author has never been imprisoned as a result of her failure to fulfil any kind of contractual obligation'.

[67] General Assembly, 13th session, official records, 3rd committee, 883rd meeting, Monday, 17 November 1958 (A/C.3/SR.883), para 25.

the opposite is true. Since he/she is sentenced to prison for contempt of court, even if he/she fulfils the contractual obligation after the sentence has been imposed, he/she may have to serve the sentence. He/she also gets a criminal record. In other words, imprisonment was a form of punishment. Legally, a person can only be punished/sentenced after a conviction. This means that he/she must have committed an offence. As the discussion below illustrates, the practice of the Human Rights Committee and of the Working Group on Arbitrary Detention shows that in some countries this approach has been followed in cases where people have refused to pay debts pursuant to court orders.

The second way is inferred from the submission of the Pakistan delegate. He argued, and his submission was endorsed by the United Kingdom delegate, that Art 11 did not prohibit the detention of a person in a 'civil prison or elsewhere' pursuant to a court order if there was evidence that his refusal to pay the debt was 'in bad faith'.[68] This means that the imprisonment is meant to force him to fulfil his/her contractual obligation. If he/she fulfils the contractual obligation, they are released from prison immediately and they don't get a criminal record. This amounts to deprivation of liberty for the purpose of forcing that person to fulfil a contractual obligation. However, the deprivation of liberty must be ordered by the court after being satisfied that the person is able but unwilling to meet his/her contractual obligation. This is perhaps the situation that the Commission of Human Rights had in mind when it stated that it was 'pointed out' during the Commissioners' deliberations on Art 11 that in many countries there were pieces of legislation to the effect that 'persons who were able but unwilling to fulfil contractual obligations might be punished by imprisonment'.[69] In this context, 'punishment' does not necessarily mean that a person has committed an offence. It is used to imply a coercive tool in the hands of a court to force judgment debtor to obey a court order. The above discussion shows that this is what the delegates had in mind when they discussed Art 11. This explains why they made it clear that Art 11 was not applicable to obligations imposed by statute. As the discussion below illustrates, many countries have adopted the 'Pakistan' approach. Therefore, it can be argued that the purpose of imprisonment under Art 11 is meant to compel the person to fulfil a contractual obligation. Otherwise, Art 11 would have provided that 'no one shall be punished merely on the ground of inability to fulfil a contractual obligation'. Once he/she fulfilled the contractual obligation, he/she must be released from detention or prison. Otherwise, he/she will remain in detention for the whole duration imposed by the court. After release, he/she is not absolved from fulfilling the contractual obligation if he/she has the means to do so.

Since there were disagreements during the drafting of Art 11, it is important to highlight how countries dealt with those disagreements at the time of ratifying

[68] ibid para 22.

[69] UN Secretary-General, Draft International Covenants on Human Rights: annotation prepared by the Secretary-General, A/2929 (1 July 1955), 106.

or acceding to the ICCPR and also in practice at the regional and domestic human rights levels. In the next part of the article, the author illustrates how Art 11 has been implemented or otherwise in practice at international, regional and national levels. At the international level, the author shows the reservations states parties have made on Art 11 and their legal implications and also the approaches that UN human rights mechanisms have taken in ensuring that states parties implement Art 11. At the regional and national levels, the author also demonstrates the approaches regional human rights bodies and states parties have taken to give effect to Art 11. The discussion will start with the international human rights system.

III. Art 11 in Practice: The International Level

At the international level, the author will examine the reservations that some states parties made on Art 11. This part of the article will also illustrate how the UN human rights mechanisms have understood and applied Art 11.

1. Reservations to Article ICCPR

Although many delegates had supported the Colombian amendment and some had suggested further amendments, these disagreements are not reflected in the reservations which the states made when ratifying or acceding to the ICCPR. For example, Colombia and other countries such as Spain and France which supported its proposed amendment, did not make any reservation on Art 11. Likewise, Israel and United States which had suggested amendments to Art 11 also did not make any reservation on the provision. The lack of many reservations could be attributable to the fact that Art 11 was adopted unanimously. However, two countries that did not participate in the debates on Art 11 – Bangladesh and Congo, made reservations on Art 11. In its reservation, Bangladesh stated that:

> 'Article 11 providing that…is generally in conformity with the Constitutional and legal provisions in Bangladesh, except in some very exceptional circumstances, where the law provides for civil imprisonment in case of willful default in complying with a decree. The Government of People's Republic of Bangladesh will apply this article in accordance with its existing municipal law'.[70]

Congo also made a reservation on Art 11 to the effect that:

> 'Article 11 (…) is quite incompatible with articles 386 et seq of the Congolese Code of Civil, Commercial, Administrative and Financial Procedure, derived from Act 51/83 of 21 April 1983. Under those provisions, in matters of private law, decisions or orders emanating from conciliation proceedings may be

[70] See http://tinyurl.com/2w6pdr3y (last visited 30 September 2024).

> enforced through imprisonment for debt when other means of enforcement have failed, when the amount due exceeds 20,000 CFA francs and when the debtor, between 18 and 60 years of age, makes himself insolvent in bad faith'.[71]

In its response to Congo's reservation, Belgium referred to the drafting history of Art 11 and argued that the reservation was unnecessary because 'there is no contradiction between the Congolese legislation and the letter and the spirit of article 11 of the Covenant'.[72] This is because, its understanding of the drafting history of Art 11 shows that

> '[i]mprisonment is not incompatible with article 11 when there are other reasons for imposing this penalty, for example when the debtor, by acting in bad faith or through fraudulent manoeuvres, has placed himself in the position of being unable to fulfil his obligations'.[73]

Belgium added that since Art 11 is non-derogable, states are not permitted to make any reservations on it. If one closely examines the Bangladesh reservation in the light of its domestic law, it is evident that the reservation was not necessary. This is because the circumstances in which the Code of Civil Procedure[74] empowers a court to order the imprisonment of a person for failure to fulfil a contractual obligation are permissible under Art 11.[75] It can thus be argued that both reservations do not affect the full implementation of Art 11 in the respective countries. It is now important to illustrate how the UN human rights bodies have dealt with Art 11.

2. The UN Human Rights Bodies and Art 11

Different UN human rights bodies or mechanisms have expressed their views on what is required of states parties to the ICCPR to give effect to their obligations under Art 11. The author will start with the views expressed by the Human Rights Committee, the enforcement body of the ICCPR. There are two main ways in which the Human Rights Committee has expressed its views on Art 11: through its concluding observations on the periodic reports of states parties to the ICCPR and through individual communications. We will start with concluding observations. Through its concluding observations on state party reports, the Human Rights Committee has recommended ways in which countries can give effect to Art 11. For example, in its Concluding Observation on Morocco's report, the Human Rights Committee was concerned about a circular issued by the Ministry of Justice providing

> 'for enforcement by committal of debtors who do not fulfil their contractual

[71] ibid
[72] ibid
[73] ibid
[74] Code of Civil Procedure, 1908 (Act no V of 1908).
[75] Section 51, 55, 58, 74.

> obligations if they have not provided a certificate of indigence or a document that certifies that they are not liable to pay taxes'.[76]

Against that background, it recommended that Morocco 'should revise its laws in such a way as to ensure that committal may not be used as a method of enforcing contractual obligations'.[77] In its concluding observation on the Republic of Ireland's report, the Human Rights Committee observed that it is a violation of Art 11 for people to be 'imprisoned for failure to pay fines in connection with their inability to fulfil contractual obligations'.[78] Against that background, the Committee recommended that Ireland should implement its domestic law to

> 'provide for a community service order as an alternative to imprisonment for failure to pay court-ordered fines or civil debt, and ensure that in no case is imprisonment used as a method of enforcing contractual obligations'.[79]

The Human Rights Committee also requires states parties to ensure that their domestic legislation clearly prohibits the imprisonment of a person for failure to fulfil their contractual obligation and also that this right is non-derogable.[80] It considers imprisonment for inability to fulfil a contractual obligation as a form of arbitrary detention.[81] The above concluding observations shows, inter alia, that in some countries a person who is able but refuses to meet a contractual obligation after being ordered by a court to do so commits an offence. This means that he/she is punished for that offence and must also fulfil the contractual obligation. Apart from concluding observations, the Human Rights Committee has also handed down decisions in which it has explained the circumstances in which Art 11 is

[76] CCPR/C/MAR/CO/6 (CCPR 2016), para 31.

[77] ibid para 32.

[78] CCPR/C/IRL/CO/4 (CCPR 2014), para 16.

[79] ibid

[80] See CCPR/C/IDN/CO/1 (CCPR 2013) (Indonesia) para 9 where the Committee stated that it was 'concerned at the lack of a clear provision in article 28I of the Constitution of 1945 and Regulation in lieu of Law no 23 of 1959 (regulating the rights that are non-derogable in a state of emergency) to dispel any doubts that certain rights, including the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation protected under article 11 of the Covenant, cannot be derogated from during a state of emergency.' In its Concluding Observation on Grenada's report CCPR/C/GRD/CO/1 (2009) para 18, the Committee stated that the state party 'giving due consideration to article 11 of the Covenant…should provide the Committee with information clarifying the meaning of this term ["civil prisoners"]. It should ensure the full implementation of article 11 of the Covenant.' See also CCPR/C/NIC/CO/3 (CCPR 2008) (Nicaragua) para 18; CCPR/C/IRL/CO/3 (CCPR 2008) (Ireland) para 18; CCPR/C/GRC/CO/2 (CCPR 2015) (Greece) para 36; CCPR/C/TCD/CO/1 (CCPR 2009)(Chad) para 25; CCPR/C/TZA/CO/4 (CCPR 2009) (Tanzania) para 20; CCPR/C/DZA/CO/3 (CCPR 2007)(Algeria) para 6 (where the Committee recommends to states parties to ensure that their laws to do permit the imprisonment of persons for failure to fulfil contractual obligations).

[81] UN Human Rights Committee (HRC), General comment no 35, Art 9 (Liberty and security of person) (CCPR/C/GC/35)(16 December 2014) para 14. See also CCPR/C/QAT/CO/1 (CCPR 2022) (Qatar) para 31.

applicable. These communications will be highlighted below in the order in which they were decided.

In *Calvet* v *Spain*,[82] the applicant and his wife divorced and the court ordered him to pay his former wife and children's maintenance.[83] The applicant failed to pay the maintenance and he was convicted of the 'offence of abandonment of the family (…) and sentenced him to eight weekends' imprisonment and reimbursement of the sums owed to his ex-wife'.[84] He argued that his imprisonment was contrary to Art 11 because it was imposed as a result of failure to fulfil a contractual obligation.[85] The state argued that the applicant had been convicted of 'failure to fulfil his legal obligation to keep and feed his family'.[86] The Committee held that the State had not violated Art 11 because the applicant had been imprisoned for failure to meet his legal as opposed to contractual obligation.[87] The Committee reached similar conclusions where the applicant was imprisoned for failure to pay alimony to his former wife[88] and where the applicant risked 'being imprisoned for failure to pay costs following criminal proceedings'.[89] In a case where the applicant was imprisoned for allegedly committing fraud in the context of contracts he had entered into with his clients, the Committee held that Art 11 was not violated where imprisonment was imposed 'under the scope of the criminal law'.[90] In *Maksim Gavrilin* v *Belarus*[91] the Human Rights Committee held that

> 'the prohibition of detention for debt does not apply to criminal offences related to civil law debts. When a person commits fraud, negligent or fraudulent bankruptcy, etc., he or she may be punished with imprisonment even when he or she no longer is able to pay the debts'.[92]

The Committee came to the same conclusion in a subsequent communication.[93] In *José Luis de León Castro* v *Spain*[94] the author, a lawyer, over-billed his clients and was convicted of fraud and sentenced to three years' imprisonment. Although he qualified for parole, the prison authorities refused to release him on the ground that he had not 'paid the compensation corresponding to the civil liabilities arising

[82] *Calvet* v *Spain* (Communication no 1333/2004)(25 July 2005).
[83] ibid para 2.1.
[84] ibid para 2.2.
[85] ibid para 2.3.
[86] ibid para 4.1.
[87] ibid para 6.4.
[88] Seto Martínez v. Spain (Communication no 1624/2007) (19 March 2010), para 4.3.
[89] Christophe Désiré Bengono v Cameroon (CCPR/C/132/D/2609/2015) (29 December 2021), para 6.8.
[90] *Latifulin* v *Kyrgyzstan* (Communication no 1312/2004) (10 March 2010), para 7.2 (he had promised to secure study visas abroad for some of his clients but failed to do so).
[91] *Maksim Gavrilin* v *Belarus* (CCPR/C/89/D/1342/2005) (3 April 2007).
[92] ibid para 7.3.
[93] *Cyrille Gervais Moutono Zogo* v *Cameroon* (CCPR/C/121/D/2764/2016) (19 December 2017) para 6.11.
[94] *José Luis de León Castro* v *Spain* (CCPR/C/95/D/1388/2005) (25 May 2009).

from the offence'.[95] He was 'not financially solvent' and therefore could not pay that money to be released on parole.[96] Although he did not argue that his imprisonment violated Art 11, one of the Committee Members held that 'the measures used in criminal cases to coerce the payment of restitution may, at some future date, be worthy of examination in light of the language of' Art 11.[97] It is argued that continued imprisonment in such a case is not contrary to Art 11. The person is not being imprisoned for inability to fulfil a contractual obligation. He is being imprisoned for inability to meet his statutory duty of compensating his victims. For the Committee to decide whether or not Art 11 was violated, the applicant has a duty to explain how the state party indeed violated that provision. Otherwise, the Committee will not consider the allegation on merit.[98]

The above jurisprudence shows that although the Human Rights Committee does not refer to the drafting history of Art 11, its conclusions in the above communications are in line with the drafting history of Art 11. As at the time of writing, there was no case in which the Human Rights Committee had held that a state had violated Art 11. It is important to highlight how other human rights bodies have dealt with Art 11.

3. The Working Group on Arbitrary Detention

As is the case with the Human Rights Committee, the Working Group on Arbitrary Detention[99] has also followed different approaches in its effort to ensure that states comply with their obligation under Art 11. For example, it has stated that using contempt of court proceedings as a disguise to imprison people for inability to pay debts is a violation of Art 11.[100] The Working Group also added that 'the prohibition of imprisonment for debt under article 11 of the International Covenant on Civil and Political Rights is absolute and forms part of customary international

[95] ibid para 2.8.

[96] ibid para 3.2.

[97] *José Luis de León Castro* v *Spain* (CCPR/C/95/D/1388/2005) (25 May 2009) (Dissenting Opinion of Committee Member Ruth Wedgwood), 17.

[98] *Lukpan Akhmedyarov* v *Kazakhstan* (CCPR/C/129/D/2535/2015) (27 November 2020) para 8.4.

[99] According to the *Report of the Working Group on Arbitrary Detention* (A/HRC/54/51) (31 July 2023) para 1, '[t]he Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42. It was entrusted with the investigation of cases of alleged arbitrary deprivation of liberty according to the standards set forth in the Universal Declaration of Human Rights and the relevant international instruments accepted by the States concerned. The mandate of the Working Group was clarified and extended by the Commission in its resolution 1997/50 to cover the issue of administrative custody of asylum seekers and immigrants. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 51/8 of 6 October 2022'. See also paras 2 and 3 of the same report which deal with the past and current membership of the Working Group.

[100] A/HRC/51/29/ADD.1 (WG Arbitrary detention 2022) (Maldives), para 46.

law'.[101] It added that 'detention due to inability to repay a debt in itself amounts to arbitrary deprivation of liberty. It is also arbitrary as it discriminates against individuals on the basis of their economic status'.[102] It called upon Maldives to

> Ensure the immediate end to deprivation of liberty for contempt of court on the grounds of a failure to comply with a court order to repay a debt or contractual obligation, in compliance with article 11 of the International Covenant on Civil and Political Rights.[103]

The Working Group uses the words 'imprisonment' and 'detention' in the context of Art 11 interchangeably. Case law from the Working Group also demonstrates its understanding of Art 11. For example, in *Buzurgmehr Yorov* v *Tajikistan*,[104] the applicant, a lawyer, was convicted of fraud and sentenced to imprisonment because he had failed 'to represent his clients properly'.[105] The evidence before the Working Group showed that these were trumped-up charges. It was argued on behalf of the applicant, that this was a violation of Art 11 because the charges against him 'related to an alleged failure to meet his contractual obligations' and that 'these should have been tried as a civil suit, not a criminal case'.[106] The Working Group highlighted the fact that Art 11 is non-derogable and that imprisonment for failure to meet a contractual obligation 'will always be arbitrary'.[107] It emphasised that 'the charges of alleged failure to represent clients indeed stemmed from private contracts rather than any statutory obligation'.[108] Against that background, the Working Group held that:

> 'If indeed Mr. Yorov failed to represent his clients properly, the matter should have been addressed through the professional misconduct proceedings of the bar association or a similar body, or pursued through civil litigation for breach of contract. The Working Group also observes that…the Government made no attempt to explain why the alleged breaches of private contracts would be considered criminal offences. The Working Group therefore finds that there has been a violation of article 11 of the Covenant'.[109]

It is not clear whether the Working Group's conclusion would have been different if the Government has explained the rationale behind the criminalisation of breaches of private contracts. In *Muhammad Iqbal* v *Qatar*[110] the applicant

[101] ibid para 47.
[102] ibid para 47.
[103] ibid para 110(h).
[104] *Buzurgmehr Yorov* v *Tajikistan* (A/HRC/WGAD/2019/17) (12 June 2019).
[105] ibid para 72.
[106] ibid para 72.
[107] ibid para 73.
[108] ibid para 73.
[109] ibid para 74.
[110] *Muhammad Iqbal* v *Qatar* (A/HRC/WGAD/2020/75) (29 January 2021).

was 'charged and detained for issuing bad cheques'.[111] He was sentenced to three months' imprisonment or to a fine (bail). He paid the fine and was released.[112] However, the Working Group observed that the applicant's detention and prosecution violated Art 11 of the ICCPR because 'detention for the inability to pay a debt is prohibited in international law'.[113] Against that background, the Working Group held that the applicant:

> '[W]as imprisoned on charges of issuing bad cheques, in other words because of his economic status. The Working Group recalls that international human rights law prohibits the deprivation of liberty for the inability to fulfil a contractual obligation, as stipulated in article 11 of the Covenant. This prohibition is non-derogable and is in fact part of customary international law. It is arbitrary as it discriminates against individuals on the basis of their economic status'.[114]

It should be remembered that imprisonment for issuing a bad cheque is an offence under section 357 of the Qatar Penal Code.[115] It is not clear why the Working Group did not refer to this section. In many countries, issuing a bad cheque is also an offence.[116] This implies that the Working Group's reasoning that imprisonment for issuing a bad cheque violates Art 11 is not only contrary to the drafting history and literal meaning of Art 11 but also to the jurisprudence of the Human Rights Committee. As discussed above, Art 11 does not apply to conduct of a criminal nature. Issuing a bad cheque is such conduct. In *Sheikh Talal bin Abdulaziz bin Ahmed bin Ali Al Thani* v *Qatar*[117] the applicant was detained on the 'trumped-up charge of defaulting on his debts'.[118] The Working Group referred to Art 11 of the ICCPR and held that it:

> 'That prohibition protects against imprisonment as a punishment for the inability to pay a private debt or to fulfil another type of contractual condition owed to another person or corporation. It follows that any imprisonment, pre- or post-trial, premised on the failure to discharge a debt obligation is without legal basis under international human rights law. The Working Group thus reiterates its jurisprudence holding that imprisoning a person for debt violates

[111] ibid para 41.
[112] ibid para 41.
[113] ibid para 61.
[114] ibid para 72.
[115] The Penal Code, Law no 11 of 2004.
[116] For example, in Austria, *Toth* v *Austria* [1991] ECHR 72 (12 December 1991); Poland, *Migon* v *Poland* [2002] ECHR 523 (25 June 2002).
[117] *Sheikh Talal bin Abdulaziz bin Ahmed bin Ali Al Thani* v *Qatar* (A/HRC/WGAD/2021/47) (18 March 2022).
[118] ibid para 9. See also para 42.

jus cogens and customary international law, regardless of domestic law'.[119]

Against that background, the Working Group concluded that Qatar had violated Art 11 of the ICCPR because the evidence before it showed that the applicable 'unable to pay his debts, as opposed to being unwilling to do so'.[120] The following observations should be made about the above holding. First, although the drafting history of Art 11 is silent on whether it prohibited imprisonment as a punishment or mere detention for inability to pay a debt, the Working Group suggests that the provision prohibits imprisonment as a form of punishment. Second, the drafting history of Art 11 shows that the majority of the delegates did not object to the argument that it bars imprisonment for inability to pay a debt whether it is owed to the state or to a private individual. Therefore, it has both vertical and horizontal applications. However, in this decision, the Working Group creates the impression that Art 11 is of horizontal application only (between private individuals). This approach is contrary to the literal interpretation of Art 11. Lastly, the Working Group, without motivation, held that the 'imprisoning a person for debt violates *jus cogens*'. Although the Working Group had previously expressed the view that the right against arbitrary deprivation of liberty had attained the status of *jus cogens*,[121] this was the first time in which it held specifically that imprisonment for failure to pay a debt, as a form of arbitrary deprivation of liberty, had attained the status of *jus cogens*. Whether or not the prohibition of imprisonment for inability to pay a debt under Art 11 amounts to *jus cogens* requires a closer examination. The International Law Commission defines *just cogens* to mean:

> 'A peremptory norm of general international law (jus cogens) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[122]

The International Law Commission stated further that:

1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).

2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).[123]

[119] ibid para 46.

[120] ibid para 48.

[121] See *Report of the Working Group on Arbitrary Detention* (24 December 2012) (A/HRC/22/44) para 51, where it is stated that 'the prohibition of arbitrary deprivation of liberty is part of treaty law, customary international law and constitutes a *jus cogens* norm'.

[122] Conclusion 3[2] of the International Law Commission, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/CN.4/L.967 (11 May 2022).

[123] Conclusion 5 of the International Law Commission, Draft conclusions on identification

The International Law Commission added that:

1. Evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) may take a wide range of forms.

2. Forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; constitutional provisions; legislative and administrative acts; decisions of national courts; treaty provisions; resolutions adopted by an international organization or at an intergovernmental conference; and other conduct of States.[124]

There is no doubt that Art 11 is non-derogable. Practice from regional human rights treaties and from many countries (as discussed below) shows that imprisonment for inability to fulfil a contractual obligation generally has not been prohibited. However, most countries prohibit imprisonment for inability to pay a debt. This means that the prohibition of imprisonment for inability to fulfil a contractual obligation generally has not attained the status of customary international law. However, prohibition for imprisonment to pay a debt could have attained the status of customary international law (as explained below in the concluding part of this article). Therefore, the author does not subscribe to the Working Group's view that imprisonment for inability to pay a debt has attained the status of *jus cogens*. In *Robert Pether and Khalid Radwan* v *Iraq*,[125] the applicants did not allege, and the evidence did not show, that the applicants were being detained for their inability to fulfil their contractual obligation. The evidence showed that the applicant had been detained allegedly because of a contractual dispute between their employer and the Central Bank of the respondent state. The Working Group referred to Art 11 of the ICCPR and held that the applicant's 'detention' was 'being used to exercise leverage in a commercial transaction, in violation of international law'.[126] Against that background, it concluded that the respondent state had violated Art 11.[127] It is argued that in this case Art 11 was not applicable. Although their detention was arbitrary and their trial was unfair, as the Working Group found, there was no evidence that they had been detained because of inability to fulfil a contractual obligation. Therefore, the Working Group stretched Art 11 beyond its scope. Apart from the Human Rights Committee and the Working Group, other UN Human Rights bodies have also invoked Art 11 in their practice. For example, the Committee against Torture has stated that detaining persons in hospitals for failure to pay hospital bills is contrary to Art 11 of

and legal consequences of peremptory norms of general international law (*jus cogens*), A/CN.4/L.967 (11 May 2022).

[124] Conclusion 8 of the International Law Commission, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/CN.4/L.967 (11 May 2022).

[125] *Robert Pether and Khalid Radwan* v *Iraq* (A/HRC/WGAD/2021/70)(16 March 2022).

[126] ibid para 88.

[127] ibid para 124.

ICCPR.[128] This implies that Art 11 is not limited to imprisonment/detention pursuant to a court order. It is also applicable in cases where detention is ordered by a government or private entity. The Committee on Migrant Workers was also concerned that migrant workers from some countries 'have been jailed in the Gulf States for…failing to fulfil contractual obligations'.[129] It is now important to take a look at how the issue of imprisonment for inability to fulfil a contractual obligation has been dealt with in the regional human rights systems.

IV. Regional Human Rights System

The right not to imprisoned for inability to fulfil a contractual obligation is also provided for in some regional human rights instruments. However, the relevant provisions in these instruments are worded differently from Art 11 of the ICCPR and this has different legal implications on the nature of the right. There are four regional human rights instruments which will be referred to in this part of the article: Inter-American, European, Arab and Africa. I will start with the American Convention. Art 7, para 7, of the American Convention on Human Rights[130] provides that '[n]o one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support'. The American Convention on Human Rights has been ratified or acceded to by 22 countries.[131] Of these, only Argentina made a declarative interpretation on Art 7, para 7.[132] Before discussing Art 11 in detail, it is important to take a look at its drafting history.

Art 6, para 6, of the Draft Inter-American Convention on Protection of Human Rights (which would later become Art 7, para 7) provided that:

> 'No person shall suffer deprivation of or limitation upon his physical liberty by reason of debt. Exceptions to this principle shall be admitted only when based on failure to fulfil pecuniary obligations imposed by law and when such failure is not due to the involuntary lack of economic capacity on the part of the oblige'.

The Inter-American Commission on Human Rights, in its 1955 annotations on the Draft Inter-American Convention on Protection of Human Rights, stated that:

[128] CAT/C/BDI/CO/1 (CAT 2007) (Burundi) para 26.

[129] CMW/C/LKA/CO/2 (CMW 2016) para 34(c); CMW/C/IDN/CO/1 (CMW 2017), para 34, lett c.

[130] American Convention on Human Rights (1969).

[131] See https://tinyurl.com/mss4w38s (last visited 30 September 2024).

[132] The Declarative Interpretation is to the effect that 'Article 7, paragraph 7, shall be interpreted to mean that the prohibition against "detention for debt" does not involve prohibiting the state from basing punishment on default of certain debts, when the punishment is not imposed for default itself but rather for a prior independent, illegal, punishable act.' See https://tinyurl.com/3n52425x (last visited 30 September 2024).

> 'Paragraph 6 [of Article 6] establishes the prohibition of deprivation of liberty by reason of debt. This paragraph correspondents with Article 11 of the United Nations International Covenant on Civil and Political Rights. However, it should be pointed out that this provision of the Covenant, which states, "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation," is broader than that suggested by the IACHR, since, when the text of the Covenant was adopted, it was agreed that "the article should cover any contractual obligations, namely the payment of debts, performance of services or the delivery of good"'.[133]

During the fifth session of the committee (on 12 November 1969) that was responsible for drafting the Convention, the delegates from Ecuador suggested that Art 6, para 6 (as drafted by the Inter-American Commission on Human Rights), should be replaced by the following provision: '[n]o one shall be deprived or limited in their physical liberty or death [for debts], except in the case of child support'.[134] He argued that the reason why he introduced that proposal was that he did not 'agree with accepting' the ICCPR and that 'all of the cases would be determined by the laws of each country'.[135] The delegate of Costa Rica supported the proposal amendment by the Ecuadorian delegate but suggested that it could be improved by revising it to read as follows:

> No one shall be deprived or limited in their physical liberty for debts. The only exceptions to this principle that shall be admitted are those dealing with the nonfulfillment of pecuniary obligations derived from the laws to protect the family.[136]

However, the Ecuadorian delegate did not explain why that amendment was necessary and that difference it would make. The Mexican delegate suggested that Art 6, para 6, should be amended to provide that '[n]o one shall be deprived or limited in their physical ability for debt'.[137] However, he did not explain why the rest of the content had to be deleted. The Nicaragua delegate opposed the Mexican delegate's proposal and argued that it should be replaced with the following '[n]o one shall be deprived or limited in his physical liberty or obligations of purely civil nature, except in the case of punishment ordered in accordance with the law'.[138] At the voting state, all the above amendments, including the 'original text' suggested by the Inter-American Commission, were defeated. However, no reasons were given

[133] T. Buergenthall and R.E. Morris, *Human Rights: The Inter-American System* (New York: Ocean Publications, 1986), 41.
[134] ibid 54.
[135] ibid 54.
[136] ibid 55.
[137] ibid 57.
[138] ibid 57.

for these defeats.[139] Against that background, the Colombian delegate's suggestion that a working group should be established to reconcile all the defeated proposal was adopted. This group was established and was composed of delegates from Colombia, Costa Rica, Chile, Ecuador, Guatemala, Mexico, Nicaragua, Panama and Paraguay.[140]

At the sixth session of the Committee (16 November 1969), the Chairperson of the Committee informed delegates that Art 6, para 6, had changed to Art 6, para 7. He informed the delegates that the Working Group had considered all the proposals that had been defeated at the fifth session and suggested that Art 6, para 7, should provide as follows: '[n]o one shall be deprived of their physical liberty for debts'.[141] The United States delegate supported that proposal but wanted the Working Group to clarify

> 'if the concept includes the deprivation of liberty for reason such as not contributing to the support of children or when support payments are not made to a wife following a divorce'.[142]

In response, the Rapporteur of the Working Group stated that those debts 'are not included in the article' because 'they have another meaning'.[143] The Brazilian delegate argued that he disagreed with the Rapporteur's interpretation of the word 'debt' and will vote against the Working Group's proposed amendment because he 'believe[d] that the juridical concept of debts in the Roman world is the broadest possible'.[144] His view was endorsed by the Guatemalan delegate although he was open to voting in support of the proposal.[145] The delegate of Trinidad and Tobago argued that he supported the amendment on condition that the article will permit the imprisonment of a person for refusal to pay debts.[146] The Colombian delegate argued that he was prepared to vote for Art 6(7) on the understanding that it 'prohibits the deprivation of liberty for debts or purely civil obligations'.[147] The Costa Rican delegate argued that he was prepared to vote for the Working Group's amendment because it complied with the constitution of his country 'which does not define debt'.[148] Since some delegates supported the Working Group's proposal with reservations (country-specific interpretations of understandings of the word 'debt'), the Uruguay delegate, in an attempt to get consensus from other delegates, submitted that:

[139] ibid 59.
[140] ibid 59.
[141] ibid 62.
[142] ibid 62.
[143] ibid 62.
[144] ibid 62.
[145] ibid 63.
[146] ibid 63.
[147] ibid 63.
[148] ibid 63.

> The solution could be a sanction imposed upon the individual who fails to fulfil his social obligations, which in many cases would be another type of nonfulfillment, of assistance to the family, of support obligations, without detriment to the precept proposed by the Working Group.[149]

It was clear that at this stage, there were three positions on the amendment. The first position was that of the countries whose delegates had been members of the Working Group. This group was prepared to vote for the proposal they had introduced. The second group was made up of countries which were prepared to vote for the Working Group's proposal on condition that the word 'debt' had the same meaning in Art 6, para 7, as it did in their national constitutions. In other words, in principle, they did not oppose the Working Group's proposal. The third position was held Brazil. It was prepared to vote against the Working Group's proposal. The Brazilian delegate went to the extent of informing other delegates that

> 'although the text under study is a collective amendment, that does no prevent offering an alternative at the time of voting and indicates that his alternative is the text of the Draft'.[150]

He added that he was 'going to vote for the original test of paragraph 6'.[151] Brazil's opposition to the Working Group's amendment meant that it had in effect reintroduced the Inter-American Commission's proposal. This implied that at the time of voting, delegates were to choose between these two proposals. Against that background, the Uruguayan delegate requested 'a short recess in order' for the delegates to 'reach consensus'.[152] The President of the Session allowed the request and granted the recess.[153] After the recess, the Uruguayan delegate reported that consensus had been reached and thanked the Panama delegate's 'ability' in the process.[154] Against that background, the Panama delegate read out the proposed amendment that had been reached my consensus. It was to the effect that: '[n]o one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support'.[155] After the consensus proposal was read out, the Brazilian delegated informed the session that he had accepted 'the formula' and withdrew his amendment.[156] Thus, when the President submitted the text to vote, it was approved.[157] The above drafting history of Art 7, para 7, is important in understanding how it has

[149] ibid 63.
[150] ibid 63.
[151] ibid 63.
[152] ibid 63.
[153] ibid 63.
[154] ibid 63.
[155] ibid 63.
[156] ibid 63.
[157] ibid 64.

been understood or likely to be understood by states parties. The next discussion illustrates these issues.

The drafting history of Art 7, para 7, shows that there are differences between Art 11 of ICCPR and Art 7, para 7, of the American Convention on Human Rights. First, the ICCPR prohibits 'imprisonment' whereas the American Convention on Human Rights prohibits 'detention'. This implies that 'detention' can be imposed without a court order whereas imprisonment is a form of punishment which has to be preceded by a court order. Second, Art 11 of the ICCPR prohibits imprisonment for 'inability' to fulfil a contractual obligation. Which, as we have seen above, does not protect a person who is able but unwilling to fulfil a contractual obligation. Art 7, para 7, of the American Convention on Human Rights is silent on whether detention is prohibited in both cases of inability and unwillingness to pay a debt. It prohibits detention 'for a debt'. This is an issue that was also not discussed during the drafting of Art 7, para 7. However, as indicated above, the delegate of Trinidad and Tobago argued that he understood Art 7, para 7, as inapplicable to people who had refused to pay debts. This means that Art 7, para 7, was meant to protect people who are unable to pay debts. None of the delegates opposed the Trinidad and Tobago delegate's interpretation of the prohibition under Art 7, para 7. This implies that there is room for the argument that Art 7, para 7, does not protect people who refuse to pay debts. It only protects those who are unable to pay debts. Third, Art 11 of the ICCPR only prohibits imprisonment for inability to fulfil a contractual obligation and is silent on the grounds in which a person may be imprisoned. This means that imprisonment on any other ground, such as fraud, negligence and failure to fulfil any statutory duty does not violate Art 11. However, Art 7, para 7, of the American Convention on Human Rights provides for one ground upon which a person may be detained – 'nonfulfillment of duties of support'. Forth, Art 11 of the ICCPR prohibits imprisonment for inability to fulfil a 'contractual obligation'. On the other hand, Art 7, para 7, of the American Convention on Human Rights prohibits detention for 'a debt'. The drafting history of Art 7, para 7, shows that the Colombian delegate argued that he understood Art 7, para 7, as prohibiting 'the deprivation of liberty for debts or purely civil obligations'.[158] However, the delegates did not include the words 'civil obligations' in Art 7, para 7. This creates room for the argument that Art 7, para 7, is applicable to debts only. This was also the view of the Inter-American Commission which, as mentioned above, stated that Art 11 of the ICCPR was broader than Art 7, para 7, of the Inter-American Convention.

As at the time of writing, there were two cases from the Inter-American Commission on Human Rights in which parties had alleged a violation of Art 7, para 7.[159] Both these cases were at the admissibility stage. The first case was that

[158] ibid 63.

[159] The author could not find a case in which the Inter-American Court on Human Rights had dealt with Art 7, para 7.

of *Alejandro Peñafiel Salgado* v *Ecuador*.[160] In this case, the petitioner was convicted of embezzlement. While he was still serving the custodial sentence for that offence, civil proceedings were instituted against him to force him to pay the money he had allegedly embezzled.[161] He argued that:

> '[I]nstituting proceedings for a civil matter and later imposing a custodial sentence constitutes a violation of the provision that no one shall be detained for debt contained in Article 7 of the American Convention, since "nonfulfillment of a sales contract causes a civil debt" '.[162]

However, since the Commission was only required to determine whether the petition was admissible, it did not express its view on the issue of whether the State had violated Art7, para 7.[163] A few months later, in *Demétrios Nicolaos Nikolaidis* v *Brazil*,[164] the alleged violation of Art 7, para 7, was raised once again. The petitioner's company had been appointed by the government to auction off property of another company which had evaded tax. The proceeds of the auction were to 'satisfy the debt' the tax evading company owed to the state.[165] However, the goods which the petitioner's company was supposed to auction off 'disappeared'.[166] As a result, the Court for Tax Affairs found that the petitioner was an 'unfaithful receiver' within the meaning of Art 5, para 67, of the Constitution of Brazil (1988) and ordered his imprisonment. Art 5, para 67, of the Constitution provides that

> 'there shall be no civil imprisonment for indebtedness except in the case of a person responsible for voluntary and inexcusable default of alimony obligation and in the case of an unfaithful trustee'.

However, the evidence before the Commission showed that the petitioner was not arrested based on the order of the Court for Tax Affairs although he had been detained previously, in another part of the country, for breach of his fiduciary duties as a receiver.[167] Notwithstanding the fact that the petitioner was not arrested pursuant to the order of Court for Tax Affairs, he argued that

> 'the Brazilian constitutional norm allowing "civil imprisonment for debt"

[160] Alejandro Peñafiel Salgado v Ecuador (Petition 1671-02) (Report No. 65/12) (29 March 2012) (Admissibility).

[161] ibid para 13.

[162] ibid para 13, fn 9.

[163] All attempts by the author to find the English or Spanish version of the Commission's decision on merits were futile. The search for these decisions was conducted on the Commission's website https://tinyurl.com/mv433jpb (last visited 30 September 2024).

[164] *Demétrios Nicolaos Nikolaidis* v *Brazil* (Petition 86-07) (Report No. 117/12) (13 November 2012) (Inadmissibility).

[165] ibid para 6.

[166] ibid para 6.

[167] ibid para 6.

> not only for nonfulfillment of duties of support, but also for the case of an unfaithful receiver is incompatible with Art 7.7 of the American Convention'.[168]

The petitioner added that when he was detained for breach of his fiduciary duties, he applied for *habeas corpus* and the Superior Court of Justice ordered his release on, amongst other grounds, that his civil imprisonment was unlawful regardless 'of the deposit'.[169] On the other hand, the state argued that the petitioner's conduct in failing to remit the proceeds of the action was fraudulent.[170] It added that the order of the Court for Tax Affairs for the detention of the petitioner was not executed because the Superior Court of Justice had held that civil imprisonment of unfaithful receivers was unlawful and contrary to, inter alia, Art 7, para 7, of the Convention. Against that background, the state argued that the petitioner's rights had not been violated.[171] The Commission observed that the parties' arguments showed that '[t]he central topic of this petition…is the right to personal liberty, specifically regarding the provisions of Art 7.7 of the American Convention'.[172] The Commission held that the evidence showed that although the Court for Tax Affairs had ordered the petitioner's civil imprisonment, this order was reversed by the Superior Court of Justice which held that civil imprisonment in those circumstances was contrary to Art 7, para 7, of the Convention.[173] The Commission concluded that the Brazilian courts:

> '[E]nsured that the alleged victim's right to personal freedom was an effective right, particularly regarding Article 7.7 of the American Convention. Indeed, the IACHR [Commission] particularly underscores that the alleged victim was always able to petition the appropriate judicial authorities for a decision on the lawfulness of his arrest or, as the case could be, of the legal foundation to order his imprisonment for being an unlawful receiver. It is also noteworthy that he was successful both in obtaining his release within 24 hours…and in obtaining a declaration regarding the unconstitutional nature of civil imprisonment of an unfaithful receiver, as a result of the application of Article 7.7 of the American Convention…'.[174]

Against that background, the Commission concluded that the petition was inadmissible because it did 'not state facts that *prima facie* tend to establish a violation of the American Convention'.[175] Since the Commission found that the petition was inadmissible, it did not express its view on whether the petitioner's

[168] ibid para 5.
[169] ibid para 7.
[170] ibid para 8.
[171] ibid paras 9-10.
[172] ibid para 15.
[173] ibid para 26.
[174] ibid para 29.
[175] ibid para 29.

imprisonment violated Art 7, para 7, of the Convention. However, the decision shows that the Brazilian court invoked Art 7, para 7, of the Convention to interpret Art 5, para 67, of the Constitution strictly.[176] In other words, the court interpreted Art 5, para 67, as applicable to money a person owes to the government.

Since neither the Commission nor the Inter-American Court of Human Rights has dealt on merits with a case dealing with an alleged violation of Art 7, para 7, this raises two questions. First, whether Art 7, para 7, is applicable to debts only or it is also applicable to any contractual obligation. The second question is whether the word 'debt' under Art 7, para 7, is limited to a debt owed to an individual (horizontal application) or it also applies to a debt an individual owes to a state (vertical application). In the author's view, based on the drafting history of Art 7, para 7, the word 'debt' in Art 7, para 7, should be given its literal interpretation. This means that it excludes other contractual obligations. This is because, as discussed above, the Inter-American Commission stated clearly that Art 11 of the ICCPR was broader than Art 7, para 7, of the Inter-American Convention on Human Rights. Secondly, the drafting history of Art 11 of the ICCPR showed that many Latin-American countries made submissions on the draft Art 11 of the ICCPR and some of them expressed their reservations on the way it was phrased. Had they wanted to 'transplant' Art 11 of the ICCPR into the American Convention on Human Rights, nothing would have prevented them from doing so. The decision to include the word 'debt' as opposed to 'contractual obligation' shows a deliberate attempt to limit the application of Art 7, para 7, to debts only. As shown above, during the drafting of Art 11, some Latin-American countries were of the view that the word 'contractual obligation' had to be replaced by the word 'civil' to, amongst other things, reflect the position in their domestic legislation. What they could not achieve under ICCPR, they achieved under Art 7, para 7, of the American Convention on Human Rights. With regards to the second question above, Art 7, para 7, is applicable to debts owed to both private individuals (horizontal application) and the state (vertical application). Otherwise, the drafters of Art 7, para 7, would have stated expressly that it was not applicable to debts or some debts owed to the state as some had argued during the drafting of Art 11 of the ICCPR. Whichever interpretation one adopts, sight should not be lost of the fact that the purpose of Art 7, para 7, is to protect the right to personal liberty.[177]It should be recalled that many states parties to the ICCPR are also states parties to the American Convention on Human Rights. This means that the citizens in the countries which have ratified both the ICCPR and the American Convention on Human Rights are protected by Art 11 of the ICCPR or Art7, para 7, of the American Convention on Human Rights and, depending on the circumstances of the case, they can choose which human rights body to approach for the enforcement of their right.

Art 18 of the Arab Charter on Human Rights provides that '[n]o one who is

[176] Meaning of 'trustee' in Brazilian law.
[177] Chaparro Álvarez and Lapo Íñiguez [2007] IACHR 3, para 51.

shown by a court to be unable to pay a debt arising from a contractual obligation shall be imprisoned'. There are differences between Art 18 of the Arab Charter and Art 11 of the ICCPR. First, under Art 11 of the ICCPR, imprisonment is prohibited for inability to fulfil any contractual obligation. However, Art 18 of the Arab Charter on Human Rights only prohibits imprisonment for inability to pay a debt. The debt must arise from a contractual obligation. In other words, Art 18 Arab Charter on Human Rights does not prohibit imprisonment for failure to fulfil other contractual obligations. Second, a person can only be imprisoned for failure to pay a debt after a court order. This means that the court has to be satisfied that he/she is unable to pay the debt. Otherwise, he/she will be imprisoned. This is an issue on which Art 11 of the ICCPR is silent about. However, as seen above, case law from the Human Rights Committee shows that imprisonment for unwillingness to fulfil a contractual obligation has to be sanctioned by the court.

Art 1 of Protocol 4 to the European Convention of Human Rights provides that '[n]o one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation'. It is evident that unlike Art 11 of the ICCPR which prohibits imprisonment, Art 1 of Protocol 4 to the European Convention of Human Rights prohibits 'deprivation of liberty'. This choice of words is explained in the Explanatory Report to Protocol 4. Initially, the draft Art 1 provided that '[n]o-one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation'.[178] This provision had been influenced by the draft Art 11 of the ICCPR.[179] However, the Committee of Experts recommended that the word 'imprisoned' should be replaced by the words 'deprived of liberty'.[180] The Committee of Experts explained the rationale behind that recommendation:

> 'The wording "deprived of his liberty" is designed to cover loss of liberty for any length of time, whether by detention or by arrest. The arguments which led to the adoption of this proposal were as follows: [1] On the one hand, the proposed wording was designed to reinforce the terms of Article 5 of the [European] Convention [on Human Rights] which guarantees the right of every person to liberty and security. In Article 5, paragraph (1), the expression "no-one shall be deprived of his liberty..." is used; [2] Furthermore, in the case it was designed to cover, this provision prohibits not only detention but also arrest…The notion of "depriving an individual of his liberty" covered both cases more precisely than the term "imprisonment". Article 5, paragraph (4), of the Convention speaks moreover of a "person deprived of his liberty by arrest

[178] Explanatory Report to Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (1963), para 3.

[179] ibid 3.

[180] ibid 3.

or detention" '.[181]

Reading Art 1 in the light of the Explanatory Report means, inter alia, that it protects a person against three things: (1) arrest for inability to fulfil a contractual obligation; (2) detention for inability to fulfil a contractual obligation; and (3) imprisonment for inability to fulfil a contractual obligation. The Committee of Experts also explained that as it is the case with Art 11 of the ICCPR, Art 1 of Protocol 4 is applicable to all contractual obligations such as money debts, 'non-delivery, non-performance or non-forbearance'.[182] The Committee also made it clear that for Art 1 to be applicable, the obligation in question 'must (...) arise out of contract'.[183] In other words, the provision 'does not apply to obligations arising from legislation in public or private law'.[184] The Committee also explained that the words 'merely on the ground of inability' prohibit 'any deprivation of liberty for the sole reason that the individual had not the material means to fulfil his contractual obligations'.[185] The Committee gave some of examples in which deprivation of liberty is permissible even if the person is unable to fulfil his/her contractual obligations.

These include cases:

> '[I]f any other factor is present in addition to the inability to fulfil a contractual obligation, for example: [i] if a debtor acts with malicious or fraudulent intent; [ii] if a person deliberately refuses to fulfil an obligation, irrespective of his reasons therefore, [ii] if inability to meet a commitment is due to negligence'.[186]

The Committee gave a few more examples in which Art 1 is not applicable.[187] The Committee's explanation shows that the inability to fulfil a contractual obligation should be genuine and not attributable to the person's fault. The intention of the person at the time of entering into a contractual obligation is also important in determining whether or not he/she should be protected under Art 1. For example, if the circumstances of the case show that any reasonable person would have concluded that the person in question entered into a contractual obligation with the intention not to fulfil it, such a person is not protected by Art 1. Therefore, for

[181] ibid 3.
[182] ibid 3.
[183] ibid 3.
[184] ibid 3.
[185] ibid 3.
[186] ibid 3.
[187] ibid 4, where it stated that 'the law of a Contracting Party would thus not be in conflict with this article if it permitted the deprivation of liberty of an individual who: [i] knowing that he is unable to pay, orders food and drink in a cafe or restaurant and leaves without paying for them; [ii] through negligence, fails to supply goods to the army when he is under contract to do so; [iii] is preparing to leave the country to avoid meeting his commitments'. For a summary of the views of the Committee of Experts, also see W.A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2015), 1049.

one to determine whether Art 1 is applicable, it is important to examine that person's conduct before, during and after entering into a contractual obligation. If this conduct shows that he/she is to blame for the inability to meet his/her contractual obligation, Art 1 doesn't protect him/her. Art 1 is only meant to protect people with 'clean hands'. The same observations apply with equal force under Art 11 of the ICCPR. There is limited case law from the European Court of Human Rights on Art 1. In these few cases, the Court has held that Art 1 is applicable 'solely when the debt arises under a contractual obligation';[188] is not applicable where the applicant was convicted of fraud and imprisoned;[189] and is not applicable to a country which has not ratified the Protocol.[190] The African Charter on Human and Peoples' Rights,[191] unlike the above mentioned regional human rights instruments, does not prohibit imprisonment for inability to fulfil a contractual obligation. However, this prohibition could be inferred from Art 6 of the African Charter which protects the right to liberty and prohibits arbitrary detention.[192] It is against that background that the African Commission on Human and Peoples' Rights (the African Commission) has called upon state parties to the African Charter on Human and Peoples' Rights to decriminalize some offences including 'failure to pay debts'.[193] The African Commission considers 'failure to pay debts' as one of the 'minor offences'.[194] The African Commission also requires states parties to the African Charter on Human and Peoples' Rights, in their periodic reports,[195] to report on the measures that have taken to protect, amongst other rights, the right not to be imprisoned for 'breach of mere contractual obligation'.[196] Indeed, in their periodic reports, some states have informed the African Commission of the measures they have taken to deal with imprisonment for debt.[197] Three

[188] *Gatt* v *Malta* (Application No 28221/08) (27/07/2010), para 39. See also *Goktan* v *France* (33402/96) (02/07/2002), para 51.

[189] *Norkunas* v *Lithuania* (Application 302/05) (20/01/2009), para 43.

[190] *Yeğer* v *Turkey* (4099/12) (07/06/2022), para 49.

[191] African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986.

[192] Art 6 of the African Charter provides that 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained'.

[193] Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa (20 September 2002) para 5 (under Plan of Action). Available at https://tinyurl.com/txdfwjuw (last visited 30 September 2024).

[194] See Preamble to Resolution on the Need to Develop Principles on the Declassification and Decriminalization of Petty Offences in Africa (ACHPR/Res. 366 (EXT.OS/XX1) 2017) (4 March 2017).

[195] These reports are submitted under Art 62 of the African Charter on Human and Peoples' Rights which provides that 'Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter'.

[196] Guidelines for National Periodic Reports (14 April 1989), 2. Available at https://tinyurl.com/yf2xe933 (last visited 30 September 2024).

[197] For example, in Algeria's 5th & 6th Periodic Reports 2010-2014 (2014) para 138, it is stated that '[i]mprisonment for debt in contractual relations has been removed from the new Code of Civil

observations should be made about this procedure. First, in their periodic reports, very few African countries have dealt with the issue of imprisonment for inability to pay debt. As at the time of writing, 72 periodic reports (in English) were available on the African Commission's website.[198] The existence of few reports on the Commission's website can be explained by two factors. One, some countries had submitted several reports but the Commission had not uploaded all of them,[199] or any of them.[200] Second, some countries had not submitted any reports.[201]The issue of imprisonment for inability to pay debts was mentioned in four reports. Second and related to the above, none of these four reports mentions the issue of imprisonment or detention for inability to fulfil a contractual obligation. They only deal with the issue of imprisonment or detention for inability to pay debts. This

and Administrative Procedure.' In Mali's 2nd, 3rd, 4th, 5th, 6th & 7th Combined Periodic Reports, 2001-2011 (2021) para 111, it is stated that the prison law was amended to cater for a special group of those imprisoned 'for debts'). In Togo's 3rd, 4th and 5th Combined Periodic Reports, 2003-2010 (2011) para 71, it is stated that in Togolese law, 'The arresting of an individual for a civil or commercial debt is formally prohibited. Despite this imperative nature of Article 92 of the Criminal Procedure Code, there are persons detained in the detention centres for offences which relate to civil or commercial debts.' It is added (para 72) that '[i]n effect it should be recalled that most of the time offences such as breach of trust or fraud are also presented by the detainees as debts.' In Uganda's 2nd Periodic Report, 2000-2006 (2006) para 59.1, it is reported that 'all debtors' are classified as 'un convicted prisoners' and are detained separately from convicted prisoners 'to minimise the danger of contamination'.

[198] There were more than 72 reports but the author only searched those that were in English. A few of the reports were in French. The author did not include these few reports in the study. All the reports were available at https://tinyurl.com/228rnw5s (last visited 30 September 2024).

[199] The period reports of the following countries were available on the African Commission's website. The number of reports submitted by each country is indicated in the brackets. In some cases, all the submitted reports were not available. This is also mentioned in the brackets. Where all the submitted reports were available in English, the author just mentions the number of the reports. Where the report was in another language other than English, this fact is also mentioned. Algeria (four reports submitted, 1 not available and 3 available); Angola (4 reports submitted, one not available); Benin (4 reports submitted, two in French); Botswana (two reports); Burkina Faso (four reports submitted, one not available); Burundi (two reports submitted, one in French); Cape Verde (one report submitted and in French); Cameroon (five reports); Cote d'Ivoire (three reports); Djibouti (one report); Democratic Republic of the Congo (three reports); Egypt (three reports); Ghana (two reports submitted but only one available); Kenya (three reports); Eretria (two reports); Eswatini (two reports); Ethiopia (two reports); Gabon (one report); Mali (one of the two reports available); Namibia (of the four reports, only one was available); Nigeria (only one of the six reports available); Sahrawi (two reports); Senegal (only one of the five reports available); South Africa (three reports); Sudan (four reports); Tanzania (two reports); Togo (submitted four reports: one in French; one was not available on the website and two were available in English); Tunisia (submitted three reports: two in French one in English); Uganda (submitted five reports: one was unavailable and four available); Zambia (two reports); Zimbabwe (5 reports but one unavailable).

[200] The following countries submitted the indicated number of reports. However, all the reports were not available on the African Commission's website: Gambia (three reports); Guinea (one report); Lesotho (two reports); Liberia (one report); Libya (five reports); Madagascar (one report); Malawi (two reports); Mauritania (three reports); Mauritius (four reports); Mozambique (three reports); Niger (four reports); Republic of Congo (one report); Rwanda (six reports); Seychelles (two reports); Sierra Leone (one report).

[201] The following countries had not submitted any reports: Guinea Bissau; Morocco; Sao Tome and Principe; Somalia; South Sudan.

implies that legislation in these countries is silent on the issue of imprisonment or detention for inability to fulfil contractual obligations. Three, in its Concluding Observations on state party reports in which imprisonment or detention for inability to pay debts, the African Commission does not express any opinion on the measures these states are required to ensure that this right is effectively promoted and protected.[202] This creates room for the argument that the African Commission does not consider imprisonment for inability to pay a debt as a pressing issue. It is now necessary to take a look at how the right against imprisonment for inability to fulfil a contractual obligation has been protected in the constitutions and legislation of different countries.

V. The Prohibition of Imprisonment for Inability to Meet a Contractual Obligation at Domestic Level

Countries have adopted different approaches to dealing with the issue of imprisonment or deprivation of liberty on the ground of inability to fulfil a contractual obligation or debt. As at the time of writing, 173 countries had ratified or acceded to the ICCPR. A study of 193 constitutions[203] shows that of the 173 countries that had ratified the ICCPR, only fifteen countries had included the prohibition of imprisonment for inability to fulfil a contractual obligation in the constitutions.[204] In other words, it is an enforceable constitutional right in less than 10% of the state parties to the ICCPR. The fifteen countries have taken different approaches on this issue. In some countries, the constitutions prohibit deprivation of liberty[205] or freedom[206] whereas in others they prohibit imprisonment.[207] As the discussion above has illustrated, deprivation of liberty is broader than imprisonment. It

[202] See Concluding Observations and Recommendations on Togo's 3rd, 4th and 5th Periodic Reports, 2003-2010 (2 May 2012) available at https://tinyurl.com/42x68nk9 (last visited 30 September 2024). See also Concluding Observations and Recommendations on Uganda's 2nd Periodic Report, 2000-2006 (29 November 2006). Available at https://tinyurl.com/3d85rfme (last visited 30 September 2024). The Concluding Observations on the Algerian and Malian reports were not available at the time of writing.

[203] The constitutions were accessed from: https://tinyurl.com/2hpwe732 (last visited 30 September 2024).

[204] These constitutions were: Albania 1998 (rev 2016); Colombia 1991 (rev 2015); Czech Republic 1993 (rev 2013); Estonia 1992 (rev 2015); Kyrgyzstan 2010 (rev 2016); Malawi 1994 (rev 2017); Maldives 2008; Panama 1972 (rev 2004); Papua New Guinea 1975 (rev 2016); Paraguay 1992 (rev 2011); Rwanda 2003 (rev 2015); Seychelles 1993 (rev 2017); Slovakia 1992 (rev 2017); Turkey 1982 (rev 2017); Zimbabwe 2013 (rev 2017).

[205] Art 27, para 3, of the Constitution of Albania (1998); Art 8, para 2, of the Constitution of Czech Republic (1993); Art 20, para 3, of the Constitution of Estonia (1992); Art 42, para 1, lett c), of the Constitution of Papua New Guinea (1975); Art 38, para 8, of the Constitution of Turkey (1982).

[206] Art 17(2) of the Constitution of Slovakia (1992); Art 20, para2, of the Constitution of Kyrgyzstan (2010).

[207] Art 19, para 6, lett c), of the Constitution of Malawi (1994); Art 55 of the Constitution of Maldives (2008); Art 29, para 7, of the Constitution of Rwanda (2003); Art 18 para 15, of the Constitution of Seychelles (1993); Art 49, para 2, of the Constitution of Zimbabwe (2013).

includes arrest and detention without a court order. In some countries, the constitutions expressly prohibit detention, imprisonment and arrest. For example, Art 28, para 3, of the Constitution of Colombia provides that '[i]n no case may there be detention, a prison term, or arrest for debts, nor sanctions or security measures that are not prescribed'. A similar approach is followed in the constitution of Panama.[208] Whereas many constitutions prohibit imprisonment or deprivation of liberty for inability to fulfil a contractual obligation, others do not qualify the prohibition of imprisonment with the person's inability to fulfil a contractual obligation. For example, Art 55 of the Constitution of Maldives provides that '[n]o person shall be imprisoned on the ground of non-fulfillment of a contractual obligation'. This creates the impression that whether or not that person is unable to fulfil his/her contractual obligation is immaterial. Imprisonment on the ground of non-fulfilment of a contractual obligation is prohibited. However, a reading of the constitution as whole shows that what is prohibited is imprisonment for inability to fulfil a contractual obligation. This is because Art 68 of the Constitution provides that:

> 'When interpreting and applying the rights and freedoms contained within this Chapter, a court or tribunal shall promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and shall consider international treaties to which the Maldives is a party'.

Art 55 is one of the provisions under the Charter of Fundamental Rights and Freedoms and the ICCPR is one of the treaties ratified by Maldives. Courts and tribunals have to give effect to Maldives' obligation under Art 11 of the ICCPR. There are also cases where the constitution(s) prohibit(s) imprisonment for any civil obligation. For example, Art 55 of the Constitution of Panama provides that '[t]hereshall not be imprisonment, detention or arrest for debts or strictly civil obligations'. This implies that a person's unwillingness to pay is not a ground for deprivation of liberty. The constitution of Paraguay prohibits imprisonment for refusal to pay a debt unless in three specific circumstances. Art 13 of the Constitution of Paraguay provides that:

> 'The deprivation of freedom for debts is not admitted, unless by [a] mandate of the competent judicial authority dictated for non-compliance [incumplimiento] of food supply duties or as a substitution of [payment of] fines [multas] or judicial bails [fianzas]'.

As is the case with human rights treaties discussed above, countries have followed different approaches on the issue of the exact prohibition. Many prohibit deprivation of liberty or imprisonment for failure to meet a contractual obligation

[208] Art 21, para 4, of the Constitution of Panama (1972) provides that '[t]here shall not be imprisonment, detention or arrest for debts or strictly civil obligations'.

whereas others prohibit deprivation of liberty for inability to pay debts. Only three countries have directly 'transplanted' Art 11 of the ICCPR into their constitutions.[209] Other countries have also indirectly transplanted Art 11 into their domestic law by virtue of the fact that the constitutions provide that international treaties ratified by these countries, such as the ICCPR, form part of domestic law[210] or that these countries will adhere to the principles established in these treaties.[211] The constitutions of nineteen countries prohibit deprivation of liberty or imprisonment for debt generally[212] or inability to pay a debt[213] or civil law obligation.[214] The majority of these constitutions prohibit imprisonment for a debt. They are silent on the word 'inability'. This creates room for the argument that imprisonment is prohibited irrespective of the reason(s) why a person has not paid a debt. Only in one country, Fiji, is inability to pay a prerequisite for a person to not be imprisoned for a failure to pay a debt.[215] In some countries, imprisonment for any 'civil' obligation is prohibited. This includes any debt and other contractual obligation. As mentioned above, Art 11 of the ICCPR prohibits imprisonment for inability to fulfil any contractual obligation. It is not limited to the prohibition of imprisonment for inability to pay a debt. Thus, constitutional provisions which prohibit imprisonment only for 'debt' but are silent on imprisonment for other contractual obligations fall short of what is required under Art 11 of the ICCPR. Likewise, constitutional provisions that prohibit imprisonment for failure to pay a debt or fulfil a contractual obligation, irrespective of the circumstances, also fall short of

[209] These are Rwanda, Seychelles and Zimbabwe.

[210] See for example, Constitutions of Bosnia and Herzegovina 1995 (Annex 1); Art 154A of the Constitution of Guyana (1980); Art 22 of the Constitution of Kosovo (2008); Art 46 of the Constitution of Nicaragua (1987).

[211] See for example, preambles to the Constitutions of Angola (2010), Central African Republic (2016) and New Zealand (1852); Niger (2010).

[212] Art 32 of the Constitution of Afghanistan (2004); Art 117 (III) of the Constitution of Bolivia (2009); Art LXVII of the Constitution of Brazil (1998); Art 61, para 6, of the Constitution of the Democratic of Congo (2005); Art 38 of the Constitution of Costa Rica (1949); Art 40, para10, of the Constitution of Dominican Republic (2015); Art 29(c) of the Constitution of Ecuador (2008); Art 27, para 2, of the Constitution of El Salvador (1983); Art 17, para 2, of the Constitution of Guatemala (1985); Art 17, para 8, of the Constitution of Mexico (1917); Art 13 of the Constitution of Micronesia (1978); Art 41 of the Constitution of Nicaragua (1987); Art 24, lett c), of the Constitution of Peru (1993); section 20 of the Constitution of Philippines (1987); Article 52(2) of the Constitution of Uruguay (1966).

[213] Art 9, para 2, of the Constitution of Fiji (2013).

[214] Art 27, para 6, of the Constitution of Armenia (1995); Art 98 of the Constitution of Honduras (1982); Art 21, para 4, of the Constitution of Panama (1972).

[215] In *Pacific Coatings Ltd* v *Prasad* [2018] FJHC 167; HBC142.2014 (13 March 2018) para 8, the High Court of Fiji referred to, inter alia, Art 9, para 2, of the Constitution and held that a court 'cannot make a committal order, where a debtor does not have means and has not wilfully refused to pay a sum ordered by Court'. The High Court held that section 9, para 2, prohibits the deprivation of liberty generally and not just imprisonment. See *Pacific Energy South West Pacific Ltd* v *Corporate Developers (Fiji) Ltd* [2015] FJHC 469; HBC97.2015 (24 June 2015) (the court refused to issue an *ex-parte* absconding warrant or stop departure order against the defendant before he could be heard).

what is required under Art 11 of the ICCPR. The above discussion shows that only three countries – Rwanda, Seychelles and Zimbabwe have 'transplanted' Art 11 of the ICCPR in their constitutions.[216] This implies that the majority of the countries have 'modified' Art 11 before including it in their constitutions. A similar approach has been followed in the regional human rights instruments discussed above. None of them 'cuts and pastes' Art 11 of the ICCPR. In other words, there is no consensus in human rights treaties on the scope of the prohibition. Whereas Art 11 of the ICCPR prohibits imprisonment for inability to fulfil a contractual obligation, the American Convention on Human Rights and the Arab Charter only bar imprisonment for inability to pay a debt. As mentioned above, three countries have transplanted Art 11 of the ICCPR into their constitutions. It is important to take a look at case law from some of these countries and from other countries for the purpose of highlighting how courts have given effect to this right. This case law shows, for example, that courts have held that before imprisoning a person for allegedly refusing to meet a contractual obligation, courts must first confirm that such a person is indeed unwilling as opposed to being unable to meet that contractual obligation. For example, in *Zimbabwe Leaf Tobacco* v *Cooke*,[217] the High Court of Zimbabwe referred to, inter alia, section 49, para 2, of the Constitution and held that:

> '[A]n indigent person will not be imprisoned for a debt simply because she owes…[I]t must be shown that the debtor has the means to pay, earn the amount due and that his failure or refusal to pay the amount due is willful. The fact that a debtor owes a contractual obligation does not necessarily call for his civil imprisonment. Civil imprisonment is a drastic measure which should be resorted to only as a last resort and only in instances where a debtor is able to service the debt but has shown an unwillingness to discharge the obligation. It is for this reason that the court is enjoined to carry out an enquiry to establish the financial position of the debtor and attitude to payment of the debt. The manner in which the debt will be cleared is considered in a case where the debtor is able to service the debt and shows a willingness to settle it'.[218]

The Seychelles Court of Appeal reached a similar conclusion when it held that before a judgement debtor is sentenced to civil prison for failure to pay a debt, a court has to conduct a means-test to determine whether this failure is attributable to inability. If he/she is unable to pay the debt, he cannot be sentenced to a civil prison because the aim of the constitutional provision prohibiting the imprisonment of a person for inability to fulfil a contractual obligation is to prevent 'sending

[216] Hong Kong also transplanted Art 11 into its Bill of Rights (as Art 7). For the circumstances in which Art 11 is applicable or inapplicable in Hong Kong, see BT and CBY (formerly known as YHK and also known as YCB) [2020] HKCFA 35; (2020) 23 HKCFAR 447; FAMV 121/2020.

[217] *Zimbabwe Leaf Tobacco* v *Cooke* (412 of 2021) [2021] ZWHHC 412 (6 August 2021).

[218] ibid para 7.

someone to prison for impecuniousness which preventing him from fulfilling his contractual debt'.[219] Put differently, 'poverty and the lack of financial means cannot justify putting a person in jail'.[220] Although the constitutions of these countries prohibit imprisonment for inability to fulfil contractual obligations, the pieces of legislation in Seychelles[221] and Zimbabwe[222] only provide for imprisonment for failure to pay a debt. In Rwandan, there is no legislation on imprisonment for failure or refusal to meet a contractual obligation generally or debt in particular.

Even in some countries which do not have constitutional provisions barring courts from imprisoning a person for inability to fulfil a contractual obligation, a judgement debtor can only be imprisoned if he/she is able but unwilling to pay the debt.[223] Courts in some of these countries have invoked Art 11 of the ICCPR to motivate why a judgement debtor should not be imprisoned for inability to pay a debt.[224] For example, in *KCB Bank Limited* v *Gichohi and 2 Others*[225] the High Court of Uganda referred to Art 11 of the ICCPR and held that:

> 'An order for imprisonment can only be made after a creditor has satisfied the Court that a debtor's failure to make repayments is due not to his inability to pay but rather due to his willful refusal or culpable neglect. To commit a debtor to prison who through poverty is unable to satisfy the judgment debt is contrary to the purpose of civil imprisonment which is to coerce payment. Its only real effect on an impoverished debtor is that of punishment. It is a punishment that can be avoided by a debtor who is able but unwilling to pay, for satisfaction of the judgment remains within his power. But it becomes mandatory against one without the means to pay. It discriminates between the one and the other. Poverty-stricken judgment debtors should not be consigned to jail.[226]

The Court also suggests, albeit indirectly, that a person can be imprisoned for failure to meet his contractual obligations generally (not just for failure to pay a

[219] *Chow* v *Bossy* (SCA 11 of 2014) [2016] SCCA 20 (12 August 2016), para 27.

[220] D. Ravindran, *Human Rights in Theory and Practice: An Overview of Concepts and Treaties* (Thousand Oaks: Sage Publications, 2022), 165.

[221] Imprisonment for Debt Act (Chapter 96) (Seychelles).

[222] See Rule 73 of the High Court Rules, Statutory Instrument No 202 of 2021.

[223] See for example, Debtors Act, 1938 (Zambia); sections 15-17 of the Courts Act (1958) (Malawi); *Esther Crescence Mashoko* v *Norbert Furaha Lyimo* (Misc Land Application 90 of 2016) [2020] TZHCLandD 2249 (23 September 2020), *James Christian* v *Mary Emmanuel Mmari* (Execution Application 30 of 2022) [2022] TZHCLandD 12419 (30 September 2022) (Tanzania); *Mwalimu Donald Mati* v *Chief Magistrates Court*, Milimani & another [2019] eKLR (Kenya).

[224] See for example, *Jolly George Verghese & Anr* v *The Bank of Cochin* [1980] INSC 19; AIR 1980 SC 470; 1980 (2) SCR 913; 1980 (2) SCC 360 (Supreme Court of India); *Jagjit Singh Saund* v *Jesvir Singh Rehal* [2021] eKLR (High Court of Kenya).

[225] *KCB Bank Limited* v *Gichohi and 2 Others* (Civil Appeal 323 of 2023) [2023] UGCommC 35 (20 March 2023).

[226] ibid 14.

debt).[227] Likewise, in *Toolsy Kamla* v *H.H. The District Magistrate of Pamplemousses*,[228] the Supreme Court of Mauritius held that:

> 'Mauritius is a party to the International Covenant on Civil & Political Rights [ICCPR] which provides in its article 11 that…This text was borrowed from article 1 to the Fourth Protocol of the European Convention for the Protection of Human Rights & Fundamental Freedoms… Any available jurisprudence on the interpretation of that article is therefore highly relevant. The prevailing opinion is that whilst article 1 extends to a failure to fulfil a contractual obligation of any kind, including non-payment of debts, it is limited in its application by the words "merely on the ground of inability to fulfil" an obligation. Deprivation of liberty is not forbidden if there is some other factor present as where the detention is because the debtor acts fraudulently or negligently or for some other reason refuses to honour an obligation that he is able to comply with'.[229]

There are cases in which the Supreme Court of Mauritius has held, inter alia, that Art 11 of the ICCPR is only applicable when the debtor is unwilling to pay the debt.[230] In South Africa[231] and in the Republic of Ireland,[232] courts held that legislation which permits the imprisonment of a judgement debtor for unwillingness to pay a debt is unconstitutional if it does not guarantee his/her constitutional rights to a fair procedure and liberty. Likewise, the Supreme Court of Mauritius held that a debtor has a right to a fair hearing before he/she can be imprisoned for unwillingness to pay a debt.[233] This implies that such legislation complies with the constitution if it the limitations it imposes on the constitutional rights are justifiable under the constitution. Since imprisonment for inability to pay a debt is outlawed in Ireland, a creditor is prohibited from threating a debtor with such

[227] ibid 15. However, there are allegations that in the magistrates' court in Uganda, some people are imprisoned in circumstances which show that they are unable to pay their debts. See https://tinyurl.com/2s368fwf (last visited 30 September 2024). Sometimes imprisonment forces some people to pay debts. See for example, https://tinyurl.com/yu9dzpbp (last visited 30 September 2024).

[228] *Toolsy Kamla* v *H.H. The District Magistrate of Pamplemousses* 2002 SCJ 16; 2002 MR 9.

[229] ibid 5.

[230] See for example, *Pelladoah* v *Development Bank of Mauritius* 1992 MR 5, 1992 SCJ 26; *Ramkorun Chabeelall* v *Ajay Shanto* 1998 SCJ 175.

[231] *Coetzee* v *Government of the Republic of South Africa, Matiso and Others* v *Commanding Officer Port Elizabeth Prison and Others* 1995 (10) BCLR 1382; 1995 (4) SA 631. However, a civil debtor can still be sentenced to prison if the conditions for 'coercive imprisonment' have been met. See, for example, *Antwerpen obo Scholtz Another* v *Road Accident Fund and Another* (41371/2021) [2024] ZAGPPHC 703.

[232] *McCann* v *Judges of Monahan District Court & Ors* [2009] IEHC 276. See also *Fulham* v *Chadwicks Ltd & Others* [2021] IECA 72 (12 March 2021).

[233] *Clelie Jean Pierre* v *Mahendar Sawon* 1998 SCJ 493. In this case, the Court (3), held that 'imprisonment for debt is a quasi-criminal sanction and the judgment debtor is submitted to a compulsory examination which forces him to answer self-incriminating questions'.

imprisonment in an effort to compel him to pay the debt.[234] Although in some countries, there is no legislation empowering courts to imprison judgement debtors,[235] there are many countries in which legislation provides for circumstances in which a person can be imprisoned for failure to pay a debt.[236] The possibility of imprisonment for failure to pay a debt is also recognised by the United Nations. Thus, rules 11, lett c)[237] and 121[238] of the United Nations Standard Minimum Rules for the Treatment of Prisoners (2015) contemplate circumstances in which a person may be imprisoned for debt. In South African the Supreme Court held that the criminalisation of breach of a fiduciary duty arising out of a contract is not contrary to Art 11 of the ICCPR.[239]

The above discussion raises an important question of whether the prohibition against imprisonment for inability to fulfil a contractual obligation has attained the status of customary law. In 2019, the United Nations General Assembly, pursuant to a recommendation by the International Law Commission, adopted a Resolution on Identification of Customary International Law.[240] This Resolution states that '[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)'.[241] The Resolution adds that:

[234] *National Bank of Ras Al-Khaimah Trading as Rakbank* v *F.K.* [2021] IEHC 541 (23 September 2021) paras 25-27.

[235] *Naylor* v *Foundas* [2004] VUCA 26 (Court of Appeal of Vanuatu) (the court observed that Vanuatu although had not yet ratified the ICCPR, Art 11 of this treaty prohibited the imprisonment of a judgement debtor for inability to pay a debt).

[236] Sections 2 and 28 of the Prisons and Corrections Act 2013 (Samoa); Hauma v Tekeeu [2019] KIHC 119 (High Court of Kiribati) para 15; sections 2 and 24 Prisons and Corrections Act 2006 (Fiji); Rule 14, para 4, of the Magistrates' Court (Execution Proceedings) Rules, S 5/92 (2001) (Brunei); section 69, para 3, of the Eswatini Correctional Services Act (Act No. 13 of 2017); sections 75, para 3, 76, para 1, 87 and 89 of the Prisons Act, 1965 (Zambia).

[237] Rule 7, lett c), provides that 'Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence'.

[238] Rule 121 provides that 'In countries where the law permits imprisonment for debt, or by order of a court under any other non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall be not less favourable than that of untried prisoners, with the reservation, however, that they may possibly be required to work'.

[239] *Defendant* v *Prosecutor* 2018 WL 10456665 (SC), [2018] 15 KORSCD 429, 2017Do4027 [2018] 15 KORSCD 429, 405, the Court held that 'Punishing an act which caused non-performance of contract by means of willful betrayal should not be deemed as the 'imprisonment merely on the ground of inability to fulfill a contractual obligation'. The use of penal authority in the private sector must be restricted, but it should not be hastily concluded that a case falling under non-performance of contract under civil law is unpunishable under criminal law, or that punishment of such case goes against the principle of no punishment without law or constitutes the abuse of the State's penal authority'. See also *Defendant* v *Prosecutor* 2011 WL 11955558 (SC), [2011] 8 KORSCD 285, 2008Do10479; [2011] 8 KORSCD 285, 297.

[240] Resolution on Identification of Customary International Law (A/RES/73/203) (11 January 2019).

[241] ibid 2.

'1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element'.

The Resolution explains the requirements of practice[242] and adds that:

'1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice'.

The above discussion shows that three forms of state practice are relevant to this article: conduct in connection with treaties; legislative acts; and decisions of national courts. For the practice to meet the criteria above, 'it must be sufficiently widespread and representative, as well as consistent'.[243] The first form relates to the issue of treaties. The Resolution states that for a treaty norm to be recognised as customary international law, one of the following conditions has to exist:

'1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule: (a) codified a rule of customary international law existing at the time when the treaty was concluded; (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or (c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary

[242] ibid 3, where it is stated that '1. The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2'.

[243] ibid 3.

international law'.

A close look at the above criteria in the light of Art 11 of the ICCPR shows the following. First, at the time Art 11 was included in the ICCPR, there was no rule of customary law prohibiting imprisonment for inability to fulfil a contractual obligation. However, it has been demonstrated in the discussion on the drafting history of Art 11, that many countries had legislation prohibiting imprisonment for inability to pay a debt. This prohibition did not extend to other contractual obligations. This also shows that the prohibition of imprisonment for inability to fulfil a contractual obligation had not 'led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty'. Second, the discussion above shows that since the adoption of the ICCPR, two regional treaties (the Arab Human Rights Charter and American Convention on Human Rights) were adopted and they prohibit detention or imprisonment for inability to pay a debt. The European treaty prohibits detention for inability to fulfil a contractual obligation. The constitutions of most countries do not prohibit imprisonment for inability to fulfil a contractual obligation. Many constitutions prohibit imprisonment or detention for inability to pay a debt. Likewise, legislation in many countries prohibit imprisonment or detention for inability to pay debts. Case law from many countries discussed above shows that courts have held that national legislation and/or Art 11 of the ICCPR prohibit imprisonment or detention for inability to pay a debt. This implies that since the adoption of the ICCPR, there is no evidence giving 'rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law' prohibiting imprisonment for inability to fulfil a contractual obligation. Thus, imprisonment for inability to fulfil a contractual obligation has not yet attained the status of customary international law on the basis of a treaty. This raises the question of whether there are other forms in which the prohibition of imprisonment for failure to fulfil a contractual obligation could have become customary international law. This takes us to the other two forms mentioned above: legislative acts; and decisions of national courts.

The discussion above has indicated that legislative acts and decisions of national courts have substantially prohibited imprisonment or detention for inability to pay debt as opposed to inability to fulfil contractual obligations generally. This implies that even on these two grounds, the prohibition of imprisonment for inability to fulfil a contractual obligation has not yet attained the status of customary international law. The Resolution also provides that

> '[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules'.

Although there are instances in which the International Court of Justice has held

that some states have violated some rights in the ICCPR,[244] it has not yet dealt with Art 11. However, as illustrated above, international and regional quasi-judicial bodies have dealt with cases dealing the prohibition against imprisonment for inability to pay debts. Of all these bodies, only the Working Group on Arbitrary Detention held that the prohibition of imprisonment to pay a debt has attained the status of jus cogens. However, the author has disagreed with this conclusion. The above discussion shows that the prohibition of imprisonment for inability to fulfil a contractual obligation has not yet attained the status of customary law. However, the prohibition of imprisonment or detention for inability to pay a debt, which is a sub-category of the prohibition of imprisonment for inability to fulfil a contractual obligation, has attained the status of customary international. This is evidenced by the fact that this prohibition is provided for in the ICCPR; the three regional treaties discussed above; the practice of the African Commission on Human and Peoples' Rights; the constitutions and legislation of many countries; and the decisions of national courts and international and regional quasi-judicial bodies.

VI. Conclusion

In this article, the author has discussed the drafting history of Art 11 of the ICCPR. It has been demonstrated that the draft Art 11 that was proposed by the Commission was adopted by the delegates after a lengthy debate. The debate was mainly on the issue of whether the words 'contractual obligation' should be replaced with the words 'civil obligations' or 'private' obligations. The author has also demonstrated that although Art 11 prohibits imprisonment for inability to fulfil a contractual obligation, very few countries have transplanted it into their constitutions or other pieces of legislation. However, legislation in many countries prohibits imprisonment for inability to pay a debt. This creates room for the argument that this prohibition has become part of customary international law.

[244] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar* v *United Arab Emirates*), Preliminary Objections, Judgment, I.C.J. Reports 2021, 71, para 101; Jadhav (*India* v *Pakistan*), Judgment, I.C.J. Reports 2019, p 418 (dealing with the right to a fair trial); Questions relating to the Obligation to Prosecute or Extradite (*Belgium* v *Senegal*), Judgment, I.C.J. Reports 2012, 422 (dealing with the right to freedom from torture); Ahmadou Sadio Diallo (*Republic of Guinea* v *Democratic Republic of the Congo*), Merits, Judgment, I.C.J. Reports 2010, 639, para 160 (the Court held that the DRC violated Arts 9 and 13 of the International Covenant on Civil and Political Rights); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina* v *Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, 43 para 220 (providing that Art 14 of the ICCPR provides for the minimum guarantees for the right to a fair trial); Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo* v *Uganda*), Judgment, I.C.J. Reports 2005, 168, para 219 (the court held that Uganda violated Arts 6, para 1, and 7 of the ICCPR).

‘Primary’ and ‘Secondary’ Use of Electronic Health Data

Carolina Perlingieri* and Annalisa Cocco**

Abstract

The paper aims to provide an overall framework of the different electronic health data processing activities, distinguishing especially between ‘primary’ and ‘secondary’ use. Firstly, the article outlines the regulatory context that is still under development and critically examines the position taken on the subject by the Italian Guarantor. Then, it illustrates the most problematic issues related to the secondary use of electronic health data like the processing involved in clinical trials. The purpose of the work is to increase awareness of the possible relationships that bind the use (primary and secondary) of electronic health data to both public and private interests.

I. The Legal Issue of Electronic Health Data Processing and the Current Rules for ‘Secondary Use’

The legal issues surrounding the processing of electronic health data are one of the most debated topics in the world regarding data protection and technological innovation. On one hand, the use of this category of data raises significant concerns about potential implications arising from their distinct nature. On the other, it creates high expectations for the advancements that their reuse could bring in specific areas, such as medical treatment, scientific research, and health planning. This issue is thus the starting point for addressing new challenges associated with healthcare assistance, public health management, and advancements in scientific research. These challenges were particularly intensified by the pandemic crisis, which prompted legislators, particularly in Europe, to adopt an approach favouring the circulation of this category of personal data, focusing in particular on the interoperability[1] of systems (platforms, apps, etc.) with robust security measures.

These systems thus play a fundamental role in the ‘primary use’ of electronic health data, namely to provide healthcare services. They allow the timely, continuous,

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[1] On the interoperability of systems may I refer to C. Perlingieri, ‘Coronavirus e tracciamento tecnologico: alcune riflessioni sull’applicazione e sui relativi sistemi di interoperabilità dei dispositivi’ *Actualidad Juridica Iberoamerica*, 836 (2020).

and coordinated exchange of data and clinical/health information among the various actors in the healthcare system, ensuring patients' needs are met regardless of their geographical location.[2]

At the same time, it is important to consider the 'secondary use' of health data.[3] This involves processing them for reasons different from those for which they were initially collected, seeking to achieve additional goals in the healthcare sector capable of bringing benefits to society. There are six such goals: 1) scientific research; 2) innovation; 3) policy making; 4) preparedness and response to health threats; 5) patient safety, and 6) personalised medicine.

The secondary use of health data must be examined in the light of the current regulations provided by the General Data Protection Regulation (GDPR) and the Italian Personal Data Protection Code (decreto legislativo no 196 of 2003); the regulations concerning the Electronic Health Record (EHR) (*Fascicolo Sanitario Elettronico - FSE*);[4] the opinions and guidelines of the European Data Protection Supervisor, the European Data Protection Board, the Italian Data Protection Authority;[5] the Data Act Regulation (EU) 2023/2854 of 13 May 2023 of the European Parliament and the Council concerning harmonised rules on fair access to and use of data, and the AI Act Regulation on Artificial Intelligence approved on 13 March 2024.

The situation, however, remains uncertain as further decrees are still awaited. These will have to be adopted by the Minister of Health and will address health data processing for research and governance purposes (see Arts 15-20 of the EHR Regulation) and telemedicine. Additionally, the Minister of Economy and Finance, in consultation with the Minister of Health, is expected to issue decrees

[2] The reference is directed mainly to telemedicine, which aims to improve the coverage and efficiency of health care and the health care system. In general on digital health, see C. Perlingieri, 'eHealth and Data', in R. Senigaglia, C. Irti and A. Bernes eds, *Privacy and Data Protection in Software Services* (Singapore: Springer, 2022), 127. Also on the digitization processes affecting the health care sector, M.R. Nuccio, 'Digitalizzazione e circolazione dei dati sanitari' *Tecnologie e diritto*, 357 (2023); M. Ciancimino, *Protezione e controllo dei dati in àmbito sanitario e Intelligenza Artificiale. I dati relativi alla salute tra novità normative e innovazioni tecnologiche* (Napoli: Edizioni Scientifiche Italiane, 2020), 44. In particular, on telemedicine see M. Orviský and J. Klátik, 'Telemedicine as a part of globalization and tool for innovation from the legal point of view' 92 *SHS Web of Conferences*, 6 (2021); C. Botrugno, *Telemedicina e trasformazione dei sistemi sanitari. Un'indagine di bioetica* (Canterano: Aracne, 2018).

[3] On this topic see A. Cabrio, 'La seconda vita dei dati. Luci e ombre della normativa privacy in materia di secondary data use', in F. Frattino and F. Massimino eds, *I dati. Il futuro della sanità. Strumenti per una reale innovazione*, available at https://tinyurl.com/2x52v7je (last visited 30 September 2024); M. Ciancimino, 'Circolazione "secondaria" di dati sanitari e biobanche' *Il diritto di famiglia e delle persone*, 37 (2022).

[4] Chapters III and IV of decreto del Presidente del Consiglio dei Ministri no 178 of 2015 (Regolamento in materia di fascicolo sanitario elettronico); decreto del Ministero della Salute of 7 September 2023 on the EHR 2.0; decreto legislativo no 179 of 2012, as amended by legge no 221 of 2012.

[5] See negative opinions nos 294 and 295 of the Italian Authority of 22 August 2022 on the EHR and the Health Data Ecosystem, no 256 of 8 June 2023, on the draft EHR decree.

on the technical and organisational measures, as well as the procedures necessary, to secure the data made available to the EHR 'health card' (*tessera sanitaria*) system via the national infrastructure. However, the National EHR Portal is yet to be set up. There is also particular expectation regarding the definitive version of the European Health Data Space (EHDS) that was proposed on May 2022 and amended in April 2024. It will work alongside the Data Governance Act (DGA) Regulation (EU) 2022/868 of 30 May 2022, which will regulate the key aspects of a data circulation system based on trust, specifically focusing on the reuse of 'protected' data by public administrations and data intermediation services.

The underlying principle of this Regulation is that personal health data may not be used without the explicit consent of the data subject, although provision is made for exceptions under certain conditions. In order to address this issue, it is necessary to review the regulations governing the EHR, which collects digital health and social care data and documents relating to past and present clinical events, including services provided outside the National Health Service.

From the patient's perspective, the EHR allows them to keep track of their medical history and share it during consultations with public and private healthcare professionals after reviewing the information notice (Art 7 of decreto ministeriale EHR 2.0) concerning EHR data processing issued by the Ministry of Health, Regions, and Autonomous Provinces. The data can only be shared with the explicit consent of the data subject (Art 8 decreto ministeriale EHR 2.0), which must be obtained separately for each of these purposes: prevention, diagnosis, treatment and rehabilitation, and international disease prevention.

In this context, the data controllers are:

a) in the context of patient care, the healthcare professionals treating the patient;

b) with regard to feeding the EHR, the local health authorities, public National Health Service facilities, health facilities accredited and authorised with the NHS, and regional welfare and health services;

c) for international prophylaxis, the Ministry of Health.

From a collective standpoint, and in relation to the national and regional health services, the EHR does not require the data subject's consent for data processing in cases of data reuse for medical, biomedical, and epidemiological studies and research, or for health planning, care quality assessment, or the monitoring of healthcare services (Arts 15-20 EHR Regulation).

In this context, the data controllers are:

a) the Regions and Autonomous Provinces and the Ministry of Health (Art 15 EHR Regulation) in relation to study and scientific research in medicine, biomedicine, and epidemiology, 'provided that the data pertaining to patients are anonymised and comply with the principles of indispensability, necessity, pertinence, and non-excessiveness', as set out in Art 28 of the Personal Data Protection Code;

b) the Regions and Autonomous Provinces and the Ministries of Health and

Labour and Social Policies for governance and health planning purposes, care quality assessment and healthcare monitoring (Arts 18-20 EHR Regulation), 'provided that the data pertaining to patients are anonymised and comply with the principles of indispensability, necessity, pertinence, and non-excessiveness', as set out in Art 28 of the Personal Data Protection Code.

Thus, in these cases, data processing is lawful when the data are anonymised through encryption using the National Unique Patient Identifier (NUPI-'*CUNA*'), enabling interconnection and, consequently, secondary use.

The data from the Ministry of Health's New Health Information System (NHIS-'*NSIS*') form the basis of the predictive methodology the Ministers of Health and the Economy use to determine annual costs and standard regional needs in accord with the State-Regions Conference. This is in contrast with other non-health sectors, where the process of identifying standard needs is less fluid and more controversial.

II. Challenges Arising from the Reuse of Health Data for Health Care Governance and Planning: So-called Proactive Health Care and the Issue of Explicit Consent

The issue of reusing data without the explicit consent of the data subject resurfaces when Regions or Autonomous Provinces rather than the Ministries, as stipulated by the EHR Regulation, process data in order to set up what is known as 'proactive healthcare'. This is a specialised healthcare model for managing chronic illnesses proactively rather than waiting for patients to seek hospital care ('reactive healthcare'). The model reaches out to them before illnesses develop or worsen, thus ensuring appropriate and differentiated interventions based on patients' risk levels. Proactive healthcare occupies a middle ground between healthcare planning and prevention, with a strong focus on health education and care. The way the framework is structured can have an impact on the legal aspects of how data are reused by the local authorities managing the various branches of the healthcare system.

To address the issue of legitimising the reuse of health data without the explicit consent of the data subject, it is necessary to consider the purpose limitation principle [Art 5 para 1(b) GDPR], which states that data collected for specific, explicit, and legitimate purposes can only be further processed if the new use is compatible with the original purposes.

Without this compatibility, an independent legal basis is required (unless exceptions apply), such as 'reasons of substantial public interest, on the basis of Union or Member State law' in accordance with Arts 22 para 4, and 9 para 2(g) GDPR, provided that Member States can maintain or introduce further conditions and limitations regarding the processing of such data [including those 'for the purposes of preventive or occupational medicine purposes only if the data are processed by a professional subject to obligation of professional secrecy' (Art 9 para 3 GDPR); 'for scientific research purposes' (Art 89 GDPR)].

III. The Italian Privacy Authority's Opinion on Proactive Medicine. Critical Remarks

Regarding the issue of proactive healthcare, the opinion of the Italian Data Protection Authority ('*Garante*') concerning a draft Regulation by the Autonomous Province of Trento (Art 4) defined 'proactive healthcare' as a 'healthcare model for early diagnosis and both primary and secondary prevention of chronic illnesses and the consequent activation of targeted interventions'. The opinion also required the Provincial authority to promote proactive healthcare and authorised the Provincial Health Services Agency to assess the risk of patients and potential patients (profiling) using statistical analysis techniques and automated systems, subject to an impact assessment in accordance with the exemption provided for in Art 22 GDPR concerning 'reasons of substantial public interest, on the basis of Union or Member State law'.

The *Garante* declared the secondary use of data in the EHR unlawful due to the lack of a legal basis. It reiterated that a healthcare professional subject to professional secrecy can only use the data for care purposes when necessary and essential for the patient's health and requires explicit consent for processing through the EHR for purposes of treatment (as reaffirmed in EHR 2.0). Specifically, according to the *Garante*, processing data through the care model for treatment purposes creates a health risk profile for the data subject, thereby constituting a use of the data not strictly necessary for the primary purpose of caring for the patient and constituting a different use, which requires the data subject's consent. This also takes into account that the aforementioned proactive healthcare model involves numerous data controllers (accredited or affiliated with the Provincial health service). Data processing through the proactive healthcare model was deemed unlawful because it lacked an independent legal basis, given that it took place separately from, and was non-essential for, the primary purpose of patient care. Consequently, it was necessary to obtain explicit consent.

This state of affairs calls for some reflection. According to the EHR Regulation, healthcare professionals and practitioners who care for individuals within the National Health Service and or Regional welfare and health services and are bound by professional secrecy or a duty of confidentiality may only consult data and documents in the EHR with the data subject's consent. Therefore, we must question whether the consent given during a medical consultation is compatible with the use of the same data for proactive healthcare.

There are two possible solutions:

a) The first aligns with the *Garante's* position and considers proactive healthcare and medical treatment as two separate activities.

While it may be accepted that the treatment and proactive models operate independently, the issue of the legal basis for reusing health data in proactive healthcare must take into account the exception provided for in Art 22 GDPR concerning reasons of substantial public interest based on Union or Member

State law. This legal basis might be found in Art 7 of decreto legislativo 19 May 2020 no 34, coordinated with legge 17 July 2020 no 77, entitled 'Urgent measures on health, support for employment, the economy, and social policies related to the COVID-19 epidemiological emergency'. The decree authorises the 'Ministry of Health, within the scope of the general guidelines and coordination functions for the prevention, diagnosis, treatment, and rehabilitation of disease, as well as national technical health programming, guidance, and the coordination and monitoring of regional technical health activities', to process personal data, including patients' health data collected in the information systems of the National Health Service in order to develop procedures to forecast the development of the population's health needs.

However, in my opinion, only a functional and axiological interpretation of this law can prevent the public interest of the 'development of the population's health needs' from being elevated to an objective health priority, seen as a superior and absolute good. When developing methods to predict, prevent, diagnose, treat and rehabilitate diseases, it is crucial to consider the patient's level of risk, and patients should be given the freedom to choose whether or not they wish to make use of the results obtained.

b) The second solution considers proactive healthcare and medical treatments interconnected activities. Proactive healthcare, such as precision or personalized medicine, is often regarded as a specific form of care. Indeed, the Italian *Garante's* statement that data reuse is unacceptable needs to be reconsidered. If the reuse of the data is necessary for care, it is compatible with the purpose sanctioned by the patient's original consent.

Along these lines, Art 110 *bis*, para 4, of the Italian Personal Data Protection Code acknowledges that the processing of personal data collected during healthcare activities (and thus the collection of data for clinical activities) can be instrumental for scientific research purposes. If instrumentality applies to two distinct activities, namely healthcare and scientific research, there is even greater justification for acknowledging it when the focus is on the same objective, ie treating the patient, even if only in terms of proactive measures. Art 110 *bis*, para 4, of the Personal Data Protection Code clarifies, in fact, that 'Processing personal data collected for clinical activities for research purposes by public and private scientific research and care institutes does not constitute further processing by third parties. This is due to the instrumental nature of the healthcare activities performed by these institutes in relation to research, in compliance with Art 89 of the Regulation'.

Further arguments supporting this position are mainly based on the growing recognition of the concept of functional proactive healthcare. From this perspective, general practitioners - organised into territorial functional groupings, as seen in Tuscany - came to play a central role in the healthcare system, developing care plans tailored to each patient's needs, while also actively involving family members and caregivers in the care process.

The same conclusion is also confirmed by a recent ruling of 20 November 2023 (*Azienda Sanitaria Friuli Centrale* v *Garante Privacy*) where the Tribunale di Udine found in favour of the *Azienda* and quashed the *Garante*'s order, which had deemed unlawful the *Azienda Sanitaria's* processing of patients' personal data, carried out in compliance with the Regional Council of Friuli Venezia Giulia's Resolution no 1737 of 20 November 2020. This resolution had instructed an in-house regional company to extract health data from the *Azienda Sanitaria's* databases to compile a list of individuals with complex and coexisting health conditions, which would then be sent to general practitioners to improve the management of the epidemiological situation. The processing was deemed unlawful it had no appropriate legal basis, specifically due to the absence of prior consent, as the processing was not considered 'necessary' for patient care. The *Azienda* was the data controller of its patients' data contained in its databases, which had been collected with prior consent from the patients for the purpose of sharing information with their general practitioners. These in-house regional company reprocessed these data to create pseudonymised lists of patients who were more vulnerable in the event of COVID-19 infection (a 'secondary use'). The lists were only accessible to their respective general practitioners through the 'continuity of care' portal. These lists were created using data already available to the GPs, extracted from each patient's Electronic Health Record (EHR). In this case, the secondary use involved merely reprocessing data that had already been collected legitimately in order to help general practitioners identify high-risk patients, enabling them to manage prevention, planning, and vaccination more efficiently and more promptly during the pandemic. The secondary use of the data pursued a purpose compatible with the original goal of providing care and assistance, as established in Art 5 GDPR. Thus, the secondary use was not intended, as the *Garante* argued, for use in profiling patients for its own sake but was part of an initiative that focused on preventing illnesses and improving patient care.

We can thus conclude that the secondary data processing mandated by the Friuli Venezia Giulia Region through Resolution no 1737/2020 is consistent with the original purpose, namely that of supporting patient care.

IV. The Legal Framework Regulating Clinical Studies and Clinical Investigations

The European Health Data Space (EHDS) stipulates that certain minimal categories of electronic data are designated for secondary use, among which are data derived from clinical trials, clinical studies, and clinical investigations, as outlined in Art 33, letter *j*. These data are considered extremely valuable for secondary use as they promote innovation across the European Union and

benefits patients in all the Member States.[6] The European legislator hopes that data from clinical trials and investigations will be routinely used for secondary purposes once the primary activities have been completed. The EHDS recommends that these data should be made available for secondary use in a structured electronic format, which will facilitate processing by information systems.[7] Although the specifics of these information systems are not discussed here, we will examine the various clinical activities mentioned above to understand how patients' personal data should be used and assess whether the legal bases for using them are legitimate.

On the international level, the terms 'clinical trial', 'clinical study', and 'clinical investigation' are often used interchangeably and used as synonyms, also in the light of ISO 14155, a standard developed by the International Organization for Standardization (ISO).[8]

However, European regulations provide more precise categorisations of these activities based depending on their particular focus. Specifically, while the term 'clinical investigation' refers to 'medical devices', 'clinical study' and 'clinical trial' are associated with 'medicinal products'. This distinction is reflected in the regulatory framework that follows. The term 'clinical investigation' is defined in Regulation (EU) 745/2017 on medical devices, which, in Art 2, no 45, describes it as 'any systematic investigation involving one or more human subjects, undertaken to assess the safety or performance of a device'.[9] On the other hand, the term 'clinical

[6] See what's stated by Recital no 40 of the European Health Data Space (EHDS): 'Electronic health data protected by intellectual property rights or trade secrets, including data on clinical trials, investigations, and studies, can be very useful for secondary use and can foster innovation within the Union for the benefit of Union patients. In order to incentivise continuous Union leadership in this domain, the sharing of the clinical trials and clinical investigations data through the EHDS for secondary use (...). They should be made available to the extent possible, while taking all necessary measures to protect such rights'. This version of the document comes from the latest amendments made by the European Parliament in April 2024 and the provision corresponds to Recital 40 *quarter* in the Italian version. For the contemporary document see the official site health.ec.europa.eu.

[7] See, on this topic, the Recital no 39 of the European Health Data Space (EHDS). This should encompass formats such as records in a relational database, XML documents, or CSV files, but also include free text, audios, videos, and images provided as computer-readable files.

[8] Art 3.8 of the ISO 14155:2020 - available at the official site iso.org - states that a 'clinical investigation' is a 'systematic investigation in one or more human subjects, undertaken to assess the clinical performance, effectiveness or safety of a medical device' and according to Note 1 to entry: 'For the purpose of this document, "clinical trial" or "clinical study" are synonymous with "clinical investigation"'.

[9] For the definition of 'device' concept see Art 2, no 1 of the European Parliament and Council Regulation (EU) 745/2017 of 5 April 2017 on medical devices, available at eur-lex.europa.eu. Medical device means 'any instrument, apparatus, appliance, software, implant, reagent, material or other article intended by the manufacturer to be used, alone or in combination, for human beings for one or more of the following specific medical purposes: diagnosis, prevention, monitoring, prediction, prognosis, treatment or alleviation of disease; diagnosis, monitoring, treatment, alleviation of, or compensation for, an injury or disability; investigation, replacement or modification of the anatomy or of a physiological or pathological process or state; providing information by means of in vitro examination of specimens derived from the human body, including organ, blood and tissue donations, and which does not achieve its principal intended action by pharmacological, immunological or metabolic means, in or on the human body, but which may be assisted in its function by such means.

trial' is a specific category within the broader category of 'clinical study', which can be either a 'clinical trial' or a 'non-interventional study', also known as 'non-interventional trial' or 'observational study'.

The regulation of clinical trials has undergone several changes due to legislative interventions carried out by the European legislator, starting with Directive 2001/20/EC of 4 April 2001, and later with European Parliament and Council Regulation (EU) 536/2014 of 16 April 16 2014, which is currently in force. The decision, in 2014, to adopt the Regulation rather than a Directive was prompted by difficulties in achieving a common objective amid the various national policies of Member States.[10] Since 2014, the European legislator has established uniform regulations for clinical trials across the EU by repealing the previous Directive and imposing common rules for conducting clinical trials of medicinal products for human use.[11]

According to Art 2 of Regulation (EU) 536/2014, a 'clinical study' is generally defined as 'any investigation in relation to humans intended: *a*) to discover or verify the clinical, pharmacological or other pharmacodynamic effects of one or more medicinal products; *b*) to identify any adverse reactions to one or more medicinal products; or *c*) study the absorption, distribution, metabolism, and excretion of one or more medicinal products with the objective of ascertaining the safety and/or efficacy of those medicinal products'.

A 'clinical trial' is specifically defined as 'a clinical study which fulfils any of the following conditions: *a*) the assignment of the subject to a particular therapeutic strategy is decided in advance and does not fall within the normal clinical practice of the Member State concerned; *b*) the decision to prescribe the investigated medicinal products is taken with the decision to include the subject in the clinical study; or *c*) diagnostic or monitoring procedures in addition to normal clinical practice are applied to the subjects'. According to European legislation, clinical trials are categorized as 'low-intervention' if the experimental

The following products shall also be deemed to be medical devices: devices for the control or support of conception; products specifically intended for the cleaning, disinfection or sterilisation of devices'.

[10] According to Recital 5 of the European Parliament and Council Regulation (EU) 536/2014 of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC: 'As regards Directive 2001/20/EC, experience also indicates that the legal form of a Regulation would present advantages for sponsors and investigators, for example in the context of clinical trials taking place in more than one Member State, since they will be able to rely on its provisions directly, but also in the context of safety reporting and labelling of investigational medicinal products. Divergences of approach among different Member States will be therefore kept to a minimum'. The document is available on the official site eur-lex.europa.eu.

[11] For a correct reconstruction of the concepts, the provisions of the European Parliament and Council Directive 2001/83/EC of 6 November 2001 on the community code relating to medicinal products for human use must also be considered. According to the Art 1, no 2, a 'medicinal product' is 'any substance or combination of substances presented for treating or preventing disease in human beings. Any substance or combination of substances which may be administered to human beings with a view to making a medical diagnosis or to restoring, correcting or modifying physiological functions in human beings is likewise considered a medicinal product'.

medicinal products have already been authorised and, in line with the trial protocol, are used according to the conditions specified in their marketing authorisation or if their use is supported by scientific publications that demonstrate their safety and efficacy. This 'low-intervention' is attributed to the fact that the additional diagnostic or monitoring procedures involved in the trial entail only minimal risks or burdens in comparison with the authorised standard clinical practice.

Distinct from 'clinical trials' is the 'non-interventional study', which refers to all studies not included in the definition of clinical trial. This type of study is typically referred to as an 'observational study'. Observational studies can be either 'prospective' or 'retrospective'. The former examine outcomes based on future exposure to a risk factor, such as in a longitudinal study, whereas the latter analyse past causes that have led to a current risk, as in a case-control study.

In Italy, clinical trials were precisely defined by decreto legislativo 24 June 2003 no 211, which implements European Parliament and Council Directive 2001/20/EC of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use, describing it as

> 'any investigation in human subjects intended to discover or verify the clinical, pharmacological and/or other pharmacodynamic effects of one or more investigational medicinal product(s), and/or to identify any adverse reactions to one or more investigational medicinal product(s) and/or to study absorption, distribution, metabolism and excretion of one or more investigational medicinal product(s) with the object of ascertaining its (their) safety and/or efficacy; This includes clinical trials carried out in either one site or multiple sites, whether in one or more than one Member State'.[12]

Clinical trials can be carried out either on a for-profit or a non-profit basis. The decreto legislativo 6 November 2007 no 200, which implements Directive 2005/28/EC containing detailed guidelines for good clinical practice in clinical trials of medicinal products for human use, as well as requirements for the authorisation of their manufacture or importing, allows the possibility of conducting trials 'for industrial or commercial purposes'. However, it imposes a subjective restriction. In particular, the promotion of trials for industrial or commercial use is only permitted for industries, pharmaceutical companies, or other private entities that operate for profit. Institutions such as scientific hospitals and research institutes

[12] Almost the same definition of clinical trials is contained in the Art 1, lett *q*, decreto legislativo 6 novembre 2007 no 200 implementing the Commission directive 2005/28/EC of 8 April 2005 laying down principles and detailed guidelines for good clinical practice as regards investigational medicinal products for human use, as well as the requirements for authorisation of the manufacturing or importation of such products.

(*IRCCS - Istituti di Ricovero e cura a Carattere Scientifico*)[13] are required to conduct trials only on a non-profit basis. Nonetheless, the results obtained can subsequently be used in drug development, regulatory processes, or for commercial purposes.[14] This suggests that the Italian legislator has already established a possible pathway for the 'secondary use' of collected data, which will be further explored in the following section.

As explicitly stated in its Art 1, decreto legislativo 24 June 2003 no 211 does not apply to observational studies; however, it does provide a definition for them. According to Art 2, letter *c*, an observational study is 'a study in which the medicinal products are prescribed according to the terms of the marketing authorisation. Assigning a patient to a specific therapeutic strategy is not predetermined by the trial protocol but falls within standard clinical practice, and the decision to prescribe the medicinal product is entirely independent of the decision to include the patient in the study. No additional diagnostic or monitoring procedures are applied to the patients'.

V. 'Secondary Use' of Health Data from Clinical Studies: Issues on the Legal Basis and Lawfulness of Processing

In all the activities examined - whether clinical investigations, clinical trials, experimental studies, or observational studies - the processing of patients' health data is always a necessary component.[15] However, the way this information is used and the corresponding legal basis for the processing can vary.

Clinical investigations and trials depend heavily on the 'primary use' of collected data, since these require organisational activities beforehand as well as defining

[13] According to Art 1, decreto legislativo 16 ottobre 2003 no 288, available at gazzettaufficiale.it, the Institutes for Hospitalization and Care of a Scientific Nature (*IRCCS*) are 'bodies of the National Health Service of national importance endowed with autonomy and legal personality that, according to standards of excellence, pursue research purposes, mainly clinical and translational, in the biomedical field and in that of the organization and management of health services and perform hospitalization and care services of high specialty or carry out other activities having the characteristics of excellence'.

[14] Art 1, letter *q*, decreto legislativo 6 novembre 2007 no 200, available at gazzettaufficiale.it.

[15] Regarding data processed within a clinical investigation, see Art 72, European Parliament and Council Regulation (EU) 745/2017 of 5 April 2017 on medical devices. Concerning data processed within clinical study, see Art 93, European Parliament and Council Regulation (EU) 536/2014 of 16 April 2014 on clinical trials on medicinal products for human use, which requires the recall of the Directive 95/46/EC - now repealed by the European Parliament and Council Regulation (EU) 679/2016 on the protection of natural persons about the processing of personal data and on the free movement of such data - for the processing of personal data carried out in the Member States and the European Parliament and Council Regulation (EC) no 45/2001 - now repealed by the European Parliament and Council Regulation (EU) 1725/2018 of 23 October 2018 on the protection of natural persons about the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data - for the processing of personal data carried out by the Commission and the Agency.

objectives and procedures to achieve the desired results. The secondary use of this data can only occur at a later stage, as data collected during or after clinical trials and investigations may well be 'reused' for secondary purposes that differ from the original purpose for which they were collected. This is a contentious issue to which we will return. In contrast, observational studies, especially retrospective ones, rely solely on the 'secondary use' of data. These studies make use of data previously collected for different purposes. These then become useful for non-interventional clinical research. In this particular field, secondary use of health data is essential.

Determining the legal basis for the secondary use of health data from studies and clinical investigations requires complex analysis that takes several regulations into account. In this regard, the Italian context has some critical issues that need to be addressed.

According to Art 6, para 4 of the General Data Protection Regulation (GDPR), personal data may be processed for a different purpose than the one for which it was originally collected. However, it imposes specific conditions when the data fall under the so-called 'special categories' as defined in Art 9 (letter *c*). When the data controller is required to assess whether processing for a new purpose is 'compatible'[16] with the original purpose for which the data was collected, the European legislator imposes a rather broad obligation concerning secondary use, which makes coordination with other regulations necessary.

The EHDS explicitly provides for and regulates the possibility of secondary use of health data. As last amended in 2024, the Regulation emphasises the importance of secondary use of electronic health data and proposes the creation of a new body: the 'health data intermediation entity'. This entity is a legal person authorised to make available, record, provide, process, restrict access to, or exchange electronic health data provided by data controllers for secondary use.[17] The EHDS leaves unchanged the existing agreements for accessing electronic health data for secondary use established through 'contractual or administrative arrangements' (Art 1, para 6-*ter*).[18]

Contractual arrangements[19] pose particular challenges for the secondary use of data from clinical trials of medicinal products. There are specific concerns related to the 'transfer of data and results from clinical trials', which is regulated nationally by the decreto del Ministero della Salute 30 November 2021.[20] This

[16] On this topic see G. Comandé, 'Ricerca in sanità e data protection un puzzle…risolvibile' *Rivista italiana di medicina legale*, 200 (2019).

[17] See the Recital 40 *ter* of the European Health Data Space (Recital 40 of the English version).

[18] Looking at the English version of the official EHDS document, the mentioned normative provision is contained in para 6 b.

[19] With regard to the interaction between personal data processing and contractual activities see A. De Franceschi, *La circolazione dei dati personali tra privacy e contratto* (Napoli: Edizioni Scientifiche Italiane, 2017); I. Speziale, 'L'ingresso dei dati personali nella prospettiva causale dello scambio: i modelli contrattuali di circolazione' *Contratto e impresa*, 602 (2021).

[20] The document is available at the official site gazzettaufficiale.it.

decree follows the decreto del Ministero della Salute 17 December 2004,[21] which set general guidelines for conducting clinical trials of medicinal products, focusing on improving clinical practice as a component of healthcare. The 2021 decree has introduced new regulations that aim to encourage 'non-profit' clinical trials of medicinal products. To this end, it offers various tax breaks and procedures for covering expenses through specific research funds or dedicated financing, including contributions from private entities.

For the purposes most relevant to this study, the decree also permits the 'transfer' of data from clinical trials initially conducted on a non-profit basis. The transfer of data can take place both during or after the trial for 'registration purposes', which allows the data to be used in the process of bringing the medicinal product to market.[22] Specifically, Art 3 of the decreto del Ministero della Salute 30 November 2021 permits the transfer of data and requires such transfers to be formalised through a contract between the sponsor and the transferee.[23] This contract must be submitted to the Italian Medicines Agency (*AIFA*: *Agenzia Italiana del Farmaco*), the relevant ethics committee, and the trial centers involved to officially notify them of the transfer of data and/or results. Regarding the treatment of ongoing health data, the Italian Ministry has stipulated that 'as a result of the transfer, the transferee assumes full ownership of the processing of personal data relating to the medical trial' (Art 3, para 5).

This provision raises at least two issues: the first concerns the legality of the processing, and the second regards its legal basis.

The legal basis is established through a private contract between the sponsor[24]

[21] The official document is available at gazzettaufficiale.it.

[22] Placing a drug on the market in Italy takes place at the end of a long procedure involving several progressive steps. The medical product must have been granted a Marketing Authorization (*Autorizzazione all'Immissione in Commercio 'AIC'*) by AIFA (*Agenzia Italiana del Farmaco*) or the European Commission. The AIC is issued following a scientific evaluation of the drug's quality, safety, and efficacy requirements. To obtain the AIC, the applicant is obliged to submit an application consisting of a dossier containing information regarding chemical-pharmaceutical, preclinical, and clinical aspects, structured according to a standardized format (CTD - *Documento Tecnico Comune*). The data and studies submitted in support of the AIC application must comply with guidelines and guidelines defined at the European level. Once obtained, the Marketing Authorization (AIC) is valid for five years and renewable for an additional five years or indefinitely. For this information, see the official website aifa.gov.it.

[23] On this topic see C.A. Piria, 'Aspetti contrattuali delle sperimentazioni cliniche no-profit' *Contratti*, 346 (2022).

[24] The nonprofit clinical trial sponsor must have the characteristics established by Art 1 of the decree. It must be a structure, entity, public institution or its equivalent, foundation or moral, research and/or health institution, association, non-profit scientific society, scientific institution of hospitalization and care, or a natural person who is an employee of the aforementioned structures and performs the role of sponsor as part of his or her work assignments, or a social enterprise that promotes the clinical trial in the context of the business activity of general interest exercised on a stable and principal basis. In addition, the sponsor must not be the holder of the marketing authorization (AIC) for the investigational drug and must not have an economic interest by way of intellectual property rights with the natural or legal person who holds the authorization. Finally, the holder must be the sole owner of the data and results related to the trial, as well as of

and the transferee. However, according to Art 6, para 3 of the GDPR, this contract cannot be deemed valid as the article states that the legal basis for processing personal data must be established by the EU or Member State law applicable to the data controller.[25]

Regarding the legality of processing, the transfer of data results in a change in the data controller's position, initially held by the sponsor and subsequently by the transferee.

The data controller is the entity that determines the purposes and methods of processing the data [Art 4(7) GDPR]. The two parties clearly have different objectives in processing the data, as the sponsor's goal is to conduct a non-profit clinical trial, whereas the transferee aims to market the medicinal product for profit. Thus, it appears that when the controller changes, a new 'primary use' of personal data is established, which serves a different purpose from the previous one and requires a separate legal basis. If, however, the transfer is viewed as merely representing a change in the data controller, with continuity from the previous processing and without marking the end of one phase and the start of another, the result would be incompatible with the framework of the General Data Protection Regulation. The GDPR lays great importance on the purposes of processing, deeming them essential for correctly identifying the data controller.

According to Recital 61 GDPR, 'secondary use' of health data occurs when the controller opts to use the data for a different purpose than initially intended, which is what happens under Art 3 (4) of the decreto del Ministero della Salute 30 November 2021, stating that a non-profit clinical trial could be 'requalified for profit by its sponsor'. In this case, the purpose would change, but the data controller would remain the same, and generating profit would not be the sole purpose of the data processing because the clinical trial would proceed and benefit the public health sector in any case.

In the case of a 'contractual transfer', however, both the purpose and the data controller change. Simply replacing the controller would lead to the paradoxical situation of potentially holding the 'final controller' liable for any harmful consequences arising from the actions of the 'initial controller', which would be unacceptable.[26] In addition, Recital 39 of the EHDS supports the distinction

any decision inherent in their publication.

[25] When the processing is necessary for the performance of a legal obligation to which the data controller is subject (Art 6, para 1, letter c) or when the processing is necessary for the performance of a task carried out in the public interest or in connection with the exercise of official authority vested in the data controller (Art 6, para 1, letter *e*).

[26] Concerning liability issues in this area, see N. Frivoli, 'Non sussiste responsabilità della casa farmaceutica per i danni subiti dal paziente sottoposto a sperimentazione clinica' *Diritto e giustizia*, 6 (2021); also M. Foglia, 'Sperimentazione clinica dei farmaci e responsabilità della casa farmaceutica' *Responsabilità civile e previdenza*, 548 (2022), examining the judgement of Corte di Cassazione 20 April 2021 no 10348, which stated that a pharmaceutical company that has promoted, using the supply of a drug, a clinical trial carried out by a health facility through its physicians could be contractually liable for the damages suffered by the subjects to whom the

between 'secondary use' and the 'contractual transfer' of data. It advocates for including data from clinical trials and investigations in secondary data use practices, while also ensuring that 'voluntary sharing' by sponsors is not compromised. This implies that 'secondary use' does not occur in the case of voluntary data sharing.

In conclusion, to verify the legality of processing electronic health data, a pragmatic approach must be taken that will take into account all the specific characteristics of each case to correctly classify the use of the data as 'primary' or 'secondary', which in turn determines the applicable regulatory framework.

Five possible scenarios may arise during data processing:

1. A change in purpose with the same controller: when the purpose of processing changes but the data controller remains the same, this constitutes 'secondary use' of the data.

2. A change in controller with same purpose: when the data controller changes, but the purpose remains the same, this marks the beginning of a new 'primary use' of the data, which is still legitimate if it serves a 'public interest in the public health sector'.

3. A change in both controller and purpose.

This scenario is further divided into two alternatives:

a) A new controller with a different but related purpose: if the new controller pursues a different purpose related to scientific research (eg, the clinical trial originally focused on the incidence of a drug on breast cancer now concerns the drug's effect on ovarian cancer), this will result in a new 'primary use' of the data. The processing is still considered legitimate even without the consent of the data subject, as it remains pertinent to public health interests.

b) A new controller with an unrelated purpose: if the new controller pursues a purpose unrelated to scientific research, this also results in a new 'primary use' of the data.

However, in this case, the processing would not be deemed lawful without the data subject's consent as it is unrelated to public health interests. This understanding is consistent with Art 110 *bis* of the Personal Data Protection Code, which will be explored in the following section.

VI. The Antinomy Between Italian and European Law: A Systematic and Axiological Interpretation

The specific situation envisaged in Italian law concerning the 'transfer' of data from clinical trials for commercialising medicine marks the start of a new

drug was administered due to an error on the part of the 'experimenting' physicians, only if it turns out - based on the concrete conformation of the trial agreement - that the hospital facility and its employees acted as auxiliaries of the pharmaceutical company so that the latter must answer for their non-performance (or inexact performance) under Art 1228 Civil Code. Otherwise, it's predictable only an extra-contractual liability of the pharmaceutical company.

'primary use' of the health data by the transferee. This new use, which aims to produce financial gain through the sale of the medicine, must be assessed in order to ensure its legality.

According to the GDPR, any subsequent processing of health data by the transferee, which would be considered a new processing activity, must be performed with the consent of all the data subjects involved. Without it, the processing would be unlawful as it would not fall under any of the exceptions justifying 'necessary' processing under Art 6, para 1, letters *b-f*, GDPR.[27] In fact, this processing would serve only the transferee's goal of making a profit. Any new processing would also lack a valid legal basis, as it would rely on a contractual agreement rather than a legal provision. In conclusion, if we only consider the GDPR, the secondary use of data collected during clinical trials and subsequently transferred for the commercialisation of medicine would be unlawful as it fails to meet the legal requirements and lacks an adequate legal basis.

From the systematic perspective, it is also essential to consider the provisions set forth by the EHDS.

Regarding the legal basis for secondary use of health data, Art 1, para 6 *ter* of the EHDS states that access to electronic health data for secondary use agreed upon through contractual arrangements, including between private entities, remains unaffected. Thus, if the EHDS is regarded as a special regulation in relation to the GDPR, concerning health data in particular rather than general personal data, it could be inferred that the transferee's secondary use of data has a valid legal basis. Nevertheless, there are still concerns about the legality of this use.

The EHDS also presents arguments against allowing secondary use for commercialising medicine, ie, economic gain.

The EHDS does not explicitly prohibit the commercial use of health data as a type of secondary use (according to Art 35). However, it does prohibit advertising and marketing (Art 35, letter *c*). The commercialisation of a medicinal product would seem to come under this prohibition, as it is geared to profitmaking. If this prohibition reflects the European legislator's intent to exclude secondary use of health data for individual profit, then secondary use of health data initially collected for clinical trials and subsequently used for marketing the medicinal product would also be considered unlawful. While the possibility of using such data is not completely excluded, it is, however, necessary to obtain new consent from data subjects.

[27] *b*) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; *c*) processing is necessary for compliance with a legal obligation to which the controller is subject; *d*) processing is necessary in order to protect the vital interests of the data subject or of another natural person; *e*) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; *f*) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

A different conclusion might be reached concerning retrospective observational studies and clinical investigations regarding medical devices, where the secondary use of health data is particularly important. The EHDS (Art 34) mentions - among the purposes for which electronic health data can be used for secondary purposes - activities such as 'ensuring high levels of quality and safety of healthcare, and of medicinal products or medical devices' (Art 34, letter a) as well as 'scientific research related to health or care sectors, contributing to public health or health technology assessment (…) with the aim of benefitting the end-users, such as patients, health professionals and health administrators' (Art 34, letter *e*). Thus, if health data initially collected for other purposes are used for any of these objectives, the processing will be considered lawful since it contributes to research or ensures the safety and effectiveness of a medicinal product.

Similarly, the GDPR makes an exception to the prohibition against processing special categories of data when it is necessary for the public interest in relation to the field of public health. The exception pertains to ensuring high standards of quality and safety in healthcare, medicinal products, and medical devices (Art 9, para 2, letter *i*).[28]

This regulatory approach is consistent with the system's underlying principles. Health data may be processed without the data subject's consent only if it fulfils objectives that are in the broader public interest, such as ensuring high levels of quality and safety in healthcare, medicines, and medical devices, or conducting scientific research. In these cases, the processing aims to benefit the entire community rather than solely serving the private economic interests of the transferee, who would profit from commercialising the medicinal product. Looking at it from this standpoint, the current Italian regulations pose significant legal concerns since they are not consistent with the European regulatory framework.

From the systematic perspective, the national provision contained in Art 3, para5 of the decreto del Ministero della Salute 30 November 2021, appears to contradict the hierarchically superior regulations of the GDPR and the EHDS and should therefore be considered subordinate to them. From the axiological perspective, this provision conflicts with the overall approach of the European legislator regarding the secondary use of health data, which is clearly directed towards prioritising public needs and managing any such data through public entities and institutions rather than private parties who might pursue individual profit motives while handling sensitive data belonging to unaware individuals.[29]

[28] On this topic cf G. Schneider, 'Disentangling Health Data Networks: A Critical Analysis of Articles 9.2 and 89 GDPR' 9 *International Data Privacy Law*, 253 (2019).

[29] Art 34 EHDS states that access to electronic health data - for reasons of public interest in the field of public health, or for activities aimed at ensuring high levels of quality and safety of health care, including patient safety, and of medicinal products or medical devices; as well as for policy-making including in the field of health and for the compilation of statistics related to the health and care sector (letters *a-c*) - is reserved only for public bodies and institutions, bodies, and organs of the European Union carrying out the tasks entrusted to them by Union law or national law. A

It is interesting to note that the approach taken by the Italian legislator in the decreto del Ministero della Salute 30 November 2021 appears to be an isolated case within Italy's national regulatory framework. In other instances, legislative actions have generally been well-aligned with European policies. One example is the recent amendment[30] to Art 110 of the Personal Data Protection Code.[31] The Italian legislator has relaxed the obligations upon data controllers when processing is carried out for 'scientific research in the medical, biomedical, or epidemiological fields'. Specifically, in such cases, obtaining consent from the data subject for processing their health data is deemed 'unnecessary', provided that the research is conducted in accordance with existing legal or regulatory provisions or EU law. Additionally, processing data without consent is permitted when, 'for specific reasons, informing the data subjects is impossible or would involve a disproportionate effort, or would risk rendering impossible or severely impeding achievement of the research objectives'.[32] According to this Regulation, consent requirements can be waived only for healthcare activities that serve the public interest and not - as stipulated in the decreto del Ministero della Salute 30 November 2021 - for the transferee's financial gain. The goal of scientific research is of decisive importance.

This conclusion is reinforced by a comparison with Art 110 *bis*, para 4, of the Personal Data Protection Code, where the Italian legislator aimed to support scientific research by specifying that

> 'The processing of personal data collected for clinical or research purposes by public and private scientific hospitals and research institutes does not constitute further processing by third parties (ie, a new 'primary use') due to the instrumental nature of the healthcare activity performed by these institutes in relation to research'.

Consequently, scientific hospitals and research institutes (IRCCS) can always reuse data collected during clinical activities for scientific research, as research is an integral part of their structure. For other organisations, however, the new 'primary use' of health data (referred to in the Personal Data Protection Code as 'further

possibility of access to such data for private entities can be derived only from letter e, which allows secondary use of electronic health data for scientific health research activities that contribute to public health or health technology assessment, but always 'with the aim of benefitting end-users'.

[30] The amendment was provided by the Art 44, comma 1 *bis*, decreto legge 2 March 2024 no 19, as converted and amended into legge 29 aprile 2024 no 56.

[31] Decreto legislativo 30 giugno 2003 no 196, 'Codice in materia di protezione dei dati personali recante disposizioni per l'adeguamento dell'ordinamento nazionale al regolamento (UE) n. 2016/679 del Parlamento europeo e del Consiglio, del 27 aprile 2016, relativo alla protezione delle persone fisiche con riguardo al trattamento dei dati personali, nonché alla libera circolazione di tali dati e che abroga la direttiva 95/46/CE', available at gazzettaufficiale.it.

[32] In such cases, the data controller shall take appropriate measures to protect the rights, freedoms and legitimate interests of the data subject, the research program shall be subject to the reasoned favorable opinion of the competent ethics committee at the territorial level. The Guarantor shall also identify the safeguards to be observed under Art 106, para 2, letter *d*, Italian Privacy Code.

processing by third parties') can still occur without requiring the consent of the data subjects, as it may be authorised by the Privacy Guarantor

> 'when, for particular reasons, informing the data subjects is impossible or would involve a disproportionate effort, or would risk rendering impossible or severely impeding the achievement of the research objectives, provided that appropriate measures are taken to safeguard the rights, freedoms, and legitimate interests of the data subject, in accordance with Article 89 GDPR, including preventive measures for data minimisation and anonymisation'.[33]

Art 89 GDPR, too, confirms the decisive importance of the purpose of processing the data, specifying that if the processing simultaneously serves another purpose (eg, profit), the derogations apply only to the research purpose (para 4).

Hence, also in the case of clinical trials, the purpose for which digital health data are processed must be given considerable weight. It is hoped that the Italian legislator will amend the legislation to address the 'transfer of data and results from non-profit clinical trials for registration purposes' as set out in Art 3, para 5 of the decreto del Ministero della Salute 30 November 2021. The Regulation needs to be revised to conform to and be consistent with the systematic and axiological framework of the Italian legal system, which, despite having numerous sources, is unified by the values it promotes.[34]

Specifically, a clearer distinction could be made between data transfer 'during 'and 'at the end' of the trial, as the former could still offer general benefits for scientific research in healthcare, while the latter would only bring economic profit for the transferee. This distinction would be consistent with the clarification provided in Art 89 GDPR regarding situations where the same processing activity serves more than one purpose. The secondary use of data should be encouraged and implemented whenever a public healthcare interest is pursued, even if this means bypassing the strict requirement of obtaining a data subject's consent. However, stricter operational conditions should be envisaged when the secondary

[33] See the Annual Report of the Italian Data Protection Authority, 2023, available at garanteprivacy.it, 93, where the Authority stated that 'by virtue of Art 110 *bis*, para 4, of the Code, IRCCS can legitimately process health data collected for purposes of treatment, for further purposes of scientific research, without having to acquire specific consent from the data subjects or, when this is not possible, without having to resort to the prior consultation of the Guarantor referred to in the last part of Art 110, para 1, of the Code. More specifically, the sector regulation of IRCCS binds their activities to strict control by the Ministry of Health and compliance with specific ethical and methodological standards (Art 8, decreto legislativo no 288 of 2003), and this, together with Art 110 *bis* para 4, of the Code, provides IRCCS with a specific regulatory basis that, pursuant to Art 9, comma 2, lett *j*, GDPR, allows them to process data collected for treatment purposes also for further purposes of scientific research in the medical, biomedical epidemiological field. Art 110 *bis*, para 4, thus constitutes one of those "legal provisions" to which Art 110 of the Code refers, identifying as a further fulfillment for the processing of data for research purposes in the medical, biomedical and epidemiological fields'.

[34] P. Perlingieri, *Il diritto civile nella legalità costituzionale nel sistema italo-europeo delle fonti*, II, *Fonti e interpretazione* (Napoli: Edizioni Scientifiche Italiane, 2020).

use of health data is intended only to generate financial gain.

Until a change in the law occurs, the only way to resolve the current contradictions to adopt a systematic and axiological interpretation. Therefore, the term '*subentra*' (meaning 'assume full ownership'), as used in para 5 of the 2021 decree, should be understood as requiring a separate justification for the new data controller, namely the consent of the data subjects.[35] Only this approach would allow the transferee to lawfully carry out their activities (including profitmaking activities) by making a new 'primary use' of the health data, not technically qualified as 'secondary use' and thus not subject to the rules and conditions typically applied to the secondary use of data.

VII. Further Developments, Open Issues, and Final Remarks

In conclusion, the problem of primary and secondary use of health data can only be addressed and resolved by adopting a multi-level perspective which also takes into account ongoing developments, such as those concerning the evolution of the EHDS Regulation Proposal.

While the European goal is principally to encourage secondary use,[36] recent versions of the regulation proposal (from December 2023, and the most recent update of April 2024) show a scenario with greater restrictions than those proposed in the first version. The first limitation is that the original version of the proposal did not require explicit consent (or 'opt-in') from the interested party for the secondary use of their data for scientific research and experimentation. However, the amended 2023 version now requires their explicit consent when secondary use and, therefore, experimentation involve 'genetic, genomic, human proteomic data (such as genetic markers), and data from biobanks'[37] as well as 'data from wellness applications'.[38] A second limitation concerns the matter of who is authorised to access electronic health data. The amendments now require that access be obtained through a formal application[39] for one of the purposes specified in Art 34, para 1 of the proposal by the following authorised entities: public bodies, private, and non-profit organisations, as well as individual researchers with a clear connection with public health. As for private entities, both the absence of profit and a connection with healthcare, public

[35] On this issue cf also M. Ciancimino, 'Circolazione "secondaria"' n 3 above, noting Corte di Cassazione 7 October 2021 no 27325.

[36] To better achieve various healthcare goals to the benefit of society, such as research, innovation, policy development, preparedness and response to health threats, patient safety, personalised medicine, official statistics, and regulatory activities, referred to as 'secondary use' of electronic health data.

[37] See amendment 312, Art 33 proposal, para 5 *bis*. Letter *m* is no longer there. See also amendment 39 introducing a new Recital 39 *bis*.

[38] It is uncertain whether this limitation will be maintained in the final text.

[39] See Art 45 proposal, as amended in no 417.

health, or medical research are required.[40]

Thus, many problematic aspects are still unsolved. Questions regarding the scope of 'biobank data' and 'data from wellness applications', and the matter of the legal basis for secondary use of electronic health data requiring prior explicit consent ('opt-in') remain answered. If the legal basis for processing such data is 'left to the determination of the applicant' it is therefore necessary to consider the solutions adopted by Member States. These may impose additional conditions or restrictions concerning the processing of genetic, biometric, or health-related data.[41]

The results presented in this work reveal a complex regulatory landscape marked by conflicts between norms (antinomies). In this context, the legal issue of the 'primary' and 'secondary' use of electronic health data can only be resolved by maintaining a balanced stance that supports medical science. Medicine must be approached from a perspective that takes a neutral stance between the ideology of the right to health as a life goal, serving only the public interest, and the logic of profit, which solely benefits powerful private interests.

From this perspective, it has been proposed to amend the Italian legal framework, which currently envisages an untoward combination of public and private interests, allowing health data processing initially intended to benefit the public to be 'requalified' for profitmaking purposes. The underlying idea is not to prohibit all use of health data for financial gain but to permit their use, while upholding stricter standards protecting the freedom and autonomy of the individuals involved in the processing.[42] While it is permissible under certain circumstances to process health data without consent, these cases should be limited to activities that benefit the entire community. The pursuit of profit will still be permitted, provided that the individuals involved are treated with due respect and their consent is obtained for any additional practices.

Consequently, when implementing preventive medicine, early diagnosis, or genetic prediction[43] on a large scale, it is essential to strike a balance between values and uphold the principles of personalisation and humanisation to ensure that public health considerations do not become the only factor used to evaluate human life.

[40] See the amended text and cf Recital 41 not present above. See also Recital 40 *quater* expressing support for experimentation.

[41] See Amendment 6 introducing a new recital 3 *bis*. Any action by the Ministry on this point is awaited. On the right to health see P. Perlingieri, 'Il diritto alla salute quale diritto della personalità', in Id, *La persona e i suoi diritti* (Napoli: Edizioni Scientifiche Italiane, 2005), 101.

[42] This kind of approach is crucially imporant in light of the fundamental principles laid down in the EU Treaties and the Constitutions of the EU member states: cf P. Perlingieri, 'Privacy digitale e protezione dei dati personali tra persona e mercato' *Foro napoletano*, 481 (2018); A. Gambino, 'Dignità umana e mercato digitale', in G. Contaldi ed, *Il mercato unico digitale* (Roma: Nuova Editrice Universitaria, 2018), 7. Recently F. Viterbo, 'Princípi di trattamento e di governance dei dati personali in àmbito sanitario' *Rassegna di diritto civile*, 1443 (2023).

[43] On the issue of predictive medicine, see the notable works of C. Donisi, 'Gli enigmi della medicina predittiva', in C. Buccelli e C. Casella eds, *Ricerche di biodiritto* (Napoli: Edizioni Scientifiche Italiane, 2020), 3.

Corporate and Financial Markets Law

Some Backdrops and Prospective Scenarios About the Emerging 'Law of Sustainable Business Organizations'

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Abstract

The terms 'sustainability' and 'company' have been progressively used together in our day-to-day talks. Yet – at least at first sight – they may seem at odd with each other. In fact, the future of our planet – and, namely, the future of human and other animal species, of plants, and their respective biodiversity – is heavily (and will increasingly be) impacted by the ways and by the extent we, the people leaving on Earth, will succeed in making these two key notions (and the many, complex, multi-level implications that each of them in turn entails) fully integrated and compatible. On these premises, the essay will try to offer, first, an outline of the current significance of each of these two expressions; and then, some reasons why their necessary combination would represent one of the current major challenges of contemporary business organizations laws around the globe. The work argues that an emerging legal field of interdisciplinary research and teaching, that could be labeled the 'Law of Sustainable Business Organizations', seems to address this goal, taking up this 'jigsaw' of legal and non-legal ESG-related topics, from the specific standpoint of the incorporated firms' typical structures and functions. The gradient of sustainability of the modern, for-profit, company *vis-à-vis* the many, interconnected ESG-related issues is alimenting this multidisciplinary research field, that – albeit concentrated in the business law area – could be fully understood by adopting a 'holistic' method; and that calls, inter alia, for intergovernmental coordination. Attaining for-profit business organizations' full ESG risk compliance would be the result of a sophisticated 'alchemy' of both regulatory and voluntary approaches, that is, of hard law (and often mandatory provisions) and soft law (and often optional) rules to be applied using the proportionality principle. Hence, finding a viable trade-off between ESG-related problems and market freedom represents the main challenge the Law of Sustainable Business Organizations ought to face in the following decades.

I. Introduction

The terms '*sustainability*' and '*company*' (or '*corporation*')[1] have been progressively used together in our day-to-day talks. Yet – at least at first sight – they may seem at odd with each other. *Sustainability*, in the last fifteen/twenty years, has been increasingly offered as a sort of methodological antidote to the multiple entanglements of the environmental, social, and governance (ESG) problems – and

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[1] The term 'company' is more commonly used in British law (eg in the UK 'Company Act' of 2006), whereas the term 'corporation' is more commonly used in US law (see, eg, the 'Delaware General Corporation Law'). Unless specified otherwise, hereinafter the two terms will be used interchangeably.

thus, to the correlated trades and businesses' risks and responsibilities that have started to detrimentally impact the survival conditions of our Mother Earth in the long run. On the other hand, the (for-profit) *company* – the most relevant and diffused business organization vehicle in the capitalistic/free-market economies (and even where capitalism is formally rejected) – has often been addressed as a 'much reviled as an externalizing, short-termist, inward-focused, politically manipulative machine'.[2]

In fact, the *future of our planet* – and, namely, the future of human and other animal species, of plants, as well as their respective biodiversity and ecosystems – is heavily (and will increasingly be) impacted by the ways and by the extent *we, the people leaving on Earth*, will succeed in making these two key notions (and the many, complex, multi-level implications that each of them in turn entails) *fully integrated* and *compatible*.

In the following pages, I will try to offer, first, an outline of the current significance of each of these two expressions; and then, some reasons why their necessary combination would represent one of the current major challenges of contemporary business organizations laws around the globe.

Anticipating some of this essay's conclusive remarks, an emerging legal field of interdisciplinary research and teaching seems to address this goal, taking up this 'jigsaw' of legal and non-legal ESG-related topics, from the specific standpoint of the incorporated firms' typical structures and functions; and it could be labeled as the 'Law of Sustainable Business Organizations'. The corporate ESG viability (that is, the 'sustainability' of the modern, for-profit, 'corporation' *vis-à-vis* the many, interconnected ESG-related issues) is alimenting a multidisciplinary research field, that – albeit concentrated in the business law area – could be fully understood only by adopting a 'holistic' method, which, on one hand, needs intergovernmental coordination (thus in turn calling for comparative

[2] A.R. Palmiter, 'Awakening Capitalism: A Paradigm Shift' (25 November 2021), 3, available at https://tinyurl.com/mreet52x (last visited 30 September 2024). The expression 'externalizing machine' often recurs among corporate law and corporate governance scholars, albeit it is unclear whom should it be originally attributed to: probably, such a perspicuous expression should be traced back to R.A.G. Monks and N. Minow's first co-authored book, *Power and Accountability: Restoring the Balances of Power Between Corporations and Society* (New York: Harper Collings Publishers Ltd, 1991), as claimed by the Authors on page 16 of the third edition of their classic hornbook *Corporate Governance* (Malden, MA-Oxford, UK: Blackwell, 2004); on the use of such expression, see also L.E. Mitchell, *Corporate Irresponsibility: America's Newest Export* (Hartford, CT: Yale University Press, 2001), 49-65 (chapter 2: 'The Perfect Externalizing Machine'). For a definition of the corporation, in connection with a critical definition of 'capitalism', see, eg, A.R. Palmiter, *Sustainable Corporations* (Washington: Aspen Publishing, 2023), 104 ('the corporation – particularly the large, multinational corporation that dominates the US and global economy – is an expression of the essentially extractive, responsibility-avoiding, short-term focused, inward looking, and politically manipulative philosophy that we call Capitalism. The corporation's relationship to labor and capital, to production and the environment, to current desires and long-term needs, and to democracy and elitism are all relationships implicit in modern Capitalism', of which the corporation thus represents the 'principal instrument'): see also para 4.

analyses); and, on the other hand, spans across the multifaceted province of the law and extends beyond it. Certainly, matching effectively such quest for companies' ESG viability constitutes a complicated and rather sensitive task. To be sure, attaining for-profit business organizations' full ESG risk compliance would be the result of a sophisticated 'alchemy' of both regulatory and voluntary approaches, that is, of hard law (and often mandatory provisions) and soft law (and often optional) rules. Ultimately, to be meaningful and effective, the multifaceted Law of Sustainable Business Organizations should be addressed at finding that alchemy internationally, so as to be evenly enforced in a multi-jurisdictional dimension and avoiding to disproportionally compress private ordering and the innovation incentivizing market freedom.

II. 'Sustainability': Some Notes on a New 'Buzzword'[3]

Sustainability could be, and it is typically employed to define – from a qualitative point of view – an *intertemporal connection* between a *current viable status* and a *future viable status* of virtually any object, activity, conducts, species, etc. In its very general meaning, it may be referred, and it could be applied to many different topics and phenomena: for example, it may establish a connection between the present use (or misuse) of a parcel of land as a vineyard and the possibility of its continued agricultural use in ninety-nine years from today, by taking into consideration the current (as well as the short-term and/or the long-term) choices and methods of harvesting the field in question.

The concept of sustainability projects present behaviors into the future; actually, it *discounts present* behaviors *against* (the very possibility of) *future* ones and their relative values – not necessarily their economic (or monetary) values, though.[4] To be sure, this notion imports a preference for long-term *vis-à-vis* short-term (public and private market actors') plans and/or investments.[5]

[3] A.M. Pacces, 'Sustainable Corporate Governance: The Role of the Law', in D. Busch et al eds, *Sustainable Finance in Europe - Corporate Governance, Financial Stability and Financial Markets* (Cham, CH: Palgrave-Macmillan-Springer, 2021), 151 ('Sustainability is a buzzword and a policy goal'); H. Fleischer, 'Corporate Purpose: A Management Concept and its Implications for Company Law' *European Company and Financial Law Review*, 161, 162 (2021) (albeit referring to the strictly correlated expression 'corporate purpose', that 'found its way into the boardrooms of larger companies'). On the same tune, see also F. d'Alessandro, 'Il mantello di San Martino, la benevolenza del birraio e la *Ford* modello *T*, senza dimenticare *Robin Hood* (divagazioni semi-serie sulla c.d. responsabilità sociale dell'impresa e dintorni)' *Rivista di diritto civile*, 409, 460 (2022).

[4] D. Weisbach and C.R. Sunstein, 'Climate Change and Discounting the Future: Guide for the Perplexed' 27 *Yale Law & Policy Review*, 433 (2009); T. Verheyden et al, 'ESG for All? The Impactof ESG Screening on Return, Risk, and Diversification' 28 *Journal of Applied Corporate Finance*, 47 (2016).

[5] As it has been noticed, long-term approaches generally tend to exacerbate wealth distributive problems, since – almost by definition – long-term policies require, in the short term, more sacrifices than those entailed by short-term policies: on this point, see F. Denozza, 'Scopo della società e interesse degli *stakeholders*: dalla "considerazione" all'"*empowerment*" ', in M. Castellaneta and F.

Favoring or not (and to what extent) short-term projects, as opposed to long-term ones, is essentially (albeit not exclusively) a matter of policy. Apparently, *public policy* (political choices) when these projects are within the province of any of the public interests (and, thus, governmental powers); *private policy*, when investments and/or (other economic-oriented or non-economic-oriented) plans are within the province of private agents, usually acting in some markets, that is, according to some free market/free enterprise principles.

However, as we will see in paras 3, 5, 6 and 7, the pervasive notion of 'sustainability' tends to blur and event to tilt such a distinction, because – at least in its general and most common sense – both public (that is, general communities') interests and private (ie market) interests are almost inevitably involved in the process of its attainment.

Not surprisingly, then, *sustainability* has been increasingly used to relate – and thus to assess, from several different points of view – the *viability* of current worldwide human *actions* (or *inactions*), including regulatory activism, with respect to *future* conditions of human, other animals, and plants, on planet Earth. Not coincidentally, this is exactly what the general concept of 'sustainability' – as applied to the 17 Sustainable Development Goals, contemplated in the UN 2030 Agenda for Sustainable Development, as adopted in Fall 2015 – entails. Indeed, back in 1987, 'sustainable development' has been defined by the *Bruntland Report*, as the development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.[6]

Vessia eds, *La responsabilità sociale d'impresa tra diritto societario e diritto internazionale* (Napoli: Edizioni Scientifiche Italiane, 2019), 63, 79; F. Denozza, 'Lo scopo della società tra *short-termism* e *stakeholder empowerment*' *Rivista Orizzonti del Diritto Commerciale*, 29 (2021); Id, 'Incertezza, azione collettiva, esternalità, problemi distributivi: come si forma lo *short-termism* e come se ne può uscire con l'aiuto degli *stakeholders*' *Rivista delle società*, 297 (2021). See also: L.E. Strine Jr, 'One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?' 66 *The Business Lawyer*, 1 (2010); K. Greenfield, 'The Puzzle of Short-Termism' 46 *Wake Forest Law Review*, 627 (2011); J.C. Coffee Jr, 'The European Commission Considers "Short-Termism" (And "What Do You Mean By That?")' available at https://tinyurl.com/mr39w9p4 (last visited 30 September 2024); M. Stella Richter Jr, 'Long termism' *Rivista delle società*, 16 (2021); B. Choudhury and M. Petrin, 'Corporate Purpose and Short-Termism', in A. Afsharipour and M. Gelter eds, *Research Handbook on Comparative Corporate Governance* (Cheltenham: Edward Elgar, 2021) 73; M.V. Zammitti, '*Long-termism* e *short-termism* nella ricerca di strategie di sostenibilità' *Rivista Orizzonti del Diritto Commerciale*, 255 (2021). Recently, see also M.J. Roe, *Missing the Target - Why Stock Market Short-Termism is Not the Problem* (Oxford-New York: OUP, 2022).

[6] In 1987, the World Commission on Environment and Development (WCED), (which had been set up in 1983), published a report entitled 'Our common future' ('*Report of the World Commission on Environment and Development: Our Common Future*', transmitted to the United Nations General Assembly as an Annex to document A/42/427, available at https://tinyurl.com/4mtj8ahn (last visited 30 September 2024). The document came to be known as the '*Brundtland Report*' after the Commission's chairwoman, Gro Harlem Brundtland. It developed guiding principles for sustainable development as it is generally understood today. In 1989, the report was debated within the UN General Assembly, which decided to organize a UN Conference on Environment and Development in 1992, in Rio de Janeiro, that tabled the UN Framework Convention on

III. We – the People Living on Earth – Have No 'Planet B'!

Recent scientific surveys on 'planetary boundaries',[7] economic studies, sociological researches,[8] reports by the most authoritative inter-governmental and non-governmental organizations ('NGOs') – such as, for example, the Intergovernmental Panel on Climate Change ('IPCC') *Six Assessment Report* of 2022[9] – and even Pope Francis, in his Encyclical *Laudato Sì* of 2014,[10] are warning us that planet Earth is currently under very dangerous distress – 'at a

Climate Change (that entered in force in 1994): see under fn 21.

[7] The planetary boundaries framework defines a safe operating space for humanity based on the intrinsic biophysical processes that regulate the stability of the Earth system: see, eg J. Rockström et al, 'Planetary Boundaries: Exploring the Safe Operating Space of Humanity' 14 *Ecology and Society* (2009), available at https://tinyurl.com/3xm8wr7f (last visited 30 September 2024); D. Griggs et al, 'Sustainable development goals for people and planet'495 *Nature*, 305 (2013); G.M. Mace et al, 'Approaches to defining a planetary boundary for biodiversity' 28 *Global Environmental Change*, 289 (2014); W. Steffen et al, 'Planetary boundaries: Guiding human development on a changing planet' 347 *Science*, 1259855-1/11, 736 (2015); A. Brown, 'Planetary Boundaries' 5 *Nature Climate Change*, 19 (2015); F. Biermann and R.E. Kim, 'The Boundaries of the Planetary Boundary Framework: A Critical Appraisal of Approaches to Define a "Safe Operating Space" for Humanity' 45 *Annual Reviews of Environment and Resources*, 497 (2020); L. Persson et al, 'Outside the Safe Operating Space of the Planetary Boundary for Novel Entities' *Environmental Science & Technology* (2022). See also C. Karayalcin and H. Onder, 'Coping with climate shocks: Ecosystems Versus Economic Systems' (15 May 2023), published in the official website of *The Brookings Institution*, available at https://tinyurl.com/bapu9t88 (last visited 30 September 2024); B. Sjåfjell and C.M. Bruner, 'Corporations and Sustainability', in Eid eds, *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge-New York: Cambridge University Press, 2019), 3, 4-5 and 7-11.

[8] J. Robinson, 'Squaring the Circle: Some Thoughts on the Idea of Sustainable Development' 48 *Ecological Economics*, 369 (2004); M. Leach et al, 'Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity', in OECD ed, *World Social Science Report 2013: Changing Global Environment* (Paris: OECD Publishing 2013), 84-90; K. Raworth, 'A Safe and Just Space for Humanity - Can We Live Within The Doughnut?' (February 2012), Oxfam Discussion Paper, available at https://tinyurl.com/yu77fm8y (last visited 30 September 2024); Id, *Doughnut Economics – Seven Ways To Think Like a 21st-Century Economist* (London: Chelsea Green Publishing, 2017); S.S. Vildåsen et al, 'Clarifying the Epistemology of Corporate Sustainability' 138 *Ecological Economics*, 40 (2017).

[9] The IPCC is the United Nations body for assessing the science related to climate change. Over time, its three Working Groups prepared a series of 'impact assessment' reports (and a Synthesis Report) about the state of scientific, technical and socio-economic knowledge on climate change, its impacts and future risks, and options for reducing the rate at which climate change is taking place. With specific regard to the 6th IPCC Impact Assessment Report, the Working Group I contribution ('Climate Change 2021: The Physical Science Basis') was finalized in August 2021; the Working Group II contribution ('Climate Change 2022: Impacts, Adaptation and Vulnerability') was published in February 2022; the Working Group III contribution ('Climate Change 2022: Mitigation of Climate Change'), was completed in April 2022, and the Synthesis Report was accomplished in March 2023. The IPCC also produces Special Reports on topics agreed to by its member governments, as well as Methodology Reports that provide guidelines for the preparation of greenhouse gas inventories.

[10] Available at https://tinyurl.com/bdfhc3r2 (last visited 30 September 2024). See, eg, M. Cian, 'Dottrina sociale della Chiesa, sviluppo e finanza sostenibili, contributi recenti' *Rivista delle società*, 53 (2021).

precipice', using CERES' words:[11] that is, our current 'way of life' is *unsustainabl*e, at least if we want to secure a viable future for the next generations of humans, animals generally, and plants (including their respective biodiversity and ecosystems).

Notably, the highest priority appears to be represented by the need to stop and to redress the environmental pollution emergencies and the consequent global warming phenomenon,[12] mainly caused (but the black list is clearly much longer than the following examples) by the GHCs emissions on the atmosphere,[13] in turn alimented by continuous massive use of fossil energy sources for industrial, commercial, and household uses, by some intensive firming and agricultural methods, by the dispersion and/or waste of water and of other scarce natural resources, the systematic eradication and burning of large portions of pluvial forests, etc.

Since our planet's critical environmental, as well as social and economic conditions – as the three are inextricably interrelated[14] – soon could become

[11] See CERES, *Ceres Roadmap 2030-A 10-year Action Plan for Sustainable Business Leadership* (2020), available at https://tinyurl.com/5y3pa4st (last visited 30 September 2024). Ceres is a nonprofit organization based in Boston (MA, USA), that – according to its website – is 'working with the most influential capital market leaders to solve the world's greatest sustainability challenges'. Through its 'networks and global collaborations of investors, companies and nonprofits', CERES drives 'action and inspire equitable market-based and policy solutions throughout the economy to build a just and sustainable future'.

[12] See, eg, C. Rosenzweig and P. Neofotis, 'Detection and attribution of anthropogenic climate change impacts' 4 *WIRWs Climate Change*, 12 (2013), available at https://tinyurl.com/nhffyzra (last visited 30 September 2024). See also MSCI, 'MSCI Net-Zero Tracker Report' (July 2023 Update) – 'A periodic report' by MSCI, a leading international investment consulting firm, based in New York, NY on 'progress by the world's listed companies toward curbing climate risk', is available for download at https://tinyurl.com/3ea8nb7t (last visited 30 September 2024). This *Report* warns that, whereas the Paris Agreement of 2015 (entered into force on 2016 within the United Nations Framework for Climate Change Convention of 1992, entered into force in 1994: see fn 21) set forth the 'threshold of limiting the rise in average global temperatures to 1,5 degrees Celsius (1.5°C, or 2.7°F) above preindustrial levels (…) the planet has warmed by nearly 1.3°C already'; and 'that while companies are pledging to reduce their emissions, preventing the costliest warming will require companies and investors to redouble their ambitions and back climate commitments with action' (quoting the proceedings from the Bonn Climate Change Conference held from 5 to 15 June, 2023, within the United Nations Framework Convention on Climate Change. Official documents can be retrieved at: https://unfccc.int/sb58).

[13] GHGs emissions (including CO_2 emissions) are mainly caused by continuous massive use of fossil energy sources, by some intensive firming and agricultural methods, dispersion and/or waste of water and of other scarce natural resources, the systematic eradication and burning of large portions of pluvial forests, etc.). For a relatively recent country-by-country data on CO_2 emissions (and GHG emissions, generally), see, eg, H. Ritchie et al, *CO_2 and Greenhouse Gas Emissions* (2020), published online at *OurWorldInData.org*, available at https://tinyurl.com/32ruke4w (last visited 30 September 2024).

[14] V. Thomas, 'The Truth About Climate Action Versus Economic Growth' (3 May 2023), available athttps://tinyurl.com/4xypus26(based on the Author's book *Risk and Resilience in the Era of Climate Change* (Singapore: Palgrave-Macmillan, 2023) (last visited 30 September 2024) recently wrote that, until the recent past, 'Economic growth has taken precedence over environmental protection on the premise that raising living standards for people now must have priority over preserving nature for future generations. But this way of thinking runs into trouble when the destruction of natural capital rises to such a height that it blocks growth itself. The crucial question is

irreversible, they all prompt national governments, private institutions, and each one of us to join in what should be an energic (re-)action, not only to the daily pollution of our *environment* (by, eg, CO_2 and GHCs emissions, generally), but also to *social* (human rights violations, unsafe/unhealthy labor conditions, gender inequalities, etc), *market* opportunisms,[15] and *governance* distortions and/or inefficiencies, both at public (governmental, intergovernmental) level and at private level, thereby involving different kind of persons and entities, political institutions, and even economic systems, such as, for example, regulated and unregulated local and global markets, all kinds of (incorporated and unincorporated) business organizations – including groups of companies, often organized as multinational enterprises (MNEs) – hybrid organizations, not-for-profit entities, and NGOs (which, albeit organized as private entities, typically advocate and/or pursue public interest goals), etc. None can pull the pin on this one.

Thus, everyone may (sadly) consider that the issues generated by the globalization of markets and economies are now matched – so to speak – and to some extent embedded by an array of transnational environmental, social, economic, and governance problems – ie, the now popular ESG '*triad*'.[16]

As obvious as it may appear, just as market boundaries have been gradually dismantled, so that every single country and/or regional economic area is increasingly influenced by business operations occurring in other trades and/or industries, today the same holds true with regard to those detrimental factors affecting our 'planetary boundaries' (again: global warming, social and economic disparities, and public and/or private governance deficiencies, etc), as they occur at every latitude and they are able to exert mutual impacts on each other, irrespective of each nation's frontiers,[17] thereby calling for harmonized legislative and/or

whether runaway climate change puts to rest the growth-versus-environment dichotomy, necessitating that they be seen as the two sides of the same coin. The answer is an unambiguous yes at the global level, and a qualified yes at the country level. (…). Climate action is not only complementary to poverty reduction but in key respects, the former is a necessary condition for the latter. When one-third of Pakistan goes underwater and 10 percent of GDP is wiped out, building flood defenses becomes synonymous with poverty reduction'. See, also, B. Sjåfjell and C.M. Bruner, n 7 above, 6-7 ('The idea that law and policy can be compartimentalized, with environmental issues left to environmental law, labor issues left to labor law, and so on, while imagining that the result will somehow become a consistent whole is outdated and has proven unworkable in practice') and A.R. Palmiter, 'Capitalism, Heal Thyself' *Rivista delle Società*, 293, 293-295 (2022).

[15] The concept of 'opportunism' (often also referred to as 'moral hazard') has been defined as 'self-interests seeking with guile' by a famous *Law and Economics* scholar (and Nobel Prize laureate in Economic Sciences in 2009), O.E. Williamson, *The Economic Institutions of Capitalism* (New York: The Free Press, 1985), 47; Id, 'Opportunism and Its Critics' 14 *Managerial and Decision Economics* (Special Issue), 97 (1993). More recently, 'opportunism' has been defined as 'the practice of engaging in actions that sacrifice ethical principles to benefit oneself at the expense of others' by S.D. Jap et al, 'Low Stakes Opportunism' 50 *Journal of Marketing Research*, 216, 216 (2013). For the use of 'opportunism' within the *corporate governance* setting, see *sub* fn 61.

[16] See, eg, A.R. Palmiter, 'Capitalism' n 14 above, 298-299.

[17] B. Sjåfjell and C.M. Bruner, n 7 above, 6-7 ('In addition to the rampant problem with lack

governmental interventions (also) in the economic setting – ie, in the province of 'private ordering' – thus ultimately intruding inside the realm of business organizations' (that is, in the companies' and especially multinationals') networks of contractual and/or quasi-contractual relationships.

Therefore – if approached under such particular respect – the term *sustainability*, not only calls for an *immediate* moral and ethical – that is, mainly *voluntary*[18] – self-restraint of individuals', groups' (and even governments') discretionary use of 'scarce resources' – including natural resources, such as, for example, *clean*, *drinking water* – in order to preserve the very possibility to maintain animal and plant life on Earth (comprised of the preservation of their respective levels of biodiversity) *in the future*, that is, for future generations.[19] But it also increasingly prompts the enactment of a compelling and coordinated set of rules, meant to achieve – using the law and its typical enforcement tools – those same results that are assumed to be not attainable on a mere voluntary and/or cooperative basis (ie, by exclusively resorting to private ordering instruments).

Consequently, selecting and implementing those legal rules would be no longer just part of a single market's or just a group of firms' self-imposed best practice – often accompanied by a reputation enhancement purpose, albeit sometimes tainted by (anticompetitive) 'greenwashing' behaviours. Instead, these compelling regulations would (need to) be enforced with the *rationale* of fostering the entire globe's 'common good': that is, again, the preservation of the all *flora* and *fauna* respective species, and, thus, the attainment of a globally viable social and economic environment and for the sake of currently young, as well as for the future generations of our planet – not just to preserve our single 'backyard'.

If an immediate and globally coordinated reaction to the *status quo* – which shall thus be also comprised of adequate (that is, *proportionate*) legal enforcement

of legal compliance within national borders, the international and fragmented nature of business further challenges' the 'idea that law and policy can be compartmentalized'. Indeed 'The size, complexity and power of modern corporations highlight the fallacy of this silo approach to law and policy. Simply put, corporations can easily structure their businesses to evade a given jurisdiction's regulatory power'). See also J. Zhao, 'Extraterritorial Attempts to Addressing Challenges to Corporate Sustainability', in B. Sjåfjell and C.M. Bruner eds, n 7 above, 29.

[18] Thus, not surprisingly, one of the main features of the several CSR policies adopted by business organizations worldwide, is their voluntary character: see, eg, H.W. Micklitz, 'Organizations and Public Goods', in S. Grundmann et al, *New Private Law Theory - A Pluralist Approach* (Cambridge: Cambridge University Press, 2021), 414, 419; A. Beckers, *Enforcing Corporate Social Responsibility Codes - On Global Self-Regulation and National Private Law* (Oxford-Portland (OR): Bloomsbury-Hart Publishing, 2015); C. Angelici, 'Divagazioni sulla "responsabilità sociale" d'impresa', in M. Castellaneta and F. Vessia eds, *La responsabilità sociale n 5 above*, 19, 24-25; F. Denozza and A. Stabilini, 'The Shortcomings of Voluntary Conceptions of CSR' *Rivista Orizzonti del Diritto Commerciale*, 1 (2013); J.P. Gond et al, 'The Government of Self-Regulation: On the Comparative Dynamics of Corporate Social Responsibility' 40 *Economy and Society*, 640 (2011).

[19] See, *ex pluribus*, M. Abrescia, 'Un diritto al futuro: analisi economica del diritto, Costituzione e responsabilità tra generazioni', in R. Bifulco and A. D'Aloia eds, *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale* (Napoli: Jovene, 2008), 161.

measures – ought to be deemed both necessary and urgent in order to (try to) redress an unsustainable (ab)use of our planet, it should also be added that – to be meaningful and effective – such reaction must be carried out *simultaneously* by every country on earth, by policing those behaviors that are exacerbating the current environmental emergency, socio-economic disparities and shortcomings, and (private and public) governance distortions of the previous two factors (including 'greenwashing' and 'social-washing' unethical and anticompetitive phenomena): that is, the ESG risk factors *triad*. In the last decade, the ESG-related risks factors (all, or just some of them) have inexorably become part of our common chats, dinner parties' talks, politicians' agendas, newspapers articles and investigative reportages, as well as academic multidisciplinary discourses.[20]

And yet, as of today – whereas many are already well aware of the very simple *fact* that we have 'no planet B' – we, the people living on Mother Earth, unfortunately are still quite far from witnessing (and welcoming) any real and effective coordination of efforts at international (ie, at inter-state) level to curb ESG-related problems, but for the 'soft' outcomes generated from the annual COPs,[21]

[20] An attempt to contribute to this interdisciplinary debate on the magnitude of the *ESG risks* and/or on the level of *ESG sustainability* was offered by the Padova Multidisciplinary Summer School on 'Corporate Sustainability: From CSR to ESG' that I had the privilege to plan, organize, and direct, in September 2022, at the School of Law of the University of Padova (which on that same year celebrated its 800th anniversary since its foundation). The five-days long intensive program involved some thirty academics and experts from three different Continents, and almost one hundred students from four different Continents, who have been presenting and discussing the ongoing transition from the CSR voluntary approach to the ESG regulatory approach from many different legal and economic perspectives, but sharing the fundamental methodological premise – at the basis of this interdisciplinary academic initiative – that complex corporate sustainability issues call for holistic solutions. See, eg, F. Vella, 'Il pericolo di un'unica storia: il diritto (commerciale) e le nuove frontiere dell'interdisciplinarità' *Rivista Orizzonti del Diritto Commerciale*, 775 (2021).

[21] 'COP' stands for 'Conference(s) of the Parties', to the United Nations Framework Convention on Climate Change ('UNFCCC'), of which the COP represents the highest permanent decision-making body. The UNFCCC was originally proposed at the Intergovernmental Negotiating Committee in New York from 30 April to 9 May 1992, and it was then opened for signature in occasion of the UN Conference on Environment and Development (UNCED), held in Rio de Janeiro, from 3 to 12 June 1992, when 154 countries adhered to it. The text of the UNFCCC, can be retrieved at https://tinyurl.com/y5fue2ma (last visited 30 September 2024). The UNFCCC entered into force on the 21 March 1994 (upon its official ratification by 50 States). The first annual COP was held in 1995 (in 2020 the COP was not held, due to the Covid pandemic. A list of the COP sessions, with updated links to the COP official transcripts and official documents, can be retrieved at https://tinyurl.com/399d2pem (last visited 30 September 2024)). The 'Kyoto Protocol', which was signed in 1997, was the first official international follow-up of the UNFCCC, and it was then superseded by the Paris Agreement of 2015, which entered into force in 2016. The Paris Agreement is an international treaty on climate change, adopted by 196 Parties at the UN Climate Change Conference (so called 'COP21') in Paris, on 12 December 2015 (see the Decision 1/CP/21, entitled 'Adoption of the Paris Agreement', included in the UN Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, dated 29 January 2016, and available at https://tinyurl.com/5xx79wz9 (last visited 30 September 2024)). The Paris Agreement entered into force on 4 November 2016. Its main purpose is to bond UN countries to implement adequate measures so as to hold 'the increase in the global average temperature to well below 2° C above pre-industrial levels' and to deploy adequate efforts 'to limit the temperature

along with the slightly more compelling effects (albeit not directly binding on private companies) stemming from the 2011 *UN Guiding Principles on Business and Humar Rights*,[22] coped with the recently revised OECD's *Guidelines for Multinational Enterprises on Responsible Business Conduct*.[23]

These recommendations are addressed by the UN to member states: and then, in turn, by (some) of these states' governments to national and multinational enterprises; they are intended to exert pressure on corporate management (as well as, possibly, on their respective investors) so as to make them adhering to social rights and to environmental protection and precaution standards, both in their market operations and in their governance structures, including company group's 'value chain': that is, making sure that those supranational recommendations will be respected, not only by each subsidiary pertaining to any multinational group of companies, but also by each additional independent business organization forming part of each MNE's respective 'supply chain(s)'.[24]

increase to 1,5° C above pre-industrial levels'. United Nations Climate Change (UNFCCC secretariat), *What is the Paris Agreement? How does the Paris Agreement work?* (2020), available at the United Nations Climate Change Official Website, https://tinyurl.com/4fr4skuf (last visited 30 September 2024). By 2022, the UNFCCC counts 198 parties.

[22] The 'UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' ('UN Guiding Principles') have been endorsed by the UN Human Rights Council by its Resolution no 17/4, of 16 June 2011, and are addressed to the UN's member States. They are also known as the '*Ruggie Principles*', after the name of the late Harvard University professor John G. Ruggie, who was appointed in 2005 as a UN Special Representative for Business and Human Rights and who drafted the UN Guiding Principles. See, eg, J.G. Ruggie, *Just Business - Multinational Corporations and Human Rights* (New York: W.W. Norton and Company, Inc., 2013); see also I. Bantekas and M.A. Stein eds, *The Cambridge Companion to business and Human Right Law* (Cambridge: Cambridge University Press, 2021; K. Morrow and H. Cullen, 'Defragmenting Transnational Business Responsibilities - Principles and Process', in B. Sjåfjell and C.M. Bruner eds, n 7 above, 43; H. Liu, 'The Environmental Protection Responsibility of Multinational Enterprises' 16 *Highlights in Business, Economics and Management*, 485 (2023).

[23] The 2023 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' ('OECD MNEs Guidelines') are recommendations addressed by the OECD to governments and, indirectly, to multinational enterprises; therefore, they are not legally binding on private entities. According to their contents' synopsis, available at the OECD web page on 'Responsible Business Conduct' ((https://tinyurl.com/bdh4dd3f (last visited 30 September 2024), where the OECD MNEs Guidelines can be downloaded)), the OECD MNEs Guidelines 'aim to encourage positive contributions enterprises can make to economic, environmental and social progress, and to minimise adverse impacts on matters covered by the Guidelines that may be associated with an enterprise's operations, products and services. The OECD MNEs Guidelines cover all key areas of business responsibility, including human rights, labour rights, environment, bribery and corruption, consumer interests, disclosure, science and technology, competition, and taxation. The 2023 edition of the OECD MNEs Guidelines provides updated recommendations for responsible business conduct across key areas, such as climate change, biodiversity, technology, business integrity and supply chain due diligence, as well as updated implementation procedures for the National Contact Points for Responsible Business Conduct'.

[24] R. McCorquodale et al, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' 2 *Business and Human Rights Journal*, 195 (2017); B. Fasterling, 'Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk' 2 *Business and Human Rights Journal*, 225 (2017); K. Buhmann, 'Neglecting the Proactive Aspect

IV. The Second Prong of the Analysis: the Modern (for-Profit) Corporation, as the Key Actor of the Capitalistic System, Strategically Placed at the Crossroad of Every Sustainability Issue (and, thus, at the Intersection of Each of the 17 UN's Sustainable Development Goals)

The preceding remarks suffice to suggest that each of the environmental, social, and governance *sustainability* factors – the general notion of 'ESG sustainability' – swiftly impinges into the very nature of the market economy's most relevant 'legal product': what I am keen in calling the 'incorporated firm', *id est*, the modern (for-profit) 'corporation' (or 'company').[25] Indeed, the incorporated firm does

of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action' 3 *Business and Human Rights Journal*, 23 (2018); V. Ulfbeck et al eds, *Law And Supply Chain Management - Contract and Tort Interplay and Overlap*, (London-New York: Routledge, 2019); G. Quijano and C. Lopez, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?' 6 *Business and Human Rights Journal*, 241 (2021); T. Nguyen, 'The Structural Complexity of Multinational Corporations and the Effect on Managing Huma Rights Risks in the Supply Chain', in I. Bantekas and M.A. Stein eds, n 22 above, 560; G.A. Sarfaty, 'Global Supply Chain Auditing', in B. van Rooij and D.D. Sokol eds, *The Cambridge Handbook on Compliance* (Cambridge: Cambridge University Press, 2021), 977; F. Wettstein, *Business and Human Rights - Ethical, Legal, and Managerial Perspectives* (Cambridge: Cambridge University Press, 2022), 142; E. Partiti, 'The Place of Voluntary Standards in Managing Social and Environmental Risks in Global Value Chains' 13 *European Journal of Risk Regulation*, 114 (2022). In connection with both, the German Law on the companies due diligence obligations throughout their respective supply chain (*Lieferkettensorgfaltsgesetz/LkSG*) and the consequent EU Commission's Corporate Due Diligence Directive ('CSDDD') proposal of 23 February 2022, as amended, that was finally adopted on the 24th of May, 2024 (according to the press release available at https://tinyurl.com/84ahy5df (last visited 30 September 2024)), see J.G. Ruggie, 'European Commission Initiative on Mandatory Human Rights Due Diligence and Directors' Duties' (February 2021), Harvard J.F. Kenney School of Government, available at https://tinyurl.com/bdw67pum (last visited 30 September 2024); and see *amplius* in para 6, *sub* nos 74 and 81.

[25] See n 1 above. For the proposition that the (for-profit) company (or corporation) – as the most relevant organizational form of a trade or business 'enterprise' – represents the key institution of modern and contemporary capitalism, see, eg, L. Talbot, 'Corporate Governance and the Political Economy of the Company', in B. Sjåfjell and C.M. Bruner eds, n 7 above, 86, 87 ('capital formation in early capitalism was generally organized under the legal form of a partnership, but by the end of the nineteenth century, it was predominantly organized under the company'), and 90 ('the modern company became the business form of choice in the late nineteenth century because it enables capital to transcend its boundedness to a particular business and to seek out new profitable areas. It allows capitalists to have no commitment to the long-term development of a business, only its capacity to deliver profits. Company law enables capital to become alienated from the productive entity and thus to limit its exposure to company debts'); see also, B. Sjåfjell and C.M. Bruner, n 7above, 5-6 ('The corporation has been cited as one of the most ingenious legal inventions of modern history, making it possible for capital from investors to be channelled to risky business ventures (…)';thus the 'legal form of the corporation remains the principal mode of organisation of large, capital-intensive business, and their regulation is often the default point of reference in the law and policy of other business forms'; moreover, 'Corporate law and corporate governance concern the regulation of the most impactful units in our economy (…)'); E. McGaughey, *Principles of Enterprise Law* (Cambridge: Cambridge University Press, 2022), 1 (pointing out that the 'Modern enterprise, most often organized in corporation and by the state', is characterized by 'three functions – of finance, governance and' allocation of 'rights'; and it 'accounts for the incredible growth, welfare and

constitute the most common form of for-profit 'enterprise';[26] and in that capacity it comes into play as the second term being addressed in these introductory remarks on the emerging body of law concerned with 'corporate sustainability'.[27]

Thus, the aforementioned ESG sustainability issues question what I would call the incorporated firm's current 'ESG viability' – that is, the *gradient* of sustainability of for-profit companies, as the more relevant and statistically more recurrent model to organize and to carry out any enterprise, 'firm', or (using the European Union law terminology) 'undertaking':[28] that is, any trade or business, worldwide,

prosperity of humankind since the Industrial Revolution'); A.R. Palmiter, *Sustainable Corporations* n 2 above, xxvii (defining the 'corporation' as 'the most dominant institution in our modern world').

[26] E. McGaughey, n 25 above, 2 ('enterprise law is almost entirely about corporations and states, and their use or abuse of power'); R.A.G. Monks and N. Minow, *Corporate Governance* (Malden (Ma)-Oxford (UK): Blackwell, 3rd ed, 2004), 14 ('Corporations are such a pervasive element in everyday life (…). Corporations do not just determine what goods and services are available in the marketplace, but more than any other institution, corporations determine the quality of the air we breathe and the water we drink, and even where we live'). See also A.A. Berle Jr, 'The Theory of Enterprise Entity' 47 *Columbia Law Review*, 343, 344 (1947); T. Raiser, 'The Theory of Enterprise Law in the Federal Republic of Germany' 36 *American Journal of Comparative Law*, 111, 113-114 (1988). According to E. McGaughey, n 25 above, 1, 'The ideas of the 'entrepreneur', the 'state-owned' enterprise, the 'multinational enterprise' or the 'enterprise state' are powerful psychological and social concepts as well as legal ones (…)'.Moreover, the term 'enterprise' has also been employed by the EU legislator, eg, in Art 4(18) of the Regulation (EU) no 2016/679, General Data Protection Regulation ('GDPR'), where an 'enterprise' means 'a natural or legal person engaged in an economic activity, irrespective of its legal form'. As pointed out by E. McGaughey, *Principles of Enterprise Law*, quot., 2, the term 'enterprise' has been frequently used also in the UK legal system, as the 'UK has passed various 'Enterprise Act' (…)'. Recently, on the Italian notion of 'entrepreneur' ('imprenditore'), see, *ex pluribus*, G. Marasà, *L'imprenditore - Artt. 2082-2083*, in *Commentario del Codice civile*, directed by F.D. Busnelli (Milano: Giuffrè, 2021).

[27] B. Sjåfjell and C.M. Bruner, 'Corporations and Sustainability' n 7 above, (first – at 4 – distinguishing a 'weak' from a 'strong sustainability' form; and then – at 11 – laying down their workable definition of 'corporate sustainability' as 'business and finance contributing to the overreaching aim of securing the social foundation for people everywhere, now and in the future, while remaining within the planet boundaries. More specifically, this involves business and finance creating value in a manner that is: (a) *environmentally* sustainable, in that ensures the long-term stability and resilience of the ecosystems that support human life; (b) *socially* sustainable, in that it facilitates the achievement of human rights and other basic social rights, as well as good governance; and (c) *economically* sustainable, in that it satisfies the economic needs necessary for stable and resilient societies'). See also, from different perspectives, A.R. Palmiter, 'Awakening Capitalism' n 2 above; M. Amini and C.C. Bienstock, 'Corporate Sustainability: An Integrative Definition and Framework To Evaluate Corporate Practice and Guide Academic Research' 76 *Journal of Cleaner Production*, 12 (2014); S.V. Sagen et al, 'Clarifying the Epistemology of Corporate Sustainability' 138 *Ecological Economics*, 40 (2017); B. Purvis et al, 'Three Pillars of Sustainability: In Search of Conceptual Origins' 14 *Sustainability Science*, 681 (2019); A. Bartolacelli, 'Editorial. Sustainability and Company Law: A Long Path to Walk' 18 *European Company Law*, 4 (2021).

[28] The term 'undertaking', referred to any form of economic activity operating in the market, recurs in both EU legislation and in the EU Court of Justice ('CJEU') decisions: see, eg, CJEU, 19 February 2002, C-309-99, *Wouters*, available atwww.curia.eu¸ para 46,stating that: 'According to settled case-law, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed' (and quoting, Case C-41/90 *Höfner and Elser* v *Macrotron GmbH*, [1991] ECR I-1979, para 21; Case C-244/94 *Fédération française des sociétés d'assurances and Others*, [1995] ECR I-4013,

adopting organizational structures and/or business models that tend (are inherently designed) to externalize (ie, to displace on someone else's shoulders) its business-generated economic, social, and environmental costs.[29]

It should be briefly recalled that for-profit companies could be qualified as organized 'legal vehicles', specifically designed to steadily engage in a trade or business in the market(s) of the production and/or the distribution of good and/or services, with the aim of at least covering organizational and operating costs with revenues earnt from those activities, but, often, also with the specific purpose of generating profits to remunerate the risk of those who contributed equity capital to the enterprise. Whether the profit 'purpose' (or 'motive') ought to be embedded in all, or just in some, types or forms of business organizations

para 14; and Case C-55/96 *Job Centre*, [1997] ECR I-7119, '*Job Centre II*', para 21), and para 47, according to which 'It is also settled case-law that any activity consisting of offering goods and services on a given market is an economic activity' (and quoting Case 118/85 *Commission* v *Italy,* [1987] ECR 2599, para 7; Case C-35/96 *Commission* v *Italy*, [1998] ECR I-3851, '*CNSD*', para 36). More recently, see also CJEU, decision of 6 October 2021, C-882/19, *Sumal* v *Mercedes BenzTrucks España S.L.* available at www.curia.eu, where, under para 39, the Court, *inter alia*, reminded that: '(…) the concept of 'undertaking', within the meaning of Art 101 TFEU, (…) constitutes an autonomous concept of EU law (…)' (quoting judgment of 14 March 2019, *Vantaan kaupunki* v*Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, para 47) and para 40, where it added that: 'In the same way, it follows from European Parliament and Council Directive 2014/104/EU of the 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349, 1), and in particular from Art 2(2) thereof, that the same legislature defined the 'infringer' upon whom it is incumbent, in accordance with that directive, to provide compensation for loss caused by the infringements of competition law attributable to that 'infringer', as being 'an undertaking or association of undertakings which has committed an infringement of competition law'.

[29] Whereas I share the position of those who believe that (for-profit) companies, like any other business (and non-business) organizations, should be(come) 'sustainable', in the light of (and in order to concur in redressing) the current global environmental, social and economic emergencies, the language I prefer to use – 'ESG viability of for-profit companies' (and for-profit business organizations, generally) – allows me to better liaise it to the idea (further developed in para 7) that incorporated for-profit firms – to be intended as the most relevant form of organizations implementing the (often constitutionally protected) 'business freedom' (or 'freedom of enterprise', as it is sometimes also referred to) – should be *limited* by legal provisions, but not 'functionalized' – ie, 'bended', so to speak – to the active pursuance of societal purposes, by subjecting the for-profit company to structural (internal) limits: that is, the free enterprise principle (which shall apply also *vis-à-vis* governmental directions) should not be altered by the law (or even sub-legislative provisions) so as to make them instrumental to (ie, a mere function of) the direct attainment of common interest goals, which is what a public, not a private entity, should be incorporated for. Of course, such very sensitive and complex topic almost inevitably leads to the more general question of whether business organizations should be entrusted with – and thus whether they should be compelled to carry out – societal purposes (namely fostering the attainment of public policy goals related to the ESG issues and/or to the SDGs), thereby becoming *quasi-public entities*, as the *longae manūs* of the governmental action. In turn, the question about the rationale, the legitimacy, and the nature of the (necessary) limits to enterprise's freedom almost inevitably falls within the *shareholderisms* vs *stakeholderisms* never-ending debates, and, ultimately, about the fine line allegedly dividing the *private law* and *public law* provinces. On these very complex and mutually entangled issues, see some bibliographical references under fns 30, 46, 49-50, 57, 84, and 85.

(and, if so, to what extent it could be legitimately opted out and to what extent would, or should, such 'for-profit purpose' necessarily entail the maximization of shareholders' wealth) is still a highly debated issue, to whom numerous and assorted answers have been offered with regard to different jurisdictions:[30] however, this

[30] Under Italian business organizations law – whereas the general notion of 'firm' (or 'enterprise'), as set forth under Art 2082 of the Italian Civil Code (see *sub* fns 26 and 28), has been traditionally interpreted as a qualified (market) activity not necessarily (but only typically) requiring a for-profit motive, but just to be carried out by means of an 'economic method' (ie, as a 'viable going concern') – Italian partnerships and companies (excluding cooperatives companies and, to some extent, consortia) used to be deemed to pursue a profit purpose ('*scopo di lucro*'), according with Art 2247 of the Italian Civil Code (which explicitly includes the 'profit motive' – '*allo scopo di dividerne gli utili*' – among the legal elements concurring in both the partnership's contract and company's contract common definition). On the long-lasting debate on the scope, intensity, and compulsory character of the corporate (for-profit) purpose, in the Italian perspective, in addition to the Authors quoted *sub* footnote 85, see also, *ex multis*: C. Angelici, *La società per azioni*, I - *Principi e problemi*, in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2012), 90-93 and 345-348; Id, 'Divagazioni' n 5 above, 27-28; U. Tombari, *Corporate Power and Conflicting Interests - What Purpose and Whose Interests Should Corporate Directors Pursue?* (Milano: Giuffrè , 2021), 73; E. Barcellona, Shareholderism versus Stakeholderism - *La società per azioni contemporanea dinanzi al profitto* (Milano: Giuffrè, 2022), 59, 64, 67-70, and 221-225; on the generally accepted assumption that the general notion of 'enterprise', as set forth under Art 2082 of the Italian Civil Code, does not necessarily require a profit intent, but simply a reasonable prospective to cover costs with revenues (ie, the consistent implementation of an 'economic method' in organizing and in carrying out any trade or business), see G. Marasà, *L'imprenditore* n 26 above, 20-22, 29, and 119-122. In a German perspective, see, eg, A. Riechers, *Das Unternehmen an sich - Die Entwicklung eines Begriffes in der Aktienrechtsdiskussion des 20 Jahrhunderts* (Tübingen: J.C.B. Mohr-Siebeck, 1990); F. Laux, *Die Lehre vom Unternehmen an sich. Walther Rathenau und die aktienrechtliche Diskussion in der Weimarer Republik* (Berlin: Duncker & Humblot, 1998); A. Bruce and C. Jeromin, *Corporate Purpose – das Erfolgskonzept der Zukunft: Wie sich mit Haltung Gemeinwohl und Profitabilität verbinden lassen* (Wiesbaden: Springer-Gabler, 2020). In a comparative German-French perspective, see, eg H. Fleischer, 'Unternehmensinteresse und intérêt social: Schlüsselfiguren aktienrechtlichen Denkens in Deutschland und Frankreich (Comparing Unternehmensinteresse and Intérêt Social: A Guided Tour Through Last Century's Corporate Law History in Germany and France)' 47 *Zeitschrift für Unternehmens und Gesellschaftsrecht (ZGR)*, 37 (2018). In a French company law perspective, see, eg, P.H. Conac, 'Le nouvel article 1833 du Code civil français et l'intégration de l'intérêt social et de la responsabilité sociale d'entreprise: constat ou révolution?' *Rivista Orizzonti del Diritto Commerciale*, 497 (2019); T. de Ravel d'Esclapon, 'Rapport Notat-Senard: l'entreprise «objet d'intérêt collectif»' *Dalloz Actualité*, 18 mars 2018(commenting N. Notat et al, *L'entreprise, object d'interêt collectif*, Paris, 9 mars 2018, available at https://tinyurl.com/r8mnhnc4 (last visited 30 September 2024)); S. Schiller, 'L'évolution du rôle des sociétés depuis la loi PACTE' *Rivista Orizzonti del Diritto Commerciale*, 517 (2019); I. Urbain-Parleani, 'L'article 1835 et la raison d'être' *Rivista Orizzonti del Diritto Commerciale*, 533 (2019). For a UK perspective, see, eg, J.S. Liptrap, 'Bristih Social Enterprise' 21 *Journal of Corporate Law Studies*, 595 (2021). In a Spanish perspective, see the essays collected by M.C. Chamorro Domínguez et al eds, *Derecho de Sociedades y Sostenibilidad* (Madrid: La Ley, 2023). In a U.S. corporate law perspective, see, eg, D.J.H. Greenwood, 'Telling Stories of Shareholder Supremacy' 2009 *Michigan State Law Review*, 1049, 1072 (2009); L.A. Stout, *The Shareholder Value Myth - How Putting Shareholders First Harms Investors, Corporations and the Public* (San Francisco: BK Publishers, 2012); L.E. Strine Jr, 'Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit' 47 *Wake Forest Law Review*, 135 (2012); B.S. Sharfman, 'Shareholder Wealth Maximization and Its Implementation Under Corporate Law' 66 *Florida Law Rev*iew, 389 (2014); J.M. Heminway, 'Shareholder Wealth Maximization as a

very complex problem cannot be dealt *funditus* within the scope of this essay.

For profit companies' main rules are usually sourced from a national 'Business Organizations Law', sometimes compounded in a general private law 'Code' (eg, in the Italian Civil Code), or in a dedicated domestic 'act' or 'statute' (eg, the UK Company Act of 2006), on the assumption of a freedom of incorporation/freedom of establishment principle. Moreover, business organizations laws[31] of virtually every jurisdiction worldwide, while enabling business ventures both, to self-regulate themselves (at least to some variable extent), and to build and nourish business networks by means of private ordering instruments (including the ability of companies, as legal persons, to 'create progeny pretty much at will',[32] thereby spawning corporate groups), and often on a multinational basis, also vest corporations with two main structural features, ie, 'legal personality' and, almost inevitably, 'limited liability' privilege for its members ('shareholders' or 'stockholders'),[33] the

Function of Statutes, Decision Law, and Organic Documents' 74 *Washington and Lee Law Review*, 939 (2017); S.J. Padfield, 'The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization' 19 *Transactions: The Tennessee Journal of Business Law*, 415 (2017); D.G. Yosifon, 'Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?' 41 *Delaware Journal of Corporation Law*, 461 (2017); E.C. Chaffee, 'The Origins of Corporate Social Responsibility' 85 University of Cincinnati Law Review, 353, 356-357 and 371-374 (2017); R.J. Rhee, 'A Legal Theory of Shareholder Primacy' 102 *Minnesota Law Rev*iew, 1951 (2018); S.M. Bainbridge, *The Profit Motive - Defending Shareholder Value Maximization* (Cambridge-New York: Cambridge University Press, 2023), 11-12. For some additional comparative references, see, *ex pluribus*, M. Maugeri, "Pluralismo" e "monismo" nello scopo della s.p.a. (glosse a margine del dialogo a più voci sullo *statement* della *Business Roundtable*)' *Rivista Orizzonti del Diritto Commerciale*, 637 (2019); A. Bartolacelli, 'The Unsuccessful Pursuit for Sustainability in Italian Business Law', in B. Sjåfjell and C.M. Bruner eds, *The Cambridge Handbook* n 7 above, 290.

[31] Intuitively,'Business Organization law' represents a wider notion than 'Company law' or 'Corporations law', since it includes, *inter alia*, the rules governing partnerships, special types of companies such as cooperatives, the US 'limited liability companies', and other 'hybrid' entities (on the US business organizations forms, see, eg, E.H. Franklin, 'A Rational Approach to Business Entity Choice' 64 *Kansas Law Review*, 573 (2016); L. Johnson, 'Pluralism in Corporate Form: Corporate Law and Benefit Corporations' 25 *Regent University Law Review*, 269 (2013); L.E. Ribstein, *The Rise of Unincorporation* (Oxford-New York: University Press Oxford, 2009); Id, 'Making Sense of Entity Rationalization' 58 *The Business Lawyer*, 1023 (2003); R. Booth, 'Form and Function in Business Organizations' 58 *The Business Lawyer*, 1433 (2003). Incidentally, it may also be noted that the specific types of 'business organizations' are differently regulated in each jurisdiction and, therefore, the actual 'perimeter' of such general notion should always be ascertained against each legal system.

[32] J. Micklethwait and A. Wooldridge, *The Company - A Short History of a Revolutionary Idea* (New York: The Modern Library, 2003), XV.

[33] While by means of the legislative attribution of 'legal personality' (or 'legal personhood') to the business organization a segregation of each company's member assets from the corporate assets occurs (thereby creating different sets of autonomous assets, ie, the company's assets and each shareholder's own assets: W.O. Douglas and C.M. Shanks, 'Insulation from Liability Through Subsidiary Corporation' 39 *Yale Law Journal*, 193 (1929), the legislative concession of the 'limited liability' privilege prevents corporate creditors to reach into the pockets of the company's members (shareholders), if the company's assets are insufficient to pay the corporate debts. Legal personality and limited liability and are two different legal concepts, performing two different, albeit to some extent complementary functions, that often, but not always, overlap; for example, under Italian Business organizations law, the limited partnership (the 'società in accomandita semplice', or

latter affording the member(s) of the company the ability to segregate – and thus to strategically distance from – the personal risks of economic losses, typically implicated by the investment in the equity of the business legal entity.[34] Diversification and 'insulation' of the ultimate beneficiaries of the corporate operations from business risks ensue almost naturally from the combination of those two common legal characteristics of the (for profit) incorporated firms.

Large companies – especially those whose stocks (and/or bonds) are issued and then traded in securities markets ('public', or 'publicly-held' corporations', or 'listed' companies) – also present two more legal characteristics, ie, the 'free transferability of the shares' (the equity securities representing the residual claims owned by the shareholders) and a complex corporate governance[35] system that also includes a 'centralized' (or 'delegated') management attribute.[36] And many legal scholars

's.a.s.') is usually deemed *not* vested with legal personhood and yet it necessarily contemplates at least one partner enjoying the limited liability privilege and at least one unlimited partner; conversely, the partnership limited by shares (the 'società in accomandita per azioni', or 's.a.p.a.'), while deemed vested with 'legal personality', also necessarily contemplates two sets of shareholders, one of which is necessarily divested of the limited liability privilege, while necessarily vested with the directorial role. Furthermore, in the Anglo-American corporate law setting, it may be recalled that California corporation law did not recognize the limited liability privilege to the stockholders of the California corporations until 1931: see, eg, M.I. Weinstein, 'Limited Liability in California: 1928-1931' (September 2000), available at https://ssrn.com/abstract=244333 (last visited 30 September 2024). On the widely discussed issue of the boundaries of the limited liability privilege, see, eg, H. Hansmann and R. Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' *Yale Law Journal,* 1879 (1991). On the legal personhood hallmark (in the aftermath the famous 2010 US Supreme Court case *Citizen United*), see, eg, E. Pollman, 'Reconceiving Legal Personhood' *Utah Law Review*, 1629 (2011); A. Verstein, 'Enterprise Without Entities' 116 *Michigan Law Review*, 247 (2017). Some fresh approaches to 'legal personality', in connection with the debate over the (appropriate) 'corporate purpose' could be found in the essays collected in E. Pollman and R.B. Thompson eds, *Research Handbook on Corporate Purpose and Personhood* (Cheltenham, UK-Northampton, MA: Edward Elgar, 2021), and in B. Sjåfjell and C.M. Bruner eds, *The Cambridge Handbook* n 7 above.

[34] On the close connection between the *limited liability privilege* – as afforded by the business organizations law virtually everywhere (albeit with exceptions and limits) – and the 'externalization of corporate's harm', see A.R. Palmiter, *Sustainable Corporations* n 2 above, 103 and 105-107.

[35] For a definition of 'corporate governance' see, eg, the OECD, 'G20/OECD Principles of Corporate Governance' (30 November 2015), available athttps://tinyurl.com/3ernxzkr (last visited 30 September 2024); see also Financial Reporting Council, 'UK Corporate Governance Code' (16 July 2018), available at https://tinyurl.com/mskfkxs9 (last visited 30 September 2024), and, additionally, the 'Report on Financial Aspects of Corporate Governance' (1 December 1992) issued by 'The Committee on the Financial Aspects of Corporate Governance', chaired by Sir Adrian Cadbury (the so-called *Cadbury Report*), available at https://tinyurl.com/4dx3bhp9 (last visited 30 September 2024); American Law Institute (M.A. Eisenberg, Chief Reporter), *Principles of Corporate Governance: Analysis and Recommendations*, vol 1, part I (Philadelphia, PA: ALI, 1994), (currently under revision). The Milan Stock Exchange, through its Corporate Governance Committee, also drafted a 'Corporate Governance Code': the latest edition (January 2020) is available at https://tinyurl.com/mth3vf65 (last visited 30 September 2024): see, eg, E. Ginevra, 'Il codice di corporate governance: introduzione e definizioni (con un approfondimento sul 'successo sostenibile')' *Rivista delle società*, 1017 (2023).

[36] The 'delegated' or 'centralized' management hallmark has been traditionally meant to implement what has been defined the 'divorce' of 'property' (of the equity interests held, *pro*

argue for additional and/or different (sets of) main legal characteristics that, according to their respective views, could (and should) be found in the company's common structure.[37]

quota, by the stockholders in public companies) from 'control' (over the public companies' business operations) by a very famous, corporate governance foundational book, *The Modern Corporation and Private Property*, written by professors Adolph A. Berle *Jr* and Gardiner C. Means and published in New York, in 1932 by The Macmillan Company. On such 'divorce' see, *ex multis*, E.F. Fama and M.C. Jensen, 'Separation of Ownership and Control' 26 *Journal of Law & Economics*, 301 (1983); M.M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (Washington D.C: The Brookings Institution, 1995); M.J. Roe, 'Political Preconditions to Separating Ownership from Corporate Control' 53 *Stanford Law Review*, 539 (2000); J.C. Coffee Jr, 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control' 111 *Yale Law Journal*, 1 (2001). Recently, with specific regard to the debate on whether or not the relationship between shareholders and management should still be analysed within the Berle and Means theorem on the separation between 'property' and 'control' in the light of the quest for *corporate sustainability*, see, eg (in addition to the bibliographical references nos above 44, 49, and 50), F. Denozza, 'Lo scopo della società: dall'organizzazione al mercato' *Rivista Orizzonti del Diritto Commerciale*, 615 (2019); Id, 'Scopo della società e interesse degli *stakeholders*: dalla "considerazione" all'"*empowerment*" ', in M. Castellaneta and F. Vessia eds, *La responsabilità sociale d'impresa* n 5 above; A.R. Palmiter, 'Awakening Capitalism' n 2 above, 4; C.A. Williams, 'For Whom is the Corporation Managed and What is Its Purpose', in E. Pollman and R.B. Thompson eds, *Research Handbook* n 33 above, 165-184; E.B. Rock, *Business Purpose and the Objective of the Corporation*, in E. Pollman and R.B. Thompson eds, *Research Handbook* n 33 above, 27; E.B. Rock, 'For Whom is the Corporation Managed in 2020?: The Debate Over Corporate' 20 *NYU School of Law, Law and Economics Research Paper Series* 16, (2020) available athttps://tinyurl.com/mr4ytfhp (last visited 30 September 2024); L.E. StrineJr, 'Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy. A Reply To Professor Rock' (December 2020), available at https://tinyurl.com/6h87a22v (last visited 30 September 2024); H. Fleischer, 'Corporate Purpose: A Management Concept and its Implications for Company Law' *European Company and Financial Law Review*, 170 (2021); G. Ferrarini, 'Redefining CorporatePurpose: Sustainability as a Game Changer', in D. Busch et al eds, *Sustainable Finance in Europe - Corporate Governance, Financial Stability and Financial Markets* (Cham (CH): Palgrave-Macmillan-Springer, 2021), 85; J. Fish and S. Davidoff Solomon, 'Should Corporations have a Purpose?' 99 *Texas Law Review*, 1309 (2021), and, more recently, S.M. Bainbridge, *The Profit Motive* n 30 above. On the topic-correlated impact of the ESG-factors analysis on the allocation of powers to shareholders, see, in addition, F. Partnoy, 'Shareholder Primacy is Illogical', in E. Pollman and R.B. Thompson eds, *Research Handbook* n 33 above, 186; L.M. Fairfax, 'The Shareholder-Stakeholder Alliance: Exposing the Link Between Shareholder Power and the Rise of a Corporate social Purpose', in E. Pollman and R.B. Thompson eds, *Research Handbook* n 33 above,109; L. Enriques, 'ESG and Shareholder Primacy: Why They Can Go Together', in P. Câmara and F. Morais eds, *The Palgrave Handbook of ESG and Corporate Governance* (Cham, CH: Palgrave-Macmillan-Springer, 2022), 131; M.C. Chamorro Domínguez, 'La Influencia de los Socios en la Consecución de la Sostenibilidad Corporativa', in Id and A.J. Viera González eds, *Derecho de Sociedades* n 30 above, 265. See also M.C. Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' 22 *Journal of Applied Corporate Finance*, 32 (2010) (previously published in 12 *Business Ethics Quarterly*, 235 (2002)).

[37] See, generally, R.C. Clark, *Corporate Law* (Boston: Little Brown & Co, 1986) 2-5; R.A.G. Monks and N. Minow, *Corporate Governance* (Chichester, UK: John Wiley & Sons, 5th ed, 2011), 7; R. Kraakman et al, *The Anatomy of Corporate Law*, (Oxford-New York: Oxford University Press, 3rd ed, 2017), 5 (adding a fifth element to the four already indicated in the text and in fn 5, ie, 'investor's ownership'); E.B. Rock, 'Business Purpose' n 33 above, 31 (adding also 'Capital lock-in'). See also A.R. Palmiter, 'The US Corporate Elephant' (February 2005), available at https://tinyurl.com/7yc43hh3 (last visited 30 September 2024), pointing out seven main characteristics of US corporate law, in

Such organizational elements of the modern company – especially publicly-held corporations – concur in raising large amounts of (equity and debt) capital, thus creating, in turn, the pre-conditions for carrying out capital intensive trade and business activities, and for the creation of capital markets and securities markets generally, all of which constituting, in turn, the necessary 'ingredients' to foster a globalized market economy.[38]

I already pointed out the essential role the modern corporation played (and that it is still playing) in establishing and fostering all the variants of the contemporary capitalistic systems. Now it should be added that the modern company will inevitably play a concurring key-role in attaining ESG viability (or, according to a different nomenclature, 'corporate sustainability'). Typical business risks associated both, with incorporated firms' market-related choice of conducts (companies' operational behaviours) and with their organizational options (that is, associated with each incorporated firm's choice of corporate governance model), influence and at the same time are influenced by ESG-related factors (and correlated risks).

This will become apparent as soon as one shall realize that none of the 17 Sustainable Development Goals ('SDGs') set forth in the UN 2030 Agenda for

turn to be intended as a 'creature' of state (not US federal) law, and especially referring to Delaware General Corporation law and to the American Bar Association's *Revised Model of Business Corporation Act* (according to *Wikipedia* (https://tinyurl.com/2f2uf88b (last visited 30 September 2024)), a 'model act' or a 'model law' is a 'model legislation', ie, 'a suggested example for a law, drafted centrally' – usually by non-governmental organizations like, eg, the American Legal Institute and the United Nations Commission on International Trade Law – 'to be disseminated and suggested for enactment in multiple independent legislature. The motivation classically has been the hope of fostering more legal uniformity among jurisdictions, and better practice in legislative wording, than would otherwise occur; another motivation sometimes has been disguised under such ideals. Model laws can be intended to be enacted *verbatim*, to be enacted after minor modification, or to serve more as general guides for the legislatures'). For a Continental Europe approach to the legal theory of the for-profit companies, see G.H. Roth and P. Kindler, *The Spirit of Corporate Law - Core Principles of Corporate Law in Continental Europe* (München-Oxford-Baden Baden: C.H. Beck-Hart-Nomos), 2013.

[38] The history of the modern company – as a medium-to-extra-large, incorporated, capital-catalyser firm – can be found, eg, in J. Micklethwait and A. Wooldridge, *The Company* n 32 above; S. Gialdroni, *East India Company. Una storia giuridica (1600-1708)* (Bologna: il Mulino, 2011); Ead, 'A Commercial Soul in a Corporate Body: From the Medieval Merchant Guilds to the East India Company', in B. Van Hofstraeten and W. Decock eds, *Companies and Company Law in Late Medieval and Early Modern Europe* (Leuven: Peeters Publishers, 2016), 149; Ead, 'Incorporation and Limited Liability in Seventeenth Century England. The Case of the East India Company', in D. De Ruysscher et al eds, *The Company in Law and Practice: Did Size Matter? (Middle Ages-Nineteenth Century)* (Leiden: Brill, 2017), 110; Ead, 'Was the East India Company a "Democratic" Organization? Majority principle and Power Relations in 17th Century England' *RomaTre Law Review*, 37 (2020); O. Gelderblom, et al, 'The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602-1623' 73 *The Journal of Economic History*, 1050 (2013); C. Mayer, *Prosperity* n 25 above, 61. With a specific focus on the US corporation, see, eg, L.M. Friedman, *A History of American Law* (Oxford-New York: OUP, 4th ed, 2019), 8, and C.R.T. O'Kelly, 'The Evolution of the Modern Corporation: Corporate Governance Reform in Context' *University of Illinois Law Review*, 1001 (2013); more recently, see also W. Magnuson, *For Profit - A History of Corporations* (New York: Basic Books, 2022).

Sustainable Development (adopted by the UN General Assembly in September 2015) could be attained without the active participation (not necessarily a voluntary cooperation, though) of the main global markets' actors, the corporations.[39] Indeed, both unincorporated and incorporated firms – and especially multinational enterprises (groups of companies) – happen to be strategically placed at the crossroads of each and every issue entailed by each and every SDG.[40] Thus, the further remark that each of the 17 SDGs and virtually every ESG-related issue shows an almost complete match, today, would probably represent a sort of truism. Incidentally, it may be added that the main ESG-related issues and the UN's SDGs, tend to overlap also with the principles set forth in Arts 2 and 3 of the Treaty of the European Union (as it was enacted in Lisbon in 2007).

All good, so far? Not really!

Incorporated firms (and for-profit business associations generally, including partnerships) are typically deemed 'profit maximizers': that is, they have been crafted – both structurally and functionally (that is: they are 'inherently' designed[41])

[39] See B. Sjåfjell and M.B. Taylor, 'Clash of norms: Shareholder primacy vs. sustainable corporate purpose' 13 *International and Comparative Corporate Law Journal*, 40-41 (2019), ('there is a contradiction embedded in the notion of sustainable development: a fundamental role for business in creating the value necessary for sustainable development is contradicted by the evidence of the central role played by business in creating unsustainable social and environmental impacts').

[40] See, eg, E. McGaughey, *Principles* n 25 above, 1 (whereas 'Modern enterprise, most often organized in corporation and by the state, gives us the ability to lie a life of splendour and holds the promise of a future when poverty may be forgotten. Yet when out of balance, enterprise law also accounts for inhuman levels of squander, abuse of power and exploitation (…). Enterprise law is probably the dominant cause of the most basic threats that we must resolve in the twenty-first century, namely escalating inequality, climate damage, and war, because enterprise is the primary type of association that stands between polities and families').

[41] This may be held true even if the 'company', as a well-known form of business (for-profit) organization, in many jurisdictions has been (and is being) used for (and thus, so to speak, has been 'bended to') non-profit purposes, thereby vesting (public and private) entities, engaged in a diversified array of no-profit activities with 'legal personality' (and often also with the limited liability privilege for their members), while affording them a viable, well known, manageable, and reliable governance set of rules: this issue, of course, deals (also) with the fine line existing between public law and private law, on one hand (paras 5 and 7), and with the limits to the enterprise freedom, on the other (see para 7). See, eg, H. Hansmann, *The Ownership of Enterprise* (Cambridge, MA: Harvard University Press, 1996). For some bibliographic references on this complex legal issue under the Italian law, see, eg, G. Marasà, *L'imprenditore* n 26 above, 274-342; the essays collected in V. Cerulli Irelli and M. Libertini eds, *Iniziativa economica pubblica e società partecipate* (Milano: Egea, 2019); V. Donativi, *Le società a partecipazione pubblica* (Milano: Wolters Kluwer, 2016); C. Ibba ed, *Le società a partecipazione pubblica a tre anni dal Testo unico* (Milano: Giuffré, 2019); G. Guizzi ed, *La* governance *delle società pubbliche nel d.lgs. n. 175/2016* (Milano: Giuffré, 2017); F. Cerioni ed, *Le società pubbliche* (Milano: Giuffrè, 2023). See also, A. Caprara, *Impresa pubblica e società configurazione giuridica tra autonomia* (Napoli, Edizioni Scientifiche Italiane, 2017); E. Codazzi, *La società in house. La configurazione giuridica tra autonomia e strumentalità* (Napoli: Editoriale Scientifica, 2018). Before the enactment of the Italian consolidated law on state-owned companies (Legislative Decree 19 August, 2016, no 175, as amended), see, eg, C. Ibba, *Le società "legali"* (Torino: Giappichelli, 1992); F. Santonastaso, *Le società di diritto speciale*, in R. Costi ed, *Trattato di diritto commerciale* founded by V. Buonocore, IV (Torino: Giappichelli, 2009), 10. From a public law perspective, *ex multis*, see F. Goisis, *Contributo allo studio delle società in mano pubblica come persone giuridiche*

– to foster their 'natural' and typical 'profit motive'.[42] This means, in turn, that their respective management usually aims at reducing costs and/or incrementing revenues connected to the firms' trade or business activities. The structure – that is the *corporate governance* model – of for-profit companies has been traditionally crafted (and 'bended') to that end.

Moreover, if the company is listed in a securities market, the (market) value of its outstanding shares will usually reflect (*inter alia*) the economic and the financial results attained by the issuing company, thereby triggering an additional incentive for management to show adequate returns to the company's investors, possibly in the short-term, to justify their compensations (and bonuses) and, ultimately, to keep their jobs, together with a good reputation.

These (and others) turned up as being good enough reasons to make the 'incorporated firms' the world's main *social cost externalizers*:[43] that is, companies, virtually everywhere, tend to place the costs of their business operations – and not necessarily monetary and/or current costs, but also non-pecuniary and/or future costs – on the shoulders of the society at large and/or on those of specific groups of people – generally addressed as the *company's stakeholders*[44] – which, while somehow connected to the company (and/or its trade or business activities), on one hand, are not enjoying the economic benefits of the trade or business each corporation engages in, and that, on the other hand, will be detrimentally affected by the enterprise's operations.

Thus, if, for example, a company engages in the manufacturing of some chemical products, which later proved to be cancerogenic, and the chemical waste are dumped in the river running by the firm's premises, whereas the profits earned from the chemical business will only benefit the incorporated firms' investors (as well as its management), the resulting water pollution will affect the (long-term) health conditions of the people using the downhill waters for household (eg, drinking, cleaning) purposes, thereby causing to this group of corporate stakeholders to bear a 'social cost' consisting in the dealing with the consequences – sometimes even lethal

(Milano: Giuffrè, 2004); P. Pizza, *Le società per azioni di diritto singolare tra partecipazioni pubbliche e nuovi modelli organizzativi* (Milano: Giuffrè, 2007); M. Cammelli and M. Dugato eds, *Studi in tema di società a partecipazione pubblica* (Torino: Giappichelli, 2008).

[42] B. Sjåfjell and C.M. Bruner, *Corporations* n 7 above, 5-6. And, again, see fns 30, 36, 44, 49, 50, and 85.

[43] A.R. Palmiter, Sustainable Corporations n 2 above, xxvii, 101, and 103-104. For an illustration of the term 'externality', see, eg, E. McGaughey, *Principles* n 25 above, 70. See also, D. Dharmapala and V.S. Khanna, 'Controlling Externalities: Ownership Structure and Cross-Firm Externalities, *Journal of Corporate Law Studies*, 1, 23, (2021). On (firm's) externalities see the seminal essay by R.H. Coase, 'The Problem of Social Cost' 3 *Journal of Law and Economics*, 1 (1960).

[44] See, eg, R.E. Freeman et al, *Stakeholder Theory - The State of the Art* (Cambridge: Cambridge University Press, 2010); M. Gelter, 'Sustainability and Corporate Stakeholders', in A. Engert et al eds, *Business Law and the Transition to a Net Zero Carbon Economy* (Oxford-München: C.H. Beck-Nomos-Hart Publishing Verlagsgesellschaft, Baden-Baden Hart Publishing, 2021), 50-55. See also *sub* fns 30, 36, 49, 50, and 85.

consequences – of the corporate activities.[45]

The societal concerns that incorporated firms have been traditionally eliciting because of their social costs externalizing attitudes, together with the political role[46]

[45] Recently, see eg, C. Grasso, 'The Aspartame Debate: Are Economic Interests Clouding the Truth?' *The Corporate Social Responsibility and Business Ethics Blog* (27 August 2023), available at https://tinyurl.com/27rv7svn (last visited 30 September 2024).

[46] This is the problem of the consequences of the overreaching (and sometimes unconscionable) economic power exerted by economic (ie, market) actors, such as, especially, multinational group of companies, and the consequential interference of the formers with the democratic decision-making processes of sovereign states, and thus with each sovereign state's domestic and foreign politics, so as to transform the economic power into a *lato sensu* 'political power'; of course, such issue is not new: see J. Habermas, *Between Facts and Norms - Contributions to a Discourse Theory of Lawand Democracy* (translated by W. Rehg), (Cambridge, UK – Maiden, MA: Polity Press-Blackwell Publishing-The MIT Press, 1996) 433-434 ('State sovereignty is undermined to the extent that powerful corporations are involved in the exercise of political authority without being legitimated for this and without submitting to the usual responsibilities incumbent on government authorities'). See also, G. Rossi, *Il mercato d'azzardo* (Milano: Adelphi, 2008), 17-18; W.G. Friedmann, 'Corporate Power, Government by Private Groups and the Law' 57 *Columbia Law Review*, 155 (1957); A.S. Miller, 'The Corporation as a Private Government in the World Community' 46 *Virginia Law Review*, 1539 (1960); J.S. Nye Jr, 'Multinational Corporations in World Politics' 53 *Foreign Affairs*, 153 (1974); T.J. Biersteker, 'The Illusion of State Power: Transnational Corporations and the Neutralization of Host-Country Legislation' 17 *Journal of Peace Researc*h, 207 (1980); D. Mazzeo, 'The State and the Transnational Corporation: An International Perspective' 10 *Journal of Eastern African Research& Development*, 1-27 (1980); J. Robinson, *Multinationals and Political Control* (Aldershot: Gower Publishing Co Ltd, 1983); A. Uhlin, 'Transnational Corporations as Global Political Actors: A Literature Review' 23 *Cooperation and Conflict*, 231 (1988); J. Bakan, *The Corporation. The Pathological Pursuit of Profit and Power* (New York: Free Press, 2004); Id, *The New Corporation - How "Good" Corporations are bad for Democracy* (New York: Vintage Books, 2020); P.A. Gourevitch and J. Shinn, *Political Power and Corporate Control - The New Global Politics of Corporate Governance* (Princeton, NJ: Princeton University Press, 2005); J.M. Kline, 'MNCs and Surrogate Sovereignty' 13 *Brown Journal of World Affairs*, 123 (2006); A.G. Schereret et al, 'Global Rules and Private Actors: Toward a New Role of the Transnational Corporation in Global Governance' 16 *Business Ethics Quarterly*, 505 (2006); S.D. Cohen, 'Multinational Corporations versus the Nation-State: Has Sovereignty Been Outsourced?', in Id, *Multinational Corporations and Foreign Direct Investment: Avoiding Simplicity, Embracing Complexity* (New York: Oxford Academic, 2007), 233-251; D.A. Detomasi, 'The Multinational Corporation and Global Governance: Modelling Global Public Policy Networks' 71 *Journal of Business Ethics*, 321 (2007); F. Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (Stanford: Stanford University Press, 2009); D.J.H. Greenwood, 'Essay: Telling Stories of Shareholder Supremacy' *Michigan State Law Revi*ew, 1049, 1072-1073 (2009); C. Dörrenbächer and M. Geppert eds, *Politics and Power in the Multinational Corporation - The Role of Institutions, Interests and Identities* (Cambridge: Cambridge University Press, 2011); L.C. Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order' 18 *Indiana Journal of Global Legal Studies*, 751 (2011); K. Irogbe, 'Global Political Economy and the Power of Multinational Corporations' 30 *Journal of Third World Studies*, 223 (2013); W. Hussain and J. Moriarty, 'Corporations, the Democratic Deficit, and Voting' 12 *Georgetown Journal of Law & Public Policy*, 429, 432-433 (2014); Id, 'Accountable to Whom? Rethinking the Role of Corporations in Political CSR' 149 *Journal of Business Ethics*, 519 (2018); A.G. Scherer et al, 'The Business Firm as a Political Actor - A New Theory of the Firm for a Globalized World' 52 *Business & Society*, 143 (2014); M. Geppert et al, 'Politics and Power in Multinational Companies: Integrating the International Business and Organization Studies Perspectives' 37 *Organization Studies*, 1209 (2016); J. Mikler, *The Political Power of Global Corporations* (Newark: Polity Press, 2018); I.S. Kim and H.V. Milner, 'Multinational Corporations and their Influence

that some corporate actors – namely large corporations and multinational enterprises[47] – have acquired over time in the international arena, had the effect of recurrently putting companies (and especially multinational groups of corporations) under the national governments' spotlight, thereby making corporate structures (ie, their organizational choices, their means of ensuring that all their agents would respect the rules and principles set forth by the applicable laws, including labor laws, environmental laws, tax laws, antitrust provisions white-collar crimes laws, whistleblowing regulations, etc) and companies' market conducts (also) a matter of public interest: ie, making both aspects falling within the scope of legislative (civil, criminal, tax, and administrative) regulations, that go under the general label of 'corporate compliance and risk management' rules.[48]

Through Lobbying on Foreign Policy', in C.F. Foley et al eds, *Global Goliaths: Multinational Corporations in a Changing Global Economy* (Washington DC: The Brookings Institution, 2021), 497-536; D.S. Lund, 'Asset Managers as Regulators' 171 *University of Pennsylvania Law Review*, 77 (2022). More recently, see also F. Vella, *Proprietà e fini dell'impresa*, forthcoming in the *Proceedings of the International Symposium for the 70th Anniversary of the Rivista delle società*, 'La s.p.a. nell'epoca della sostenibilità e della transizione tecnologica', held in Venice, on 10 and 11 November, 2023, 7-8 of the manuscript (accessed upon the courtesy of the Author). See also the following fn.

[47] P.T. Muchlinski, *Multinational Enterprise and the Law* (Oxford-New York: OUP, 3rd ed, 2021); S. Picciotto, *Regulating Global Corporate Capitalism* (Cambridge: Cambridge University Press, 2011). See also the preceding footnote and fns 19-21. With specific attention to the multinational companies' social responsibilities, see, eg, J.G. Ruggie, 'Multinationals as Global Institutions: Power, Authority and Relative Autonomy' 12 *Regulation & Governance*, 317 (2018); L.C. Backer, '*A* Lex Mercatoria, for Corporate Social Responsibility Codes Without the State? A Critique of Legalization Within the State Under the Premises of Globalization' 24 *Indiana Journal of Global Legal Studies*, 115 (2017); Id, 'Regulating Multinational Corporations: Trends, Challenges, and Opportunities' 22 *The Brown Journal of World Affairs*, 153 (2015); M. Monshipouri et al, 'Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities' 25 *Human Rights Quarterly*, 965 (2003); J. Bennett, 'Multinational Corporations, Social Responsibility and Conflict' 55 *Journal of International Affairs*, 393 (2002). See also, with more specific regard to MNE's *liabilities*, eg, A.R. Palmiter, *Sustainable Corporations* n 2 above, 111 (discussing, *inter alia*, the notable US Supreme Court case *United States* v *Bestfoods*, 524 U.S. 51 (1998)) and 224-226; F.M. Mucciarelli, 'Ricomporre il nesso spezzato: giurisdizione e legge applicabile alle imprese multinazionali' *Rivista delle società*, 349, 351-352 (2021); M.V. Zammitti, *La responsabilità della capogruppo per la condotta socialmente irresponsabile delle società subordinate* (Milano: Giuffré, 2020), passim. In the recent past see also: M. Sornarajah, 'The liability of multinational corporations and home state measures', in Id, *Foreign Investment,* (Cambridge: Cambridge University Press, 5th ed,2021),174-208; K.K. Wodajo, 'Multinational Enterprise Tort Liability and Limited Liability Rule: An Economic Analysis' 29 *International Company and Commercial Law Review*, 283 (2018); P. Muchlinski, 'Limited liability and multinational enterprises: a case for reform?' 34 *Cambridge Journal of Economics,* 915 (2010); S. Joseph, 'Liability of Multinational Corporations: An Integrated Approach to Economic and Social Rights', in M. Lanford ed, *Social Rights Jurisprudence – Emerging Trends in International Law and Comparative Law* (Cambridge: University Press, Cambridge, 2009), 613-627; M.T. Kamminga and S. Zia-Zarifi eds, *Liability of Multinational Corporations under International Law* (The Hague-London-Boston: Kluwer Law International, 2000).

[48] See, eg, S.J. Griffith, 'Corporate Governance in an Era of Compliance' 57 *William and Mary Law Review*, 2075 (2016), and the essays collected in S. Manacorda and F. Centonze eds, *Corporate Compliance on a Global Scale – Legitimacy and Effectiveness* (Cham (CH): Springer, 2022); B. van Rooij and D.D. Sokol eds, *The Cambridge Handbook* n 24 above; S.A. Cerrato ed, *Impresa e rischio - Profili giuridici del* risk *management* (Torino: Giappichelli, 2019); G. Rossi

Therefore, there should be little doubt left on that the latest in time (and possibly the most relevant) set of public interest concerns the private (multinational) enterprises are posing to national governments – as well as at international level – are those associated with the emergencies represented by the many and intertwined ESG risks.

In some relevant respects, this appears as a new chapter of a century-long diatribe – that among *stakeholderisms* and *shareholderisms*[49] – that essentially

ed, *La* corporate compliance*: una nuova frontiera per il diritto?* (Milano: Giuffré, 2017). See also, A. Adotti and S. Bozzolan, *La gestione della* compliance *- Sistemi normativi e controllo dei rischi* (Roma: LUISS, 2nd ed, 2020); A. Lai ed, *Il contributo del sistema di prevenzione e gestione dei rischi alla generazione del valore d'impresa* (Milano: Franco Angeli, 2013). See also the works cited *sub* fns 64-69, and 72.

[49] Besides the often-recalled *Berle* v *Dodd* and *Berle* v *Manne* diatribes (on which see, eg, S.M. Bainbridge, 'Interpreting Nonshareholder Constituency Statutes' 19 *Pepperdine Law Review*, 971 (1992); W.W. Bratton and M.L. Wachter, 'Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation' 34 *Journal of Corporation Law*, 99 (2008); V. Harper Ho, '"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide' 36 *Journal of Corporation Law*, 59, 69-77 (2010), and the famous quote(s) from Milton Friedman *NY Times Magazine* article (published on 13th September, 1970, at 32, and reported in the next fn), see, eg (and with quite different accents), M. Gelter, '*Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light*' 7 *NYU Journal of Law & Buisness*, 641 (2011); Id, 'The Pension System and the Rise of Shareholder Primacy' 43 *Seton Hall Law Review*, 909 (2013); Id, '*Comparative Corporate Governance: Old and New*', in B. Choudhury and M. Petrin eds, *Understanding the Company - Corporate Governance and Theory* (Cambridge: Cambridge University Press, Cambridge, 2017), 37-59; Id, '*EU Company Law Harmonization between Convergence and Varieties of Capitalism*', in H. Wells ed, *Research Handbook on the History of Corporation and Company Law* (Cheltenham, UK – Northampton, MA: Edward Elgar Publishing, 2018), 323-352; L.A. Stout, 'The Problem of Corporate Purpose' *Brookings Issues on Governance Studies*, no 48, (2012), 1-14, available at https://tinyurl.com/yknhe74s (last visited 30 September 2024); C. Mayer, *Prosperity - Better Business Makes the Greater Good*, (Oxford: OUP, 2019); Id et al, '50 years later, Milton Friedman's Shareholder Doctrine is Dead, in Fortune', available at https://tinyurl.com/4jz87h5w (last visited 30 September 2024); L. Enriques, 'Missing in Friedman's Shareholder Wealth Maximization Credo: The Shareholders'65 *Rivista delle società,* 1285 (2020); L.A. Bebchuk and R. Tallarita, 'The Illusory Promise of Stakeholder Governance' 106 *Cornell Law Review*, 91 (2020); C. Mayer, 'Shareholderism Versus Stakeholderism - a Misconceived Contradiction. A Comment on 'The Illusory Promise of Stakeholder Governance' by Lucian Bebchuk and Roberto Tallarita'522 *ECGI - Law Working Paper Series*, (2020); J.F. Sneirson, 'The History of Shareholder Primacy, from Adam Smith through the Rise of Financialism', in B. Sjåfjell and C.M. Bruner eds, *The Cambridge Handbook* n 7 above, 73; K.J. Hopt and R. Veil, 'Gli stakeholders nel diritto azionario tedesco: il concetto e l'applicazione. Spunti comparatistici di diritto europeo e statunitense' *Rivista delle società*, 65, 921 (2020); F. Vella, *Proprietà e fini dell'impresa* n 46 above, 2-3, 9, and 17-19; Id, 'L'impresa e il lavoro: vecchi e nuovi paradigmi della partecipazione' *Giurisprudenza commerciale*, 40, 1120 (2013); R. Rolli, *L'Impatto dei fattori ESG sull'impresa – Modelli di* governance *e nuove responsabilità*, (Bologna: il Mulino, 2020), 78; U. Tombari, *Corporate Power and Conflicting Interests - What Purpose and Whose Interests Should Corporate Directors Pursue?* (Milano: Giuffré, 2021), 6 (but passim); E. Barcellona, *Shareolderism versus stakeholderism* n 30 above, passim; F. d'Alessandro, *Il mantello di San Martino* n 3 above; Id, 'Il diritto delle società dai "battelli del Reno" alle "navi vichinghe"' (1988), in Id, *Scritti di Floriano d'Alessandro* (Milano: Giuffré 1997), I, 447; F. Denozza, 'Due concetti di stakeholderism' *Rivista Orizzonti del Diritto Commerciale*, 37 (2022); A. Alonso Ureba, 'Derecho de Sociedades y Función Económico Social de la Gran Impresa ("Interés Social" Vs "Interés de Impresa": Una Cuestión Abierta)', in M.C. Chamorro Domínguez

tries to establish an equilibrium between (corporate) powers and (social) responsibilities within a free enterprise/free-market economy:[50] but today it is not just about debating the 'pros and cons' of a new corporate governance theory, since the future life conditions of animals and plants living on our planet are now at stake!

The preceding observations – together with those expressed in paras 2 and 3, with regard to the supranational dimension of the *sustainability* issues and their necessary intersections with business organizations' structures and market activities, which in turn call for a joint, coordinated, global inter-governmental responses – may help in further justifying the assertion that I made at the beginning of the current paragraph: that no SDG listed in the UN 2030 Agenda for Sustainable Development (adopted in by the UN General Assembly in September 2015) could realistically be attained without regulating, policing, and sometimes limiting what, according to the Italian taxonomy, goes under the name of the *enterprise freedom*,

and A.J. Viera González eds, *Derecho de Sociedades* n 30 above, 27. See also, K. Schwab (with P. Vahnam), *Stakeholder Capitalism - A Global Economy that Works for Progress, People and Planet* (Hoboken, NJ:John Wiley & Sons Inc., 2021); C. Windbichler, 'The Public Spirit of the Corporation' 15 *EBOR*, (2001), 795; M.S. Spolidoro, Interesse, funzione e finalità. Per lo scioglimento dell'abbraccio tra interesse sociale e Business Purpose' *Rivista delle società*, 69, 322 (2022). See also *sub* fn 46.

[50] See the Authors quoted *sub* nos 36, 44, 49 above and 84 below, and *adde* S.M. Bainbridge, *The New Corporate Governance - In Theory and Practice* (Oxford-New York: OUP, 2008), 15-16 ('corporate governance is made at the margins of an unending competition between two competing values: namely, authority and accountability'); R.A.G. Monks and N. Minow, *Power and Accountability: Restoring the Balances of Power Between Corporations and Society* (New York: Harper Collins Publishers Ltd., 1991); Id, *Watching the Watchers: Corporate Governance for the 21st Century* (Hoboken, NJ: John Wiley & Sons Inc., 1996); R.A.G. Monks, *Corpocracy: How CEOs and the Business Roundtable Hijacked the World's Greatest Wealth Machine - And How to Get It Back* (Hoboken, NJ: John Wiley and Sons, Inc., 2007); L.E. Strine Jr, Corporate Power Is Corporate Purpose I: Evidence From My Hometown' 33 *Oxford Review of Economic Policy*, 176 (2017); Id, 'Corporate Power is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon' 74 *Washington & Lee Law Review*, 1165 (2017); Id, 'The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law' 50 *Wake Forest Law Review*, 761 (2015). It may be worth mentioning that even Milton Friedman, when advocating against stakeholders theories (and, thus, against CSR doctrines) was not compromising on the company's and corporate management's respective duties to fulfil and respect their correlative corporate responsibilities, to the extent that these responsibilities (ie, external limits to 'enterprise freedom', and, thus, incorporated firms' organizational and operational discretion) were mandated by the law: the full quote of the famous Chicago School and Nobel Laureate scholar that has been spawning such an intense (and still vibrant) debate on the legitimacy and limits of CSR approaches (and on stakeholderisms, generally) reads as follows: 'The view has been gaining widespread acceptance that corporate officials and labor leaders have a 'social responsibility' that goes beyond serving the interest of their stockholders or their members. This view shows a fundamental misconception of the character and nature of a free economy. In such an economy, there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud': M. Friedman, *Capitalism and Freedom* (1962) (Chicago-London: University Chicago Press, 40th Anniversary ed, 2002), 133.

usually vested with the business actors – and especially with for-profit (multinational) companies – operating in the marketplace.

One more remark to conclude this paragraph: since any public or private policy concerned with corporate sustainability issues – in order to be meaningful – should entail a high gradient of harmonization at supra-national level, it could be argued that the ESG viability 'mission' will end up embedding a strong case for *convergence* of domestic rules concerned both, with business organizations governance postures and, more generally, with the crucial market roles and responsibilities of business organizations.[51]

V. The Current Relevance of the 'Corporate Sustainability' Concept in Setting the Stage for a New Forefront of the Traditional 'Public Law vs Private Law' Divide

As pointed out in paras 2 and 3, *sustainability* could be framed and understood as a methodological approach, and a correlative set of parameters, used to prevent, to monitor, to measure, and to redress (and/or at least to mitigate) the impact of the many human-generated ESG-related harms (as well as the correlative ESG-related risks factors) on the ability of future generations of women and men, animals generally, and plants to survive in the (not too far) future.

Moreover, as illustrated in para 4, *sustainability* appears inevitably concerned

[51] The respective levels of global 'convergence' and 'persistence' in company law principles and rules, at any given time, is often deemed to depend on many different political, social, economic variables, as well as on each jurisdiction's own cultural roots (see sub n 86 below and accompanying text). In the light of the severe challenges to the apparently most common shareholder-oriented corporate governance model (based on the shareholder wealth maximization purpose, SWM, so widespread globally that often it has been referred to as the 'standard' model) that have been posed in the last two decades by the increasingly diffuse quests for turning (also) the company – wherever incorporated and/or managed – into a ESG-viable business organization form (see, eg, M.M. Blair and L.A. Stout 'A Team Production Theory of Corporate Law' *Virginia Law Review*, 247, 249-253 and 257-58 (1999); B. Sjåfjell, 'Sustainability and Law and Economics: An Interdisciplinary Redefinition of Agency Theory', in Ead et al, *Interdisciplinary Research for Sustainable Business - Perspectives of Women Business Scholars* (Cham, CH: Springer, 2022), 81; C. Mayer, 'Reinventing the Corporation' 4 *Journal of the British Academy*, 53 (2016), it may be argued that no 'end of history for corporate law' could be confirmed yet, at least in those terms which were envisaged by Professors Hansmann and Kraakman in their famous 2000 essay (H. Hansmann and R. Kraakman, 'The End of History for Corporate Law' (2000), in J.N. Gordon and M.J. Roe eds, *Convergence and Persistence in Corporate Governance* (Cambridge: Cambridge University Press, 2004), 33, where they argued, *inter alia*, that 'Despite the apparent divergence in institutions of governance, share ownership, capital markets, and business culture across developed economies, the basic law of the corporate form has already achieved a high degree of uniformity, and continued convergence is likely. A principal reason for convergence is a widespread normative consensus that corporate managers should act exclusively in the economic interests of shareholders, including noncontrolling shareholders. (…) . The ideology of shareholder primacy is likely to press all major jurisdictions toward similar rules of corporate law and practice. Although some differences may persist as a result of institutional or historical contingencies, the bulk of legal development worldwide will be toward a standard legal model of the corporation'.

with both, the structural and the governance aspects of private 'enterprises' – whether organized in the form of incorporated entities, or as partnerships (and even if carried out by a sole entrepreneur) – together with their respective conducts in the marketplace.

Therefore, when the sustainability approach is to be used in order to assess the multiple ESG impacts of (for-profit) business organizations (and their markets operations) in the future of our planet – that is, to measure companies' ESG/SDGs viability – almost inevitably it will then become also matter of public policy, precisely because any such assessment shall encompass the measurement, in the long term, of the detrimental effects (negative externalities) of private businesses on those planetary boundaries that currently ensure animals and plants survival conditions, as well as on a variety of societal and (private and public) governance matters.

And yet, as of today, only few groups of nations – including the EU[52] – are proactively attempting to react to the entangled compounds of environmental, social, and governance emergencies by means of the enactment of specific sets of direct and indirect rules imposing – both to public (governmental and quasi-governmental) entities, and to private (for profit and not-for profit) organizations (including incorporated firms, eg, those companies located or showing a substantial contacts with the EU's 'internal market') – higher and more specific environmental and social protection standards, together with improved governance mechanisms (including pro-gender diversity, whistleblowers protection, and anti-bribery rules), often coped with public compensatory actions, while in many other areas of the globe the environment and the other two factors currently still appear substantially neglected.

Geo-political reasons, economic interests, market-oriented policies, ethical, religious, and cultural behaviors generally, together with other social factors – that is, those idiosyncratic elements that typically concur in defining political communities and, thus, different legal systems around the planet – all converge in creating a very complex and intricate net of reciprocal vetoes that are currently stopping those necessary global reactions to the now self-evident magnitude of the ESG-related risks triggered by the private (business) actors on the global scene.

An additional reason that may concur in explaining some national governments'

[52] See, on this specific aspect (which appears to fall within the regulatory activism on corporate sustainability matters enacted by the EU legislator, starting with the Directive (EU) no 2014/95 of the European Parliament and of the Council of 22 October 2014 (the, 'Non-Financial Reporting Directive', or 'NFRD'), EU Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal' (COM (2019) 640 Final); EU Commission, 'Action Plan: Financing Sustainable Growth' (COM (2018) 97 final); L. Mélon, *Shareholder Primacy and Global Business - Re-Clothing the EU Corporate Law* (New York Abingdon, UK: Routledge, 2019) 1, 3-5, 117-119, 146, 150, and 197; R. Ibba, 'L'introduzione di obblighi concernenti i fattori ESG a livello UE: dalla direttiva 2014/95 alla proposta di direttiva sulla corporate sustainability due diligence' *Banca, borsa, titoli di credito*, I, 433 (2023); see also fns 63, 73, 74, and 75 and 81.

reticence *vis-à-vis* the regulation of ESG-related risks – thus devolving the corporate social responsibility problem to the (insufficient) enterprises' voluntary self-restraint – could be found in some underlying 'collective action problem',[53] not too dissimilar from what *Law and Economics* scholars almost half a century ago posited with regard to the costs that a single (or even a small group of) non-controlling shareholder(s) would have to face in order to effectively monitor the agents (namely, the directors and officers) of a publicly-held corporation:[54] costs that worked as a deterrent for any meaningful engagement by dispersed shareholders, ultimately resulting in their 'rational apathy' with regard to almost any active participation to shareholders' decisions,[55] which could corresponds – *mutatis mutandis* – to the today's reluctant attitude of many states in enacting a coordinated set of pro-ESG/SDGs rules.

Indeed, many of the legislative measures concerned with each of the ESG-related issues that have already been (or will soon be) enacted in some legal systems (including the EU) could be eventually perceived as counterproductive (and thus, in some instances, even rejected) by the same stakeholders groups to whom those regulatory measures were primarily addressed, and namely (multinational groups of) companies and to a lesser extent even by consumers. This could be the case,

[53] See, eg, P.G. Harris, 'Collective Action on Climate Change: The Logic of Regime Failure' 47 *Natural Resources Journal*, 195 (2007); D.C. Esty and A.L.I. Moffa, 'Why Climate Change Collective Action has Failed and What Needs to be Done Within and Without the Trade Regime' 15 *Journal of International Economic Law*, 777 (2012); M.A. Janssen, 'A Behavioral Perspective on the Governance of Common Resources' 12 *Current Opinion on Environmental Sustainability*, (2015), 1-5; S.R. Brechin, 'Climate Change Mitigation and the Collective Action Problem: Exploring Country Differences in Greenhouse Gas Contributions' 31 *Sociological Forum* (Special Issue), 846 (2016); S. Hormio, 'Collective responsibility for climate change' 14 *WIREs Climate Change* (July 2023), available at https://tinyurl.com/2nmbxk4s (last visited 30 September 2024), 1, 4; A. Kallhoff, 'Climate Change Action as Collective Action', in G. Pellegrino and M. Di Paola eds, *Handbook of the Philosophy of Climate Change* (Cham, CH: Springler Nature, 2023), 1179. Compare with M. Banks, 'Individual Responsibility For Climate Change' 51 *The Southern Journal of Philosophy*, 42 (2013), available at https://tinyurl.com/5d65j592 (last visited 30 September 2024). See also A. Fragnière, 'Climate Change and Individual Duties' 7 *WIREs Climate Change*, 798 (2016), available at https://tinyurl.com/3rp4jst8 (last visited 30 September 2024).

[54] Notoriously, in the traditional *Law & Economics* construction of the corporation as a 'network of contracts' (see M.C. Jensen and W.H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' 3 *Journal of Financial Economics*, 305 (1976), publicly-held companies' directors are deemed acting as *agents* for the shareholders (*principals*), typically considered as a group, at least when there is no controlling shareholder. See, eg, R. Kraakman et al eds, *The Anatomy of Corporate Law* n 27 above, 29, 79, 84.

[55] For a critical assessment of rational (shareholders') apathy with regard to environmental shareholder proposals at the shareholder annual general meeting of US publicly held companies, recently see, eg, L.M. Fairfax, 'From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm' 99 *Boston University Law Review*, 1301 (2019); S.C. Haan, 'The pathology of passivity: Shareholder passivity as a false narrative in corporate law' *ECGI Blog* (21 February 2024), available at https://tinyurl.com/3y58xv4f (last visited 30 September 2024) (and, *amplius*, Id, 'The Pathology of Passivity', in S.T. Omarova et al eds, *Hidden Fallacies in Corporate Law and Financial Regulation – Reframing the Mainstream Narratives* (New York: Bloomsbury-Hart Publishing, forthcoming).

for example, when (and to the extent that) legal persons and/or other pressure groups falling within the reach of such more exacting environmental and socially conscious rules and/or standards would perceive them as an undue burden to their economic and social activities, and/or an unwarranted restriction to consumer's choice: and – therefore – they could be claimed as *useless* for the purposes these constraints have been enacted. Moreover, such undue burden/useless claims are often intended as a threat to market freedom and fair competition principles.

In fact, such claims may find some policy grounds (and, thus, political attention) precisely because of these rules' too narrow jurisdictional scope, while at the same time offering additional discretion and/or other unwarranted market advantages (in terms of, eg, lower costs of regulatory compliance) to any of their competitors located in countries adopting more relaxed ESG regulations (or no ESG regulations at all).

To be sure, as many times in history, market-related forces, and public (societal) interests almost inevitably meet, and often collide.[56] This is why company's ESG viability is very likely to become the contemporary forefront of the never-ending debate on the fine line of demarcation of the classic *private law-public law* divide,[57] as projected in an international and comparative dimension and thus

[56] On the 'triangular relationship between public goods, varieties of capitalism (VoC) and corporate social responsibility (CSR)', suggesting that 'the type of market economy provides insights on whether the prime responsibility of is supposed to lie with the state of with the private companies', and – implicitly – on the legal implications of the VoC on the 'corporate purpose' issues (on which see also fns 30, 49, 50, and 85), which, in turn, clearly should be viewed as being closely interrelated with each of the formers, see, H.W. Micklitz, 'Organizations and Public Goods' n 18 above, 414 (and passim). See also J. Tirole, *Economics for the Common Good* (Princeton: Princeton University Press, 2017); M. Libertini, 'A "highly competitive social market economy" as a founding element of the European economic constitution' 18 *Concorrenza e mercato*, part II, 491 (2011).

[57] It would be impossible to offer an adequate bibliography on this 'classic' legal research topic within the constraints of a single fn. See, eg, N. Bobbio, 'Pubblico/privato' *Enciclopedia* (Torino: Einaudi, 1981), XIII, then published in Id, *Stato, governo, società. Per una teoria generale della politica* (Torino: Einaudi, 1985), 3; O. Beaud, 'La distinction entre droit public et droit privé: un dualisme qui résiste aux critiques', in J.B. Auby and D. Friedland ed, *La distinction du droit public et du droit privé: regards français et britanniques. Une entente assez cordiale?* (Paris: Editions Panthéon-Assas, 2004), 21; M. Rosenfeld, 'Rethinking the boundaries between public law and private law for the twenty first century: An introduction' 11 *International Journal of Constitutional Law*, 125-128 (2013); G.A. Benacchio and M. Graziadei eds, *Il declino della distinzione tra diritto pubblico e diritto privato* (Trento: University Trento Press, 2016); A. Jakab, 'Public law–private law divide?' *European Constitutional Language* (Cambridge: Cambridge University Press, 2016), 387; J.B. Auby, 'Public/Private', in P. Cane et al eds, *The Oxford Handbook of Comparative Administrative Law* (Oxford-New York: Oxford University Press, 2019), 467; I. Pupolizio, *Pubblico e privato. Teoria e storia di una grande dicotomia* (Torino: Giappichelli, 2019); O.O. Cherednychenko, 'Rediscovering the public/private divide in EU private law' *European Law Journal*, 27 (2020); E. Slautsky, 'L'influence du droit de l'Union européenne sur la distinction du droit privé et du droit public: l'exemple du droit des marchés publics', in A. Bailleux et al eds, *Distinction (droit) public/(droit) privé: brouillages, innovations et influences croisées* (Bruxelles: Presses de l'Université Saint-Louis, 2022), 115. With specific regard to the heavily discussed role of companies, see, eg, L.E. Mitchell, 'Private Law, Public Interest? The ALI

exacerbated by the 'regulatory competition' phenomenon.[58]

In order to deal with these very complex issues, and to foster a harmonized and possibly uniform response to the global ESG issues, the OECD Council, on 12 December 2022, adopted the '*Recommendation on the Role of government in Promoting Responsible Business Conduct*'. As explained in the *Recommendation* itself, this (non-binding) document

> 'lays out a set of 21 principles and policy recommendations to assist governments, other public authorities and relevant stakeholders in their efforts to design and implement policies that enable and promote responsible business conduct'.[59]

VI. Some (Not Exhaustive) Remarks on the Emerging 'Law of the Sustainable Business Organizations': (a) the Role to be Played by the General Clauses of 'Organizational, Administrative and Accounting Adequacy', Pursuant to Italian Company Law and (Corporate) Insolvency Law

The preceding notes constitute just the introduction to a very complex,

Principles of Corporate Governance' 61 *George Washington Law Rev*iew, 871, 876 (1992-1993); P.H. Pattberg, 'The Institutionalization of Private Governance: How Business and Non Profit Organizations Agree on Transnational Rules' 18 *Governance*, 589 (2005); M. Bainbridge, *The New Corporate Governance* n 50 above, 9; J.W. Cioffi, *Public Law and Private Power: Corporate Governance Reform in the Age of Finance Capitalism* (Ithaca (NY): Cornell University Press, 2010); I. Lee, 'The Role of the Public Interest in Corporate Law', in C.A. Hill and B.H. McDonnell eds, *Research Handbook on the Economics of Corporate Law* (Chaltenham, UK-Northampton, MA: Edward Elgar, 2012), 106-129; D. Ciepley, 'Beyond Public and Private: Toward a Political Theory of the Corporation' 107 *American Political Science Review*, 139 (2013); M.T. Moore, 'Understanding the Modern Company through the Lens of Quasi-Public Power', in B. Choudhury and M. Petrin eds, *Understanding the Company* n 49 above, 91; B. Sjåfjell, *Regulating for Corporate Sustainability: Why the Public-Private Divide Misses the Point*, in B. Choudhury and M. Petrin eds, *Understanding the Company* n 49 above, 145; H.W. Micklitz, 'Organizations' n 18 above, 414-415 and 419-420.

[58] Today, the literature on 'regulatory competition' and the 'race to the bottom' effects that the former phenomenon often triggers is overwhelmingly vast: see, *ex multis*, the essays collected in A. Zoppini ed, *La concorrenza tra ordinamenti giuridici* (Roma-Bari: Laterza, 2004); see also B. Sjåfjell and C.M. Bruner, 'Corporations and Sustainability' n 7 above, 7 ('Simply put, corporations can easily structure their businesses to evade a given jurisdiction's regulatory power'). On the 'regulatory competition' phenomenon, generally, see, eg, R. Romano, 'Law as a Product: Some Pieces of the Incorporation Puzzle' *Journal of Law, Economics, and Organization*, 225 (1985); more recently, see Id, *The Advantage of Competitive Federalism for Securities Regulation* (Washington DC: AEI Press, 2002); S.M. Bainbridge et al eds, *Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law* (Cambridge-New York: Cambridge University Press, 2018), and (albeit mainly in the EU company law perspective); H.W. Micklitz, 'Law as a Product', in S. Grundmann et al eds, *New Private Law Theory* n 18 above, 437. See also D. Kandar and G.M. Prakash, 'Law As A Product From Tradition And Culture' 3 *Indian Journal of Law and Legal Research*, available at https://tinyurl.com/46mmezsk (last visited 30 September 2024).

[59] Available at https://tinyurl.com/mryd4z2z (last visited 30 September 2024).

multidisciplinary, and yet dramatically important area of study, that will probably challenge legal scholars for a long period of time in the future. I will now try to offer some prospectives on current developments of legal research, focusing on some company law principles rooted in the enterprise freedom, as they are evolving in the light of some relevant legislative changes.

As pointed out in para 2, *sustainability* is a qualified *intertemporal link* that connects set(s) of present circumstances to future scenarios by a pre-selected causation link (or even sets of links), projecting the effects of current behaviors and/or situations into the future ability to at least maintain (and thus to afford) the same behaviors and/or situations.

Thus, the notion of *sustainability* can be (and is) currently used, at every latitude of the planet, in connection with many different scenarios, including the analysis of future environmental, economic, and social conditions – globally –, in the light of the emerging data about the current detrimental impact of human activities on the planet (including animals, plants and their biodiversity).

Scientific data show that in the last two centuries or so, trade and business activities and their organizations have heavily contributed to the *status quo*. Business organizations, voluntarily created and often organized as incorporated firms, have been traditionally perceived as profit-seeking organizations 'no matter what' – ie, no matter the high costs the trade or business carried out by the companies would be charging to the society at large. On the other hand, 'sustainability' has become – in its current and most frequent use – a far-reaching public policy notion, based on the ideological adherence to societal, or common interest values[60]

[60] See, eg, M.J. Roe, 'Path Dependence, Political Options, and Governance Systems', in K.J. Hopt et al eds, *Comparative Corporate Governance: The State of the Art and Emerging Research* (Oxford: Oxford University Press, 1997), 847; L.A. Bebchuk and M.J. Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance', in J.N. Gordon and M.J. Roe eds, *Convergence* n 51 above, 69. Here it would be impossible to account for the 'ideological underpinnings' of 'corporate sustainability' in the light of the various political, social, cultural, legal, and economic intertwined issues such expression shall entail. It may suffice to stress that the many questions combined under such currently popular label are caused by, and, at the same time, are exerting a significant ideological momentum; therefore, also the following sequence of quotes seems to perfectly apply *also* to the law of sustainable business organizations: 'At its core, corporate law, like most law, is a morality play. Its internal structure is not determined by logic, justice, or efficiency. Instead, doctrine and action alike flow from a highly contested argument over status and position'; 'we are constrained by the nature of the morality we are describing and trying to influence. And, much to our regret, we constantly rediscover that our moral universe is not simple or unified, but complex and contradictory – a constant intellectual struggle between competing ideals that parallels the real-world political struggles between competing people, parties, and goals'; more generally, 'The law is a conflict of narratives. The stories it tells have independent power that can influence, as well as be influenced by, the struggles that create it and which it mediates'; corporate law and securities law make no exception: they 'are driven by several large narratives', ie, 'coherent (in narrative, not logical) and complex stories, extending beyond simple metaphors or framing': see D.J.H. Greenwood, 'Essay: Telling Stories of Shareholder Supremacy' *Michigan State Law Review*, 1049 (quotes at 1049, 1050, and 1052) (2009). Stated differently, even the meaning and scope we would individually decide to attach to the concept of 'corporate sustainability' (or 'companies' ESG viability') depends – ultimately – upon those narratives that will more convincingly

addressed to the preservation of our planet, and thus naturally tending to limit private individuals' and/or groups' self-interest (including *opportunistic*)[61] motives and, correlatively, the realm of private ordering.

According to the 'double materiality' approach,[62] while social and economic conditions are heavily dependent on the environmental conditions, and vice versa, animal and plants lives (and their biodiversity) are seriously at risk due to the aggregate negative externalities stemming from business organizations conducts (including their organizational models), thereby prompting an assessment of ESG-related risks that ought to measure, in close correlation, how ESG factors influence business organizations practices (including governance choices), and,

embed each of our respective ideological (not necessarily rational/logical) human stances.

[61] On the meaning of 'opportunism', generally, see n 15 above. Within the typical corporate governance structure of a for-profit company, 'opportunism' (behaviors characterized by 'moral hazard') could be found, mainly, within three sets of legal relationships: those between *shareholder and management*; those among *shareholders and corporate creditors*, and (especially in closely held companies, including limited liability companies), in the relationships among *minority shareholders and majority shareholders*: see, eg, R. Kraakman et al, *The Anatomy of Corporate Law* n 37 above, 29.

[62] The notion of 'double materiality' may be deemed an extension of the key accounting concept of 'materiality' of financial information. Yet, the concept of double materiality takes this notion one-step further: it is not just climate-related impacts on the company that can be material, from both, financial and non-financial disclosure perspectives), but also any impacts of a company's structure (including governance postures and financial structures) and/or market operations on the climate – or any other environmental, social, and/or governance, dimension of sustainability (ie, any of the elements comprised under the ESG label and it was then adopted as the main parameter to both select and evaluate the data and information to be provided by companies subject to the rules set forth under the Directive (EU) no 2014/95 of the European Parliament and of the Council of 22 October 2014 (the 'Non-Financial Reporting Directive', or 'NFRD'), that amended Directive (EU) no 2013/34, as regards disclosure of non-financial and diversity information by certain large undertakings and groups – now repealed and superseded by Directive (EU) no 2022/2464, of the European Parliament and of the Council of 14 December 2022, amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting ('Corporate Sustainability Reporting Directive' or 'CSRD'). Indeed, the 'double materiality' concept was set forth in the EU Commission's 'Communication containing the Commission's Guidelines on Non-financial Reporting: Supplement on Reporting Climate-related Information' of 20 June 2019 (C/2019/4490), which, in turn, built on the previous of the EU Commission's 'Communication containing the Guidelines on non-financial reporting (methodology for reporting non-financial information'*)*, of 5 July 2017 (C/2017/4234). At page 6, the EU Commission's 2019 *Guidelines* encouraged undertaking falling within the scope of the NFRD (and, now, of the CSRD), to assess *materiality* of non-financial information (mainly for disclosure purposes) from two perspectives: (a) 'the extent necessary for an understanding of the company's development, performance and position' and 'in the broad sense of affecting the value of the company'; and (b) the environmental and social impact of the company's activities on a broad range of stakeholders. Of course, the 'double materiality concept implies the need to assess the impacts on the ESG factors derived from the interconnectivity of the two aforementioned aspects. See, eg, F.E. Mezzanotte, 'Corporate Sustainability Reporting: Double Materiality, Impacts and Legal Risks' 23 *Journal of Corporate Law Studies*, 633 (2023). On the connection between disclosure of ESG related matters and firms' performance, see, eg, D. Gafni et al, 'ESG regulation and financial reporting quality: Friends or foes?' 61 *Finance Research Letters*, 105017 (2024); M. Chibanem and M. Joubrel, 'The ESG-efficient frontier under ESG rating uncertainty', in *Finance Research Letters*, no 67/2024, 105881.

correlatively, how different business organizations' organizational and operational options would respectively impact the ESG-related problems.

Therefore, *sustainability* may be coupled with environmental, social, economic, and (private and public) governance issues – thereby constituting the ESG 'triad', we all should be somewhat familiar with by now – on at least three key assumptions: (*a*) that any and every set of ESG-related issues is (and will increasingly be) capable of intense interactions with each other, and to mutual influence, because they are all interconnected, both synchronically and diachronically; more specifically each of these sets of issues – according to the double materiality perspective – are impacting and, at the same time are being impacted by the operations carried out, and/or by the governance models adopted by the business organizations (and namely MNEs), worldwide; (*b*) by the same token, ESG issues cannot be dealt with on a mere domestic (or even regional) basis, as their mutual influence clearly does not stop at the national borders, thereby calling for a coordinated transnational reaction, whenever sustainability approach is to be applied – holistically – to the complex sets composing the ESG risk factors, and (*c*) it necessarily entails the active contribution of both governments and business organizations, and namely of (multinational) corporations as MNEs are the main market players at every latitude of the globe.

In the light of the foregoing assumptions, there should be little doubt that the two notions these remarks aimed to deal with – *sustainability* and *incorporated firms* – cannot longer afford to be (and to be held) at odd with each other: they should become necessary companions, or companions by necessity, if you wish.

Fortunately (and albeit this is just the first step of a long and complicated process of acknowledgment and reaction to the ESG problems), an increasing number of governments – and the EU currently appears one of the most proactive political institution[63] – are becoming aware of these issues and their interconnectedness, and, therefore, they are including them in their policy agendas while media are heightening their attention to interplay between business organizations and the ESG issues and they are generally much more prepared than in the past to communicate to all people living on earth that the entire planet's sustainability is under severe distress.

[63] Sustainability goals are clearly stated in Arts 2 and 3 of the Treaty of the European Union (TUE) and the EU legislator is currently implementing a wide range of mandatory provisions implementing those goals: see *sub* fn 24, and fns 73 and 74. On the leading role of EU law in shaping corporate and financial sustainability see, eg, A.M. Pacces, 'Sustainable Corporate Governance' n 3 above, 152-53 and 169-173. Incidentally, it should be mentioned that Arts 9 and 41, of the Italian Constitution have been amended in 2022 in order to introduce, as an additional limit to the enterprise freedom, the environmental sustainability principle: in addition to the bibliography cited under fn 84, see, eg, S.A. Cerrato, 'Appunti per una via italiana all'ESG. L'impresa costituzionalmente solidale (anche alla luce dei nuovi artt. 9 e 41, comma 3, Cost.)' *Analisi Giuridica dell'Economia*, 63 (2022); G. Passarelli, 'Imprese, mercati e sostenibilità: nuove sfide per il diritto commerciale', Paper presented at the *XIV Convegno annuale dell'Associazione italiana dei professori universitari di diritto commerciale "Orizzonti del diritto commerciale"*, available at www.orizzontideldirittocommerciale.it. More recently, see S. Ambrosini, *L'impresa nella Costituzione* (Bologna: Zanichelli, 2024), passim.

While national governments must first find appropriate ways to effectively coordinate their respective ESG policies and then enact and evenly enforce rules of conduct to prevent, preserve and, if necessary, to redress environmental and social harms, incorporated firms – as the main legal and economic institutions of contemporary capitalism, and in the light of their undeniable tendence to externalize social costs of their business activities – must correlatively implement globally uniform ESG compliance rules and standards, adequate organizational and monitoring measures in order to respect the public policies aimed at attaining the SDGs within those deadlines that scientists deem necessary to preserve the planet, animals plants (and their biodiversity) for future generations.

For example, some renowned Italian scholars[64] have started to consider 'corporate (or enterprise) sustainability' – when analyzed within the specific coordinates provided by the Italian business organizations law – as a 'general clause' of conduct that would affect, at the same time, companies (undertakings) and their management's behaviors, both at organizational level and at the market operations' level, thereby generating a new set of responsibilities and correlative liabilities to be mandated by the law in the light of the protection of societal – not just private – interests.[65]

[64] See, eg, M. Rescigno, '"Sostenibilità": una nuova clausola generale nelle regole dell'esercizio dell'attività di impresa', in R. Sacchi ed, *Il ruolo delle clausole generali in una prospettiva multidisciplinare* (Milano: Giuffrè, 2022), 431. More generally, on the role of 'general clauses' within the province of Italian 'enterprise' (or 'business') law, see, *ex multis*: G. Scognamiglio, '"Clausole generali", principi di diritto e disciplina dei gruppi di società' *Rivista di diritto privato*, 517 (2011); M. Libertini, 'Clausole generali, norme di principio norme a contenuto indeterminato. Una proposta di distinzione' *Rivista critica di diritto privato*, 345 (2011); Id, 'Ancora a proposito di principi e clausole generali, a partire dall'esperienza del diritto commerciale' *Rivista Orizzonti del Diritto Commerciale*, 1 (2018). See also the insightful essays collected in G. Meruzzi and G. Tantini eds, 'Le clausole generali del diritto societario' *Trattato di diritto commerciale e diritto pubblico dell'economia* (directed by F. Galgano) (Padova: CEDAM, 2011), LXI. On the qualification as a 'general clause' of the directors's duty to organize and to monitor the enterprise administrative and accounting structure to prevent and/or minimize risks (the so called 'organizational, administrative, and accounting adequacy' principle), see, eg, P. Montalenti, I principi di corretta amministrazione: una nuova clausola generale', in M. Irrera ed, *Assetti adeguati e modelli organizzativi nella corporate governance delle società di capitali* (Bologna: Zanichelli, 2016) 3; A. Caprara, *I principi di corretta amministrazione - Struttura, funzioni e rimedi* (Giappichelli: Torino, 2021), passim; A.M. Benedetti, 'Gli "assetti organizzativi adeguati", tra principi e clausole generali. Appunti sul nuovo art. 2086 c.c.' *Rivista delle società*, 965 (2023); for additional references on this clause see *infra*, in this paragraph, and fns 48, 65-69, 71, 75, and 76.

[65] On this emerging issue see, eg, B. Sjåfiell, 'Time to Get Real: A General Corporate Law Duty to Act Sustainaibly', in M.C. Chamorro Domínguez and A.J. and Viera González eds, *Derecho de Sociedades* n 30 above, 93; Ead, 'Integrating sustainability into the duties of the corporate board', in A. Martínez-Echevarría y García de Dueñas ed, *Interés social y gobierno corporativo sostenible: deberes de los administradores y deberes de los accionistas* (Pamplona: Thomson Reuters-Aranzadi, 2019), 163; Ead, *Realising the Potentials of the Board for Corporate Sustainability*, in B. Sjåfjell, C.M. Bruner eds, *The Cambridge Handbook* n 7 above, 696, and, from other perspectives, see also: B. McDonnel et al, 'Green Boardrooms' 53 *Connecticut Law Review*, 335 (2021); R. Rolli, *L'Impatto dei fattori ESG* n 49 above, chapter IV; M. Cian, 'Sulla gestione sostenibile e i poteri degli amministratori: uno spunto di riflessione' *Rivista Orizzonti*

Furthermore, if (as it could be reasonably anticipated) this approach would eventually be turned into an acceptable test to assess the (Italian) business organizations' ESG viability, then such new 'general clause' should probably be matched and coordinated both, with the already intense thread of the existing corporate compliance and risk management rules and standards, and with another recent key behavioral standard of (Italian) corporate governance law, that is the assessment of the 'adequacy' of the organizational, administrative and accounting structure of the undertakings, to be evaluated, case by case, in the light of both, the *size*, and the *specific type(s) of trade(s) or business(es)* carried out by each enterprise under scrutiny.[66]

del Diritto commerciale, 1131 (2021); C. Amatucci, 'Responsabilità sociale dell'impresa e nuovi obblighi degli amministratori. La giusta via di alcuni legislatori' *Giurisprudenza commerciale*, I, 612 (2022); Assonime, 'Doveri degli amministratori e sostenibilità - Rapporto Assonime (Note e Studi no 6/2021)' *Rivista delle società*, 387 (2021); A. Genovese, *La gestione ecosostenibile dell'impresa azionaria - Fra regole e contesto* (Bologna: il Mulino, 2023), 130-132 and 164-184; M. Libertini, 'Gestione "sostenibile" delle imprese e limiti alla discrezionalità imprenditoriale' *Contratto e Impresa*, 54 (2022); N. Ciocca, 'Sostenibilità dell'attività di impresa e doveri degli amministratori', in F. Massa ed, *Sostenibilità - Profili giuridici, economici e manageriali delle PMI italiane* (Torino: Giappichelli, 2019), 77-105. See also, M.V. Zammitti, *La responsabilità della capogruppo* n 47 above; L. Papi, 'Verso un modello *enlightened governance*? A proposito dei doveri di gestione responsabile', in M. Castellaneta and F. Vessia eds, *La responsabilità sociale d'impresa* n 5 above, 231. In connection with the EU Commission's CSDDD proposal of 23 February 2022, as amended and ultimately approved by the EU Parliament (on 24 April, 2024) and by the EU Council (on 24 of May, 2024), see fns 24, 74, and 81.

[66] The Italian literature on this principle (expressed, since the Italian company law reform of 2003, in Arts 2381, paras 3 and 5, and 2403, of the Italian Civil Code and Art 149, para. 1, letter *c)*, of the Italian Financial and Securities Act of 1998, as amended) is overwhelming: see, eg, in addition to references provided under fns 64, 66, 69, 71, 75 and 76: V. Buonocore, 'Adeguatezza, precauzione, gestione, responsabilità: chiose sull'art. 2381, commi terzo e quinto, del codice civile' *Giurisprudenza commerciale*, I, 5 (2006); M. Irrera, *Assetti organizzativi adeguati e governo delle società di capitali*, (Milano: Giuffrè, 2005); Id, 'Adeguatezza dell'assetto organizzativo, amministrativo e contabile', in V. Donativi ed, *Trattato delle Società* (Torino: UTET, 2023), 1549; I. Kutufà, 'Adeguatezza degli assetti e responsabilità gestoria' *Amministrazione e controllo nel diritto delle società* (Torino: Giappichelli, 2010), 707; M. Mozzarelli, *Appunti in tema di rischio organizzativo e procedimentalizzazione dell'attività imprenditoriale*, ibid, 728; M. Callegari, 'Gli assetti societari e i gruppi', in M. Irrera ed, *Assetti adeguati* n 64 above, 585; Ead, 'Gli assetti adeguati nei gruppi tra disciplina positiva ed autonomia privata' *Rivista della Corporate governance,* 413-427; G. Riolfo, 'Assetti e modelli organizzativi della società per azioni: il ruolo degli organi societari nei sistemi alternativi di amministrazione e controllo', in M. Irrera ed, *Assetti adeguati* n 64 above, 139; N. Rondinone, 'Interesse sociale vs. interesse "sociale" nei modelli organizzativi di gruppo presupposti dal d.lgs. n. 254/2016' *Rivista delle società*, 360 (2019); V. Calandra Bonaura, 'Corretta amministrazione e adeguatezza degli assetti organizzativi nella Società per azioni' *Giurisprudenza Commerciale*, I, 439 (2020); P. Benazzo, 'Organizzazione e gestione dell'"impresa complessa": compliance, adeguatezza ed efficienza. E pluribus unum' *Rivista delle società*, 1197 (2020); V. Di Cataldo, 'Dimensioni minime per il dovere di creare assetti e valutazione della diligenza nella loro creazione', in M. Irrera ed, *La società a responsabilità limitata: un modello transtipico alla prova del Codice della Crisi - Studi in onore di Oreste Cagnasso* (Torino: Giappichelli, 2020), 570; S. Ambrosini, *Assetti adeguati e "ibridazione" del modello s.r.l. nel quadro normativo riformato*, ibid 433; Id, 'Adeguatezza degli assetti aziendali, doveri degli amministratori e azioni di responsabilità alla luce del codice della crisi', in M. Callegari et al eds, Governance *e mercati - Studi in onore di Paolo Montalenti* (Torino: Giappichelli, 2022),

Such principle of 'organizational, administrative, and accounting adequateness' of the Italian undertakings – which shows some similarities to the three-prong principle, that was first laid out in the *Caremark* case in the Delaware corporate law[67] (and then refined by later cases)[68] – has been enacted, first, under Arts 2381, paras 3 and 5, and 2403, para 1 (with respect to Italian stock companies); and then, since 2019, also under Art 2257, para 1 (with respect to Italian partnerships) and Art 2475, para 1 (with respect to Italian limited liability companies), so as to ground a specific responsibility – as well as a corresponding liability – on managing partners and on companies management[69] of the Italian unincorporated and incorporated firms, respectively.[70]

II, 1703-1720; R. Santagata, 'Assetti organizzativi adeguati e diritti particolari di ingerenza gestoria dei soci' *Rivista delle società*, 1453 (2020); R. Lolli, *L'Impatto dei fattori ESG* n 49 above, 127; A. Jorio, 'Note Minime su assetti organizzativi, responsabilità e quantificazione del danno risarcibile' *Giurisprudenza commerciale*, I, 812 (2021); L.A. Bianchi, *La gestione dell'impresa. I consigli di amministrazione tra regole e modelli organizzativi* (Bologna: il Mulino, 2021), 118; A. Genovese, *La gestione ecosostenibile* n 65 above, 130; N. Abriani and G. Schneider, '*Adeguatezza degli assetti, controlli interni e intelligenza artificiale',* in V. Donativi ed, *Trattato delle Società*, fn, I, 1179; G. Meruzzi, 'Il riparto di responsabilità per inadeguatezza organizzativa', in M. De Poli and G. Romagnoli eds, *Azioni di responsabilità nelle società di capitali* (Pisa: Pacini Giuridica, 2nd ed, 2024), 13. See also, in a public law perspective, R. Titomanlio, *Il principio di precauzione fra ordinamento europeo e ordinamento Italiano* (Torino: Giappichelli, 2018).

[67] *In re Caremark Int'l Inc. Deriv. Litig*., 698 A.2d 959, 970-971 (Del. Ch. 1996); on this seminal case see, eg, S.M. Bainbridge, 'Caremark and Enterprise Risk Management' 34 *Journal of Corporation Law*, 967 (2009); D.C. Langevoort, 'Caremark and Compliance: A Twenty Year Lookback' 90 *Temple Law Review*, 727 (2017). See also S. Gadinis and A. Miazad, 'Corporate Law and Social Risk' 73 *Vanderbilt Law Review*, 1401 (Oct. 2020) (*inter alia* advocating the advantage of 'Contrasting sustainability with compliance, the only risk monitoring mechanism sanctioned in our laws'). See also *sub* fns 48, 68, 72, and 76.

[68] See, eg, *Marchand* v *Barnhill*, 212 A.3d 805 (Del. 2019), in which (former) Delaware Supreme Court Chief Justice Leo E. Strine Jr, in his unanimous opinion, *inter alia* specified that the board of directors 'failed to implement any system to monitor Blue Bell's food safety performance or compliance', and thus failed to apply the 'duty to monitor' doctrine enunciated in the *Caremark* case; Chief Justice Strine, while quoting *Caremark*, significantly added – possibly opening the door for future discussions – that: 'A board's 'utter failure to attempt to assure a reasonable information and reporting system exists' is an act of bad faith in breach of the duty of loyalty'. Recently, see also *In re McDonnald's Corporation Stockholder Derivative Litigation*, No 2021-0324 (Del. Ch. Jan. 25, 2023). On the corporate management duty of oversight and on the *Caremark* case progeny, see M. Petrin*,* 'Assessing Delaware's Oversight Jurisprudence: A Policy and Theory Perspective' 5 *Virginia Law & Business Review*, 433 (2011) (cited by Vice Chancelor Laster in *In Re McDonald's Corp. Stockholder Derivative Litigation*); Id*,* 'The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law' 59 *American University Law Review*, 1661 (2010).

[69] As well as on the internal auditors, to the extent that an 'internal auditors board' ('collegio sindacale') is mandated under Italian business organizations law; see, eg, the essays collected in G. Meo and G. Presti eds, 'Indipendenza? Dipende…' 2 *Analisi Giuridica dell'Economia* (2022); see also V. Calandra Bonaura, 'Ruolo e responsabilità degli organi di controllo societari nel Codice della crisi e dell'insolvenza' *Giurisprudenza commerciale*, I, 791 (2020); M. Centonze, 'Il *risk-based approach* come metodo di condotta del collegio sindacale'*Giurisprudenza commerciale*, I, 866 (2020); A. Caprara, *I principi di corretta amministrazione* n 64 above, 114.

[70] See, again, the Authors quoted *sub* fns 64, 66, and 69, and, for additional references, see also under fns 71 and 75.

In connection therewith, a more general and pervasive 'entrepreneurial duty' of the management of Italian partnerships and companies to select and to implement an 'adequate' organizational, administrative, and accounting structure, as well as to monitor the 'adequacy' of such system in the light of the (incorporated and unincorporated) firms' subsequent operations and/or governance choices, has been enacted in 2019, both, on general terms (and with respect to all business organizations), under Art 2086, para 2, of the Italian Civil Code, and in order to assess partnerships' managing partners, corporate directors' and internal auditors' liabilities in case of financial crisis and/or insolvency, pursuant to Art 3 of the Italian Code of Enterprise Crisis and Insolvency.[71]

In addition – and in more general terms – it can be (and it has already[72]) quite safely anticipated that the specific ESG risks management rules that have been recently and/or are currently being enacted at EU level (eg, the SFDR of 2019, the puzzle of primary and secondary regulations constituting the European 'ESG

[71] The new Italian Crisis and Insolvency Code is contained in the Legislative decree 12 January 2019, no 14, as amended (and as finally entered into force in July 2022): among the first systematic commentaries of the Code, see, eg, S. Ambrosini ed, *Crisi e insolvenza nel nuovo Codice - Commento tematico ai dd.lgs. nn. 14/2019 e 83/2022* (Bologna: Zanichelli, 2022). On the impact of the new para 2 of Art 2086 of the Italian Civil Code (also in connection with Art 3 of the Italian Crisis and Insolvency Code and/or with Arts 2257, 2381, and 2475 of the Italian Civil Code), see, eg (in addition to references *sub* fns 64, 66, 69, 75 and 76): M.S. Spolidoro, 'Note critiche sulla "gestione dell'impresa"nel nuovo art. 2086 c.c. (con una postilla sul ruolo dei soci)' *Rivista delle società*, 253 (2019); S. Fortunato, 'Codice della crisi e Codice civile: impresa, assetti organizzativi e responsabilità' *Rivista delle società,* 952 (2019); M. Cian, 'Crisi dell'impresa e doveri degli amministratori: i principi riformati e il loro possibile impatto' *Nuove leggi civili commentate*, 1160 (2019); E. Ginevra and C. Presciani, 'Il dovere di istituire assetti adeguati ex art. 2086 c.c.' *Nuove leggi civili commentate*, 1209 (2019); P. Montalenti, 'Gestione dell'impresa, assetti organizzativi e procedura di allerta: dalla "Proposta Rordorf al Codice della crisi"', in A. Amatucci et al eds, *La nuova disciplina a delle procedure concorsuali - In ricordo di Michele Sandulli* (Torino: Giappichelli, 2019), 482; Id, 'Il Codice della crisi d'impresa e dell'insolvenza: assetti organizzativi adeguati, rilevazione della crisi procedure di allerta nel quadro generale della riforma' 47 *Giurisprudenza commerciale*, I, 829 (2020); Id, 'Le riforme del Codice civile: assetti organizzativi societari', in A. Jorio and R. Rosapepe eds, *La riforma delle procedure concorsuali - In ricordo di Vincenzo Buonocore* (Milano: Giuffrè, 2021), 41-47; V. Calandra Bonaura, 'Amministratori e gestione dell'impresa nel Codice della crisi' *Giurisprudenza commerciale*, I, 5 (2020); E. Barcellona, Business Judgment Rule *e interesse sociale nella crisi - L'adeguatezza degli assetti organizzativi alla luce della riforma del diritto concorsuale* (Milano: Giuffré, 2020); S. Bruno, 'Cambiamento climatico e organizzazione delle società di capitali a seguito del nuovo testo dell'art. 2086 c.c.' *Banca, Impresa, Società*, 47 (2020); S. Ambrosini, *Diritto dell'impresa in crisi* (Pisa: Pacini Giuridica, 2022), 43-48; E. Ricciardiello, 'Sustainability and Going Concern' *Rivista delle società*, 53 (2022). More recently, see also M. Perrino, 'Adeguatezza del sistema organizzativo, amministrativo e contabile e doveri dell'imprenditore e degli amministratori' forthcoming in *Proceedings* n 46 above.

[72] With regard to US corporation law, see, eg, L.E. Strine Jr et al, 'Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy' 106 *Iowa Law Review*, 1885 (2021). On the relevance of the *Caremark* case, see *sub* fns 48, 67 68, and 76.

taxonomy', the CSRD of 2022 and its ESRS,[73] and the recently adopted CSDDD,[74]

[73] The Sustainable Finance Disclosure Regulation (Regulation (EU) no 2019/2088) imposes to all financial market actors (including institutional investors) and financial advisors to disclose both the climate risk exposures and the degree of investment sustainability consistently with the Taxonomy Regulation; in turn, the Taxonomy Regulation (Regulation (EU) no 2020/852) introduces a legislative system for defining sustainable economic activities with reference to six main goals, (namely: climate change mitigation, including the mitigation of GHGs according to the 2015 Paris Agreement; climate change adaptation; sustainable use of water resources; transition to circular economy; pollution prevention; protection of biodiversity). Whereas Arts 19a, 29a, 29b, 40a of the CSRD (Directive (EU) no 2022/2464) requires some companies (namely, listed and large EU and non-EU) to disclose information about the risks and opportunities arising from ESG-related issues, as prescribed by Arts 43(3b) and 29b(1) of the CSRD, on 31 July 2023, the EU Commission adopted the first cross-cutting reporting standards and standards for all sustainability topics (European Sustainability Reporting Standards – ESRS, which are now under scrutiny by the EU Parliament and the EU Council). By a *Proposal for a decision of the European Parliament and of the Council amending Directive 2013/34/EU as regards the time limits for the adoption of sustainability reporting standards for certain sectors and for certain third-country undertakings* (COM(2023) 596 final), eventually adopted by the EU Council on the 29 April 2024 – which amended the CSRD of 2022– the implementation of sector-specific sustainability reporting standards for EU companies and general sustainability reporting standards for non-EU companies has been postponed to 30 June 2026, in order to give companies more time to apply the first set of ESG reporting standards and prepare for the next ones. It may briefly be recalled that, in its Communication *Long-term competitiveness of the EU: looking beyond 2030* (as part of the *SME Relief Package*, COM(2023) 535 final) the EU Commission identified reporting as one of the main burdens for companies in general and for SMEs, hence proposing to reduce undertakings' reporting obligations by 25% without undermining the underlying policy objectives. Recently, see K. Hummel and D. Jobst. 'An Overview of Corporate Sustainability Reporting Legislation in the European Union' 21 *Accounting in Europe*, 1 (2024); T. Dinh et al, 'Corporate Sustainability Reporting in Europe: A Scoping Review' 20 *Accounting in Europe*, 1 (2023).

[74] In connection with the EU Commission proposal of the Corporate Due Diligence Directive ('CSDDD'), published on the 23 February 2022 and finally adopted (in an amended version) on 24 May 2024, according to the press release available at https://tinyurl.com/bddzax9w (last visited 30 September 2024), see, eg: E. Wymeersch et al, 'European Company Law Experts Group - The European Parliament's Draft Directive on Corporate Due Diligence and Corporate Accountability' *Rivista delle società*, 275 (2021); L. Enriques, 'The European Parliament Draft Directive on Corporate Due Diligence and Accountability: Stakeholder-Oriented Governance on Steroids' *Rivista delle società,* 319; M. Libertini, 'Sulla proposta di Direttiva UE su "Doveri di diligenza e responsabilità delle imprese"' *Rivista delle società,* 325 (2021); P. Marchetti, 'Il bicchiere mezzo pieno' *Rivista delle società,* 336 (2021); F.M. Mucciarelli, 'Ricomporre il nesso spezzato' n 47 above, 359-360; G. Strampelli, 'La strategia dell'Unione europea per il capitalismo sostenibile: l'oscillazione del pendolo tra amministratori, soci e *stakeholders*'*Rivista delle società*, 365 (2021); U. Tombari, 'La Proposta di Direttiva sulla *Corporate Due Diligence* e sulla *Corporate Accountability*: prove (incerte) di un "capitalismo sostenibile"' *Rivista delle società,* 375; M. Ventoruzzo, 'Note minime sulla responsabilità civile nel progetto di direttiva *Due Diligence*' *Rivista delle società,* 380; G. Ferrarini, 'Sustainable Governance and Corporate Due Diligence: The Shifting Balance Between Soft Law and Hard Law', in P. Câmara and F. Morais eds, *The Palgrave Handbook of ESG and Corporate Governance* (Cham, CH: Palgrave-Macmillan-Springer, 2022), 41; C. Patz, 'The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment' 7 *Business and Human Rights Journal*, 291 (2022); E. Barcellona, Shareholderism versus Stakeholderism n 30 above, 171. More recently, see, eg, B. Sjåfjell, 'Corporate Sustainability and Due Diligence'1 *European Company Case Law* (ECCL), 5 (2023); I.M. Barsan, 'Scope and private enforcement of corporate sustainability due diligence requirements - A comparative approach', ibid, 31; J. Linder and S. Meyer, 'Supply Chain Act under German Law', *ivi*, 55; A.J. Viera González, 'El

the many directives and regulations already in force, and/or soon to be enacted, pursuant to the 'EU Green Deal', etc) will soon merge with the more general principles and standards that have been long and widely implemented with regard to business-related risks management and company compliance duties, possibly altering the traditional scope of the BJR,[75] hence integrating and ultimately strengthening the scope and the substantive reach of the correlative business and corporate compliance liabilities,[76] especially (albeit not exclusively) in connection with the parallel process of establishing uniform and homogeneous ESG rating methods.[77]

Deber de Diligentia de los Administradores Como Forma de Aplicación de los Principios del Desarrollo Sostenible', in M.C. Chamorro Domínguez and A.J. Viera González eds, *Derecho de Sociedades* n 30 above, 215; E.R. Jordá Capitán, 'La Función de la Responsabilidad Civil de la Impresa En Materia de Sostenibilidad. La Propuesta de Directiva Sobre Diligencia Debida', ibid, 307; A. Genovese, *La gestione ecosostenibile* n 65 above, 184-188. Recently, see also A. Schall, 'The CSDDD: Good Law or Bad Law?' 21 *European Company Law*, 56 (2024). For additional references see fn 81.

[75] Specifically, on whether or not the BJR should be applied to the general 'organizational, administrative, and accounting adequacy' clause (also in the vicinity of insolvency), see, eg, in addition to the bibliography cited, *sub* fns 64-69, 71, and 76: C. Amatucci, 'Adeguatezza degli assetti, responsabilità degli amministratori e *Business Judgment Rule*' *Giurisprudenza commerciale*, I, 643 (2016); L. Benedetti, 'L'applicabilità della *business judgment rule* alle decisioni organizzative degli amministratori' *Rivista delle società*, 413 (2019); M. Irrera, 'Adeguatezza degli assetti organizzativi tra correttezza e business judgment rule', in P. Montalenti and M. Notari eds, *Crisi d'impresa. Prevenzione e gestioni dei rischi: nuovo codice e nuova cultura* (Milano: Giuffré, 2021), 81; V. Di Cataldo and D. Arcidiacono, 'Decisioni organizzative, dimensioni dell'impresa e *business judgment rule*' *Giurisprudenza commerciale*, I, 69 (2021); E. Ricciardiello, 'La rilevanza delle fasi della crisi in punto di identificazione delle condotte doverose degli organi sociali (dalla *twilight zone* alla perdita di continuità aziendale, all'insolvenza e alla decozione)', in L. Balestra and M. Martino eds, *Crisi d'impresa e responsabilità degli organi sociali nelle società di capitali* (Milano: Giuffré, 2022), 59, 76-81; M. Martino, 'La responsabilità degli amministratori', ibid, 99, 135-142.

[76] See fns 48, 64-69, 71, 72, and 75. In addition, see, eg, D.C. Langevoort, 'Compliance as Liability Risk Management', in B. van Rooij and D.D. Sokol eds, *The Cambridge Handbook* n 24 above, 123; E. Pollman, 'Corporate Social Responsibility, ESG, and Compliance', ibid, 662; B. Simkins and S.A. Ramirez, 'Enterprise-Wide Risk Management and Corporate Governance' 39 *Loyola University Chicago Law Review*, 571 (2008); A.R. Keay and J. Loughrey, 'The Framework for Board Accountability in Corporate Governance' 35 *Legal Studies,* 252 (2015); G. Strampelli, *Sistemi di controllo e di indipendenza nelle società per azioni* (Milano: EGEA, 2013); M. Siri and S. Zhu, 'Will the EU Commission Successfully Integrate Sustainability Risks and Factors in the Investor Protection Regime? A Research Agenda' 11 *Sustainability*, 6292 (2019), and, with more specific regard to the group of companies (multinational enterprises) setting, see, eg, I. Mevorach, 'The Role of Enterprise Law Principles in Shaping Management Duties at Times of Crisis' 14 *European Business Organizations Law Review*, 471 (2013); M. Rabitti, 'Responsabilità da *deficit* organizzativo', in M. Irrera ed, *Assetti adeguati* n 64 above, 955. For a thorough analysis of the risk of non-compliance with the EU data protection rules in the bank business supply chain, see L. Miotto, *Organizzazione di impresa e gestione dei dati personali - Il rischio di non* compliance *nelle catene di fornitura* (Torino: Giappichelli, 2022).

[77] See, *ex multis*, A. Engert, 'ESG Ratings - Guiding a Movement in Search for Itself' *European Corporate Governance Institute - Law Working Paper*,no 727/2023, available at https://tinyurl.com/ejv894nu (last visited 30 September 2024); D. Cash, *Sustainability Rating Agencies vs Credit Rating Agencies - The Battle to Serve the Mainstream Investor* (Cham, CH:

Thus, business organizations' compliance responsibilities concerned with ESG-related risks (especially by those incorporated firms embedded in a group of companies and/or in MNEs) – as well as those (separate albeit often, mutually interfering) responsibilities resting with their respective management (corporate directors and officers) – are likely to become soon the ultimate frontier of companies' as well as corporate directors' liabilities litigation:[78] indeed, as it has effectively pointed out, *Caremark* (directors duties) and the emerging *regulations* of *ESG risks* are '*Perfect Together*'.[79]

Spinger-Palgrave Macmillan, 2021); A. Hughes et al, 'Alternative ESG Ratings: How Technological Innovation Is Reshaping Sustainable Investment' 13 *Sustainability*, 3551, 1 (2021); G.A. Safarty, 'Regulating Through Numbers: A Case Study of Corporate Sustainability Reporting' 53 *Virginia Journal of International Law*, 575 (2013); F. Möslein, 'Certifying 'Good' Companies - A Comparative Study of Regulatory Design', in B. Sjåfjell and C.M. Bruner eds, *The Cambridge Handbook* n 7 above, 669; A.A. Alfalih, 'ESG disclosure practices and financial performance: a general and sector analysis of SP-500 non-financial companies and the moderating effect of economic conditions' 13 *Journal of Sustainable Finance & Investment*, 1506 (2022). From an Italian perspective, see, eg, E. Clementino and R. Perkins, 'How Do Companies Respond to Environmental, Social and Governance (ESG) ratings? Evidence from Italy' 171 *Journal of Business Ethics*, 379 (2021); G. Catello Landi, *Sostenibilità e Rischio d'impresa - Evidenze e criticità del* Rating ESG (Padova: CEDAM, 2020); L. Dal Fabbro, *ESG - La misurazione della Sostenibilità* (Rubbettino: Soveria Mannelli, 2022); F. Bertelli, *Le dichiarazioni di sostenibilità nella fornitura di beni di consumo* (Torino: Giappichelli, 2022); P. Tenuta and D.R. Cambrea, *Corporate Sustainability: Measurement, Reporting and Effects on Firm Performance* (Cham, CH: Springer, 2023).

[78] Of course, company's liability postulates that the incorporated firm could be treated as a legal 'subject' (typically, a 'legal person'), that could, therefore, be held liable for breach of contracts, torts, environmental liability, etc, like any other market agent, whereas corporate management's liabilities may be originated in connection with some company's own responsibility (and thus corporate liability), but it may also be triggered in connection with a breach of the fiduciary duties owed to company's shareholders, or by the violation of specific legal provisions that would in turn be deemed relevant in assessing directors' (and/or management's) fulfilment of their 'good faith' and/or 'duty of obeyance' obligations (on which see, eg, A.R. Palmiter, 'Duty of obedience: the forgotten duty of U.S. Corporate Law' *Rivista di diritto societario*, 436 (2013) and A. Mazzoni, 'Introduzione a Alan R. Palmiter *Duty of obedience: the forgotten duty of U.S. Corporate Law*' *Rivista di diritto societario*, 434-435. While company's liability and corporate directors' liability notably operate on different grounds, incidentally, it may be added that Italian company law provides for three separate company directors' (and/or top management's) liability rules, thereby framing three different scopes of D&Os' duties: liability towards the shareholders (Arts 2392, 2393, and 2393-*bis* of the Italian Civil Code); liability towards the company's creditors (Art 2394, of the Italian Civil Code), which may be further articulated within groups of companies (Arts 2497-2497-*septies*, of the Italian Civil Code), and towards third parties for damages *directly* caused to their patrimonies (Art 2395, Italian Civil Code). Whereas this latter type of corporate directors and officers liability action seems quite difficult to be successfully grounded before Italian courts (especially because of standing, burden of proof, and causation reasons that cannot be exhaustively illustrated in this fn), it should be added that – in the light of the anticipated convergence of different directors and officers responsibilities (and correlative duties) – civil law scholars and lawyers may reasonably expect to witness a revamped interest in the old distinction between those types of directors and officers legal obligations to deploy their learned, good faith, best efforts to diligently and prudently act in the best interest of the company, and those D&Os' legal obligations consisting in ensuring that the company would attain a specific goal (eg, a pre-determined standard of compliance), thereby imposing directors and officers to achieve a specific result, in order to avoid liability claims.

[79] L.E. Strine Jr et al, 'Caremark and ESG' n 72 above, 1885.

As the *Shell* litigations in Netherland (in 2019-2021) and in UK (in 2022-2023) have already started to show,[80] one of the main issues that will be often debated (and litigated) will be whether the BJR could (and, if so, to what extent) protect managing partners and companies directors' business choices from shareholders' and, possibly, stakeholders' complaints, *also* with regard to the ESG risk prevention and ESG risk management policies – both *within* the legal boundaries of the single business legal entity and/or partnerships, and *beyond* those boundaries, ie, upwards and/or downwards the business organization's 'supply chain', as it will be soon imposed by the combination of the upcoming EU directives on corporate sustainability reporting (CSRD) and on corporate sustainability due diligence (CSDDD).

Whether falling within the province of the loyalty owed to the company and its equity interest holders – as the recent progeny of the *Caremark* case seems to hint – or within an enhanced duty to carefully manage business organizations, the general increase in the standard of the duty to diligently assess, monitor, prevent and redress ESG-related problems, by ensuring that an adequate system of organizational, administrative and accounting checks has been enacted (and it is effectively implemented) within any single incorporated firm, as well as within the corporate group (if any), and across the company's (or the group's) value chain(s),[81]

[80] For more information about the case see, eg, https://tinyurl.com/bdefbakv (last visited 30 September 2024); https://tinyurl.com/84ks8mx6 (last visited 30 September 2024); https://tinyurl.com/2p9kf5ws (last visited 30 September 2024) could be deemed just an early example of such new trend. See also F. Benatti, 'Prospettive sul contenzioso climatico' *Rivista di Diritto Privato*, 545 (2023). See under fns 65, 72, and 76.

[81] See *sub* fns 24, 52, 63, 73, and 74 and see also: Ernst & Young, "Study on directors' duties and sustainable corporate governance' (July 2020), available at https://tinyurl.com/5bz2myeu (last visited 30 September 2024); G. Ferrarini et al, 'The EU Proposed Reform of Director's Duties and The Missing Link to Soft Law' 25 *European Business Organization Law Review*, 359 (2024); B. Sjåfjell, 'Corporate sustainability and due diligence'1 *European Company Case Law (ECCL)*, 5-30 (2023); I.M. Barsan, 'Scope and private enforcement of corporate sustainability due diligence requirements - A comparative approach' 1 *European Company Case Law (ECCL)*, 31 (2023); European Company Law Experts Group (ECLE), 'The proposed Due Diligence Directive should not cover the general duty of care of directors' *European Corporate Governance Institute Blog,* 2 August 2022 (last visited 30 September 2024); P. Krüger Andersen et al, 'Response to the Proposal for a Directive on Corporate Sustainability Due Diligence by Nordic and Baltic Company Law Scholars' 22 *Nordic & European Company Law Working Paper Series*1, (2022), available https://tinyurl.com/28pj37kb (last visited 30 September 2024); M. Stella Richter Jr, 'Corporate Sustainability Due Diligence. Noterelle semiserie su problemi serissimi' *Rivista delle società*, 714 (2022); G.D. Mosco and R. Felicetti, 'Prime riflessioni sulla proposta di direttiva UE in materia di Corporate Sustainability Due Diligence' *Analisi Giuridica dell'Economia* 1, 185 (2022); F. Agostini and M. Corgatelli, 'Article 25 of the Proposal for a Directive on corporate sustainability due diligence: enlightened shareholder value or pluralist approach?' 19 *European Company Law Journal*, 92 (2022). On the related German law on the companies' duty of 'due diligence' across their respective supply chains (*Lieferkettensorgfaltsgesetz/LkSG*) entered into force on 1 January 2023 (see, eg, A. Schall, '(Berechtigte) Lücken in der Lieferkettensorgfaltspflicht des LkSG?' *NZG - Neue Zeitschrift für Gesellschaftsrecht*, 787 (2022); Id et al eds, *Lieferkettensorgfaltspflichtengesetz: Kommentar* (Berlin: de Gruyter, 2023); H. Fleischer, 'Grundstrukturen der lieferketten rechtlichen Sorgfaltspflichten' *CCZ - Corporate Compliance Zeitschrift*, 205 (2022); Id, 'Risk Management and Due Diligence Obligations under the German Supply Chain Act', forthcoming in the *Proceedings* n 46 above,

represents – in my opinion – the compelling legal limit that the ESG movement is presently forcing into business organizations laws of many jurisdictions, including Italy.

However, devising and, then, enforcing such a regulatory limit inevitably imports critical and, of course, not uncontroversial policy choices, as its construction – albeit naturally influenced by the circumstances of each D&Os liability case at hand and by the specific forum rules[82] – ultimately entails the selection of important ideological options on the corporate governance model that it would be set (or, rather, be deemed) to prevail in the following decades, with respect to the many different ESG-related risks and their correlative corporate responsibilities.

VII. *Continued*. (b) The Role to be Played by the 'Enterprise Freedom' Principle within the Raising of the EU Regulatory Trends Concerned with ESG Risks Management and Assessment (*Public Law* v *Private Law*: A Reprise)

The preceding remarks could also concur in explaining why an increasing number of experts, scholars, and politicians, in several different jurisdictions, while still considering incorporated firms, by and large, *private entities* – enjoying, as such, business (or enterprise) freedom, and therefore primarily (albeit not exclusively) subject to private law rules (including the freedom of contract principle), and private ordering mechanisms –, yet would deem their operations (and, ultimately, even their structural elements concurring to their *governance* posture) to be too heavily impacting many relevant ESG-related matters of *public* interests, thereby necessarily falling (also) within the province of the *public law*.[83]

Hence, the eternal diatribe contending the boundaries between the provinces of *private law* and *public law* revives once again under the header of (the assessment of) the company's ESG viability.

Ultimately, the main issue that should wear off – and that indeed is currently

offering additional bibliographical references on the *LkSG*; J. Lieder and S. Meyer, 'Supply chain act and liability under German law' 1 *European Company Case Law (ECCL)*, 55 (2023). For some echoes in the Italian Scholarschip, see, eg: P. Kindler, 'I gruppi di società nella nuova legge tedesca in materia di due diligence sulle catene di approvvigionamento (Lieferkettensorgfaltsplichtensgesetz)', in M. Callegari et al eds, Governance *e mercati – Studi in onore di Paolo Montalenti* (Torino: Giappichelli, 2022), II, 1605; A. Vicari, 'Risikoanalyse e Risikomanagement nella LkSG: spunti in tema di assetti adeguati nella "catena di fornitura"' *Giurisprudenza commerciale*, I, 757 (2023); F. Bordiga and A. De Maria, 'Tutela dei diritti umani nelle catene di approvvigionamento nell'ordinamento tedesco: la Lieferkettensorgfaltsplichtensgesetz' *Rivista delle società*, 971 (2022).

[82] Incidentally, the many existing differences on forum procedural and substantive rules constitutes an additional incentive to regulatory arbitrages by MNEs: they prevent the creation of a regulatory level playing field that would eventually eliminate those companies' competitive advantages that are merely based on their respective main place of management or operations (real seat doctrines) and/or their respective place of incorporation (incorporation doctrine).

[83] See para 5 and bibliographic references under fn 57.

challenging – the corporate law scholars' intellects all around the globe consists in finding out *to what extent* and *how* ESG issues should impact and *limit* the (usually constitutionally protected) *enterprise freedom*:[84] that is, the discretion

[84] M. Libertini, 'Gestione "sostenibile" ' n 65 above; Id, 'Sulla nozione di libertà economica' *Contratto e impresa*, 1255 (2019); E. Ginevra, 'Libertà d'impresa, autonomia privata e nuove direttrici per l'interprete', in E. Ginevra et al eds, *L'orizzonte è una linea che non c'è* - Liber Amicorum *per Aldo A. Dolmetta* (Pisa: Pacini Giuridica, 2023), 573; G. Capo, 'Libertà d'iniziativa economica, responsabilità sociale e sostenibilità dell'impresa: appunti a margine della riforma dell'art. 41 della Costituzione' *Giustizia Civile*, 81 (2023); F. Fimmanò, 'Art. 41 della Costituzione e valori ESG: esiste davvero una responsabilità sociale dell'impresa?' *Giurisprudenza commerciale*, I, 777 (2023); B. Saavedra Servida, 'Sviluppo sostenibile e autonomia d'impresa - L'interesse ambientale come limite all'autonomia privata?' *Osservatorio del diritto civile e commerciale*, 143 (2023); E. Barcellona, *Shareholderism versus Stakeholderism* n 30 above, 208; S.A. Cerrato, 'Appunti' n 63 above, 72; E. La Marca, 'Rischio e libertà nell'impresa azionaria, tra standardizzazione dei processi decisionali, prevenzione della crisi e annunciato superamento dello scopo di lucro' *Rivista delle società*, 508 (2021); L. Marchegiani, 'Shifting the SME Corporate Model Towards Sustainability: Suggestions from Italian Company Law' 7 *Italian Law Journal* 355, 363-364 (2021); S. Amorosino, *Le regolazioni pubbliche delle attività economiche* (Torino: Giappichelli, 2021). In the past, see, G. Minervini, 'Contro la "funzionalizzazione" dell'impresa privata' *Rivista di diritto civile*, I, 618 (1958); V. Spagnuolo Vigorita, *L'iniziativa economica privata nel diritto pubblico*, (Napoli: Jovene, 1959), 78; U. Belviso, 'Il concetto di "iniziativa economica privata" nella Costituzione' *Rivista di diritto civile*, I, 153 (1961); P. Barcellona, *Intervento statale e autonomia privata nella disciplina dei rapporti economici* (Milano: Giuffré, 1969), 1-11; F. Galgano, 'La libertà di iniziativa economica privata nel sistema delle libertà costituzionali' *Trattato di diritto commerciale e di diritto pubblico dell'economia* (directed by F. Galgano), I, *La costituzione economica* (Padova: CEDAM, 1977), 511; G. Oppo, *'L'iniziativa economica'*, in Id, *Scritti giuridici* (*Diritto dell'impresa*) (Padova: CEDAM, 1992) 16, 34-39; V. Buonocore, 'Iniziativa economica privata e impresa', in Id ed, *Iniziativa economica e impresa nella giurisprudenza costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2007), 3. Recently, see R. Costi, 'Sostenibilità e scopo della società' *Banca, Impresa, Società*, 503, 505-506 (2023); S. Ambrosini, *L'impresa nella Costituzione* n 63 above, 8-9 and 25-32. In a French law perspective, see, eg, G. Ripert, 'L'ordre économique et la liberté contractuelle', in *Recueil d'études sur les sources du droit en l'honneur de François Gény* (Paris: Libr. du. Recueil Sirey, 1934), 347; Id, *Le régime démocratique e le droit civil modern* (Paris: Libr. générale de droit et de jurisprudence, 2nd ed, 1948), 254-256; G. Farjat, *L'ordre public économique* (Paris: Libr. générale de droit et de jurisprudence, 1963); with specific reference to the French *loi n° 2017-399 du 27 mars 2017*, see, eg, L. Mavoungou, 'Le pouvoirs privés économiques à l'épreuve de la loi français sur le devoir de vigilance' *Rev. Internationale de droit économique*, 49 (2019); in a US law perspective, see, *ex multis*, D.G. Yosifon, *Corporate Friction: How Corporate Law Impedes American Progress And What To Do About It* (Cambridge: Cambridge University Press, 2018); L.A. Stout and S.A. Gramitto Ricci, 'Corporate Governance as Privately Ordered Public Policy: a Proposal' 41 *Seattle University Law Review*, 551 (2018); W.E. Wagner, 'Imagining Corporate Sustainability as a Public Good Rather than a Corporate Bad' 46 *Wake Forest Law Review*, 561 (2011); B. Choudhury and M. Petrin, 'Corporate Governance that 'Works for Everyone': Promoting Public Policies through Corporate Governance Mechanisms' 18 *Journal of Corporate Law Studies*, 381 (2018); T. Wu, 'The Goals of the Corporation and the Limits of the Law' *The CLS Blue Sky Blog*, available at https://tinyurl.com/e56xxazz (last visited 30 September 2024); M. Petrin, *'Beyond Shareholder Value - Exploring Justifications for a Broader Corporate Purpose'*, in E. Pollman and R.B. Thompson eds, *Research Handbook* n 33 above, 345; Y.S. Lee, 'Reconciling Corporate Interests with Broader Social Interests - Pursuit of Corporate Interests Beyond Shareholder Primacy' 14 *William & Mary Business Law Review*, 1 (2022-2023). From a transnational business and company law perspective see, B. Sjåfjell et al, 'Shareholder Primacy: The Main Barrier to Sustainable Companies', in B. Sjåfjell and B.J. Richardson eds, *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge: Cambridge University Press, 2015), 79; L.C. Backer, 'A

that entrepreneurs – and namely corporate managers – have traditionally been enjoying in choosing the trades and/or businesses they wanted to engage in, and strategic options implementing business models and as they deem fit and appropriate in order to best fulfil their private economic interests (traditionally, but often discussed, to maximize returns on equity-type investments, that is, in for-profit companies, to pursue the SWM).[85]

Lex Mercatoria For Corporate Social Responsibility Codes Without the State? Critique of Legalization Within the State Under the Premises of Globalization' 24 *Indiana Journal of Global Legal Studies*, 115 (2017). In an European perspective see, specially, B. Sjåfjell et al, 'Securing the Future of European Business: SMART Reform Proposals' (7 May 2020) *University of Oslo Faculty of Law Research Paper Series* 11, (2020), and *Nordic & European Company Law Working Paper Series*8, (2020), (cf especially Section 6.2.1) available at https://tinyurl.com/yfhn8vxd (last visited 30 September 2024); B. Sjåfjell and G. Tsagas, 'Integrating Sustainable Value Creation in Corporate Governance: Company Law, Corporate Governance Codes and the Constitution of the Company', in B. Sjåfjell et al eds, *Sustainable Value Creation in the European Union - Towards Pathways to a Sustainable Future through Crises* (Cambridge: Cambridge University Press, 2023), 209; B. Sjåfjell, 'Time to Get Real: A General Corporate Law Duty to Act Sustainably', in H. Birkmose et al eds, *Instruments of EU Corporate Governance: Effecting Changes in the Management of Companies in a Changing World* (Kluwer Law International: Alphen aan den Rijn, 2023), chapter 3.

[85] See, eg, S.M. Bainbridge, *The Profit Motive* n 30 above, 169 ('Shareholder value maximization is the law. It ought to be the law (…) because the chief alternative available in liberal democratic societies – stakeholder capitalism – is fundamentally flawed. (…)'); *contra* LA. Stout, *The Shareholder Value* n 30 above, 28-32 (denying the existence of a pervasive shareholder wealth maximization norm). In addition to the works cited in fns 36, 44, 49, 50, and 84, see also O. Hart, L. Zingales, 'Companies Should Maximize Shareholder Welfare Not Market Value' 2 *Journal of Law, Finance, and Accounting*, 247 (2017). With regard to this key topic, that was introduced *sub* fn 30, Italian business organizations law – especially in the light of the important legislation enacted in 2015 with regard to the 'società benefit' (on which see, M. Speranzin, 'Benefit Legal Entities in Italy: An Overview' 19 *European Company LawJournal*, 142 (2022); M. Palmieri, 'L'interesse sociale: dallo shareholder value alla società Benefit' *Banca, Impresa, Società*, 201 (2017); E. Codazzi, 'Società benefit (di capitali) e bilanciamento di interessi: alcune considerazioni sull'organizzazione interna' *Rivista Orizzonti del Diritto commerciale*, 589 (2020), and in 2017, with regard to both, the 'social enterprise' and the 'third sector entities' rules (as set forth, respectively in Decreto legislativo 3 July 2017, no 112, and in Decreto Legislativo 3 July 2017, no 117, on which see, eg, the essays collected by G.D. Mosco et al eds, 'Oltre il profitto - I nuovi rapporti tra impresa e sociale' *Analisi Giuridica dell'Economia*1, (2018); G. Marasà, *Imprese sociali, altri enti del terzo settore, società benefit* (Torino: Giappichelli, 2019); M. Ceolin, 'Codice del Terzo settore - a norma dell'articolo 1, comma 2, lettera b), della legge 6 giugno 2016, n. 106', in *Commentario del Codice Civile Scialoja-Branca-Galgano* (Bologna: Zanichelli, 2023) – does no longer seem to require all business companies to necessarily pursue a full-fledge for-profit purpose, in the exclusive interest of their members (shareholders, quota-holders, partners) – as it was assumed in the past, pursuant to the common traditional construction of Art 2247 of the Italian Civil Code, which explicitly states that the ultimate end of the economic (trade or business) activity to be carried out by the company (or partnership) is that of 'sharing the profits' among its members (see, eg, G. Marasà, *Le "società" senza scopo di lucro* (Milano: Giuffré, 1984), 73, and 113; Id, 'Lucro, mutualità e solidarietà nelle imprese (Riflessioni sul pensiero di Giorgio Oppo)' *Giurisprudenza commerciale*, I, 197 (2012). Albeit the issue is still intensively debated, there is an emerging trend that, in the light of the abovementioned legislation, treats the full-fledge for-profit corporate purpose in the (exclusive) interests of their members merely as a default/not-mandatory company law rule (see, eg, M. Porzio, 'Allo scopo di dividerne gli utili' *Giurisprudenza commerciale*, I, 661 (2014); *contra*, R. Costi, *Sostenibilità* n 84 above, 503-504). Indeed, in the light of both: (a) the business organization's additional 'label' ('social enterprise', 'benefit company'), and (b) their respective, specific business

And this, in turn, further postulates that appropriate and coordinated private *and* public governance measures be implemented *at present time*, without any further delay, *worldwide*, thereby creating a uniform regulatory playing field – which ideally should disregard national boundaries to limit regulatory arbitrages and to curb regulatory competition – in order to improve the overall social conditions of planet's (*present* and) *future* populations, as environmental, economic, and social issues are closely intertwined with each other, each representing just a specific aspect of the contemporary overall sustainability objectives that *we* – the people living on Earth – cannot afford to miss, for our own sake *and* for the sake of those who will come after us.

Not surprisingly, both issues – that relating to the limits of the business freedom and that concerning the limits of domestic regulations in spite of the global scale of the sustainability problems – are very contentious, essentially because they both linger at the core of the idea of the controversial relationship between market and state, on one side, and on the very notion of state's sovereignty on the other; and also, because both impinge on various non-legal idiosyncratic aspects (cultural, social, economic) that are specific of each legal system and that cannot therefore be easily harmonized.

To be sure, very high and intense ideological stakes are entailed by each of those challenges – and, thus, behind any 'temptation' to bend egoistic purposes (as

objectives (in addition to, in case of benefit corporations, the common benefit purpose(s)), to be set forth in each organization's specific articles of association/incorporation, such a rule can be departed from – in full, or in part – thereby treating the 'profits', as earnt by each legal entity from its respective trade or business, simply as a means in order for these business organizations to pursue their own ultimate not-for-profit (societal) end(s). However, should the specific business organization not be labelled as a 'social enterprise', nor as a 'società benefit', nor as a 'cooperative company' (endorsing a 'prevailing mutual purpose': see Arts 2512, 2513, and 2514 of the Italian Civil Code); or, alternatively, if its profit purpose shall not be deemed otherwise limited (or excluded) by the operation of other specific legal provisions (eg, those enacted by companies participated by local and/or central governments, or by other 'public entities': see fn 41), or by explicit and analytical (albeit limited) constrictions set forth in the company's certificate of incorporation (on this specific issue, see, recently: M. Cian, 'Clausole statutarie per la sostenibilità dell'impresa: spazi, limiti e implicazioni' *Rivista delle società*, 475, 485-488 (2021)), then the for-profit purpose should re-expand to its traditional full scope. And, if this is the case, then shareholder's wealth maximization shall still be considered as the organization's exclusive and ultimate end: thus, any social responsibility project could then be pursued by the company's directors, although on a mere voluntary basis, while such managerial decisions generally remaining subject to the BJR standard of review. Therefore, whereas Italian business organizations – mainly due to the ability to opt-out of the traditional for-profit model, pursuant to the recent 'social enterprise' and the 'benefit company' rules – could be thought as a sort of 'empty vessel' that one may 'load' with virtually any legitimate 'purpose', including not-for profit, societal ends (of course, subject to the applicable legislation's terms and conditions), by contrast, and by the same token, the shareholders' traditional interest to the maximization of their respective equity investment – with the view to ultimately 'share the profits' among themselves– may be deemed strengthened by the very possibility – as expressly reinforced by the aforementioned Italian recent legal provisions – to choose alternative forms of business organization that would allow to voluntarily depart (opt out) from those types of full-fledge for-profit business organizations. See also the essays collected by G. Olivieri et al eds, 'Il lucro sostenibile. Obiettivi e ruolo delle imprese tra comunicazione e realtà' *Analisi Giuridica dell'Economia*, 1 (2022).

naturally embedded in any private entrepreneurial project) towards societal/ public policy ends – and one could anticipate that 'path dependance'[86] would also play a relevant role in framing any plausible answer, by slowing down any corporate governance/corporate purpose convergence trend.

However – and again – it would seem reasonable to anticipate that the companies' ESG viability (or 'corporate sustainability') – whether one would perceive it as an ideologically-oriented mission, or just as a non-essential and

[86] In general, on *path dependency* (originally, as an evolutionary economics' concept), see, eg, P.A. David, 'Clio and the Economics of QWERTY' 75 *American Economic Review*, 332 (1985); Id, 'Path Dependence And The Quest For Historical Economics: One More Chorus Of The Ballad Of Qwerty' (1997), available at https://tinyurl.com/7p38wjmf (last visited 30 September 2024); Id, 'Path Dependence, Its Critics and the Quest of 'Historical Economics' (2000), available at https://tinyurl.com/mr2ayrun (last visited 30 September 2024); Id, *Evolution and path dependence in economic ideas: past and present* (Cheltenham, UK-Northampton, MA: Edward Elgar Publishing, 2005); K. Dopfer, 'Toward a Theory of Economic Institutions: Synergy and Path Dependency' 25 *Journal of Economic Issues*, 535 (1991); B. Arthur, *Increasing Returns and Path Dependence in the Economy* (Ann Arbor: University of Michigan Press, 1994); P. Pierson, 'Path Dependence, Increasing Returns, and the Study of Politics' 94 *American Political Science Review*, 251 (2000); M. Stack and M.P. Gartland, 'Path creation, Path Dependency, and Alternative Theories of the Firm' 37 *Journal of Economic Issues*, 487 (2003); W. Barnes et al, 'Old Habits Die Hard: Path Dependency and Behavioral Lock-in' 38 *Journal of Economic Issues*, 371 (2004); J. Mahoney and D. Schensul, 'Historical Context and Path Dependence', in R. Goodin and C. Tilly eds, *The Oxford Handbook of Contextual Political Analysis* (Oxford-New York: Oxford University Press, 2006), 454. In the legal arena, see, eg, S.E. Page, 'Path Dependence' I *Quarterly Journal of Political Science*, 87 (2006); B. Markesinis, 'Judicial Mentality: Mental Disposition or Outlook as a Factor. Impeding Recourse to Foreign Law' 80 *Tulane Law Review*, 1325 (2006); M.M. Siems, 'Legal Origins: Reconciling Law & Finance and Comparative Law' 52 *McGill Law Journal*, 55 (2007); R. La Porta et al, 'The Economic Consequences of Legal Origins' 46 *Journal of Economic Literature*, 285 (2008). Within the specific company (and corporate governance) law area, see, eg, M.J. Roe, *Political Determinants of Corporate Governance: Political Context, Corporate Impact* (Oxford-New York: Oxford University Press, 2003); and the essays collected in J.N. Gordon and M.J. Roe eds, *Convergence* n 51 above; A.N. Licht et al, 'Culture, Law, and Corporate Governance' 25 *International Review of Law and Economics*, 229 (2005); J. Armour et al, 'How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection' 57 *American Journal of Comparative Law*, 579 (2009); Id, *Comparative Law* (Cambridge: Cambridge University Press, III ed, 2022), 61-62, 129-131, 195-200, 261-263, and 315-318; J.W. Cioffi, *Public Law and Private Power: Corporate Governance Reform* n 57 above, chapter 1; C.M. Bruner, *Corporate Governance in the Common-Law World - The Political Foundations of Shareholder Power* (New York: Cambridge University Press, 2013), 4-5 and 111; M. Gelter and M.M. Siems, 'Language, Legal Origins, and Culture before the Courts: Cross Citations between Supreme Courts in Europe' 21 *Supreme Court Economic Review*, 215 (2013-14). Moreover, see the essays collected by A. Afsharipour and M. Gelter eds, *Comparative Corporate Governance* (Cheltenham, UK-Northampton, MA: Edward Elgar Publishing, 2021); D. Katelouzou and P. Zumbansen, 'Transnational Corporate Governance: The State of the Art and Twenty-First-Century Challenges', in P. Zumbansen ed, *The Oxford Handbook of Transnational Law* (Oxford-New York: OUP, 2021), 615. Incidentally, *path dependency* may also concur in triggering the correlated phenomenon of '*regulatory competition*', on the assumption that the aimed-for global uniformity in the legal treatment of any given aspect of any given society – including the corporate governance relationships – could be eventually reached by selecting and extending the legal rules, principles, and/or standards already enacted by the 'prevailing' jurisdiction, ie, by the jurisdiction that – due to a combination of economic, social, and political factors – will result the most influential in imposing its own rules, principles and standards to the other (competing) jurisdictions. See under fn 58.

possibly transient nuance of business organizations law – could have the beneficial effect of fostering uniformity among current diversified corporate governance models and markets' rules, thereby ultimately concurring in re-defining – on a global scale – the legitimate boundaries of the 'enterprise freedom' and, hence, the limit of legitimate regulatory actions by governments in market activities.

VIII. Concluding Remarks

Any interdisciplinary approach to the ESG-related risks seems almost inevitably to be impacted by, and to have a correlative impact on both, the market operations and the structures (governance) of incorporated firms, worldwide.

Thus, the quest for corporate ESG viability – that is, the attainment of a viable level of 'sustainability' of both, the companies' design, and the markets regulatory environment where incorporated firms respectively operate, in the light of the many interconnected ESG and SDGs-related issues – is alimenting a somewhat new multidisciplinary research field, that could be fully understood only by adopting a holistic approach.

The 'law of sustainable business organizations' could adequately describe this rapidly expanding topic that – albeit concentrated in the company law area – spans across the multifaceted province of the law, as enacted and enforced in different jurisdictions, and extends beyond it.

From a legal perspective, matching effectively such quest for companies' ESG viability constitutes a very complicated and sensitive task, *inter alia* because it would entail striking a delicate balance between regulatory (top-down/hard law) interventions with respects to corporate governance mechanisms and businesses 'operational rules, on the one hand; and voluntary (bottom/up), or semi-voluntary (soft law) sets of best organizational and trade practices rules – which, to some extent, could be instilled by virtuous market-based incentives – on the other.

At the same time, it postulates a concurring definition of the fine line between public law and private law using the proportionality principle to secure that the free market/free enterprise principle – which in many countries (such as, eg, in Italy) enjoys a constitutional protection – would neither be bended to public policy goals, nor result over compressed, so as to substantially deter productive investments and innovation.

Moreover, it would also appear an ambitious goal, because the process of finding such balance would also import the attainment of substantive international cooperation among national governments, as differential regimes would almost inevitably generate some degree of regulatory competition, in turn resulting in regulatory arbitrages, especially by more sophisticated market actors (namely, MNEs).

To be sure, achieving for-profit business organizations' full ESG compliance would be the result of a sophisticated 'alchemy' of both, voluntary/market and

compulsory/regulatory approaches. One of the foreseeable (and already perceivable) outcomes would be the widening of managerial (ie, D&Os') responsibilities, a heightened level of diligence expectations, which will plausibly result in an increase of D&Os liabilities and correlative litigation. Even in close corporations and in LLCs, monitoring and prevention of ESG-related risks, prudential (sometimes even conservative) managerial behaviors, and advance ESG planning are becoming standard benchmarks to be used to assess D&Os liabilities, due, especially, to the increased attention to the environmental and human rights compliance standards throughout the products and services supply chains.

Indeed, risk management adequacy and correlative compliance assessment duties – which already constitute very pervasive aspects of corporate governance (especially in groups of companies and/or in those companies that operate internationally) – will conceivably become even more crucial liability triggers for company's directors and managers (as well as for internal and external auditors); and the general principle of proportionality may consequently be expected to play a key-role in assessing the gradient of every company's ESG viability *vis-à-vis* such measures, in connection with each firm's dimension and organizational complexity, as well with regard to the nature of the economic activities it carries out in the market. This, in turn, could advance the highly controversial position of those who argue that managerial discretion (and, thus, enterprise freedom as applied to incorporated firms) could be bent (functionalized) to serve the active pursuance of ESG goals, thereby transforming *de facto* the for-profit company into a quasi-public entity.

And yet, dealing with those (and other) complex and interrelated private ordering and public policy regimes, geo-political, and jurisdictional issues is precisely the essence of the 'law of sustainable business organizations', as an emerging multifaceted and interdisciplinary field of both legal research and teaching that is here to stay.[87]

[87] See, once more, A.R. Palmiter, *Sustainable Corporations* n 2 above: this book is – to my knowledge – the first law coursebook that sets forth in a systematic way (with specific attention to US corporate and securities law) the many intertwined legal, business, and social issues entailed by the two terms 'sustainability' and 'corporations'. See, in addition, some recent rich collections of essays: B. Sjåfjell and C.M. Bruner eds, *The Cambridge Handbook* n 7 above; D. Busch et al eds, *Sustainable Finance* n 3 above; P. Câmara and F. Morais eds, *The Palgrave Handbook of ESG* n 36, above; C. Liao ed, *Corporate Law and Sustainability from the Next Generation of Lawyers* (Montréal: McGill Queens University Press, 2022); P. Yeoh, *Environmental, Social and Governance Laws, Regulations and Practices in the Digital Era* (Alphen aan den Rijn: Kluwer Law International, 2022); T. Miller and Todd L. Cort eds, *The Sustainable Corporation: A Legal and Business Centric Approach to ESG* (American Bar Association, 2023); T. Kuntz ed, *Research Handbook on Environmental, Social and Corporate Governance* (Cheltenham, UK-Northampton, MA: Edward Elgar Publishing, 2024); J.H. Binder et al, *Corporate Purpose, CSR, and ESG* (Oxford: Oxford University Press, 2024, forthcoming)).

Corporate and Financial Markets Law

Bridging Traditional Corporate Governance and Technology: the 'AI Corporate Design' Framework to Computational Corporate Governance Model

Giuseppe Claudio Cicu*

Abstract

Emerging technologies like artificial intelligence and big data are rapidly transforming social, political, and economic landscapes. This technological revolution is reshaping business organization and operations, leading to new corporate governance forms where AI is integrated into various managerial functions. However, the uncritical integration of AI poses risks, including transparency and accountability issues. To mitigate these risks, the paper proposes an 'AI by Corporate Design' framework, aimed at integrating AI solutions through reengineering corporate mechanisms and processes, ensuring adherence to ethical, legal, and algorithmic standards. This framework combines corporate governance rules, business process management (BPM) techniques, legal provisions like 'privacy by design', and recommendations for responsible AI use from regulators. However, since the framework is voluntary, it is advisable to consider technology as a fourth dimension of corporate structure, along with organizational, administrative, and accounting structures, thus incorporating it into the realm of director's duties.

I. Introduction

Emergent technologies such as artificial intelligence (AI) and big data, characterized by simultaneous and breath-taking improvements over the recent decades, are becoming pervasive in the social, political and economic domains.

The ongoing technological and digital revolution is also affecting the organization and operation of businesses, as well as the processes through which a corporation is managed.

For instance, in 2014, Deep Knowledge Ventures, a Hong Kong venture capital firm, announced to media that it 'appointed' as a corporate director an AI program - named *Vital* - capable of making investment recommendations to the other component of the board.[1]

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[1] E. Zolfagharifard, 'Would you take order from a Robot? An artificial intelligence becomes the world's first company director' *Daily Mail*, available at https://tinyurl.com/5n8kftta (last visited 30 September 2024). See also F. Moslein, 'Robots in the Boardroom: Artificial Intelligence and Corporate Law', in W. Barfield and U. Pagallo eds, *Research Handbook on the Law of Artificial Intelligence* (Cheltenham: Edward Elgar Publishing, 2017), 649-670. Even if legally speaking Vital has not acquired the status of corporate director under the corporate laws of Hong

On April 2016, the first blockchain venture capital fund was established in the form of a decentralized autonomous organization (the 'DAO'). This organization was characterized by decentralization, automatic transaction governance, transparency, and token-based membership.[2]

More recently, and in particular in August 2022, NetDragon Websoft Holdings Limited (a Chinese gaming company) made an announcement regarding the 'appointment' of an AI-powered virtual humanoid robot (the so called 'Ms Tang Yu') as the rotating CEO of its flagship subsidiary, Fujian NetDragon Websoft Co Ltd.[3]

Although there is no unanimous opinion among commentators on the extent to which technological breakthroughs will change corporate governance, the aforementioned examples demonstrate the relentless interpenetration between the corporate and technology fields.

This underscores the need to re-evaluate the current regulatory models of corporate governance, as well as the set of mechanisms and processes by which a company operates, in light of the significant changes and risks arising from the widespread adoption of AI technologies.[4] To achieve this, adopting an interdisciplinary approach that encompasses legal, economic, and technological dimensions, all deeply integrated with an ethical and human-centered view, appears necessary.[5]

Based on these premises, the paper is structured as follows: Section 2 explores the impact of AI on corporate governance and business processes, and introduces the concept of a new corporate governance model, the so-called '*Computational Corporate Governance Model*', referring to the future's inextricable integration of AI into corporate operations. Section 3 introduces the '*AI by Corporate*

Kong, nor the equality in voting on all the financial decision made by the company, it is already known as the '*world first intelligence company director*'. See, 'Algorithm appointed board director' *BBC*, available at https://tinyurl.com/ydp3ay6b (last visited 30 September 2024). For more details, cf N. Burridge, 'Artificial intelligence gets a seat in boardroom' *Nikkei Asian Review*, available at https://tinyurl.com/54b8yxh8 (last visited 30 September 2024).

[2] C. Jentzsch, 'Decentralized Autonomous Organization to Automate Governance', available at https://tinyurl.com/mswj4f6n (last visited 30 September 2024). The main goals of the project were to create an organization in which participants would have maintained direct real-time control of contributed funds through governance rules formalized, automated and enforced using smart contract technology.

[3] 'NetDragon Appoints its First Virtual CEO' *PR Newswire*, available at https://tinyurl.com/ymmju8sr (last visited 30 September 2024). The company declared that 'Ms. Tang Yu' serves to streamline process flow, to enhance quality of work tasks, and to improve speed of execution, by helping as a real-time data hub and analytical tool to support rational decision-making in daily operations, as well as to enable a more effective risk management system.

[4] M. Fenwick and E.P.M. Vermeulen, 'Technology and Corporate Governance: Blockchain, Crypto, and Artificial Intelligence' *ECGI Working Paper Series in Law*, (2018); M.T. Zagar, 'A New Chapter for ICONOMI: Transformation of Corporate Governance and Issuance of Equity Tokens *Medium*', available at https://tinyurl.com/bdz2mwa5 (last visited 30 September 2024).

[5] Echoing the words of M. Coeckelbergh: 'The technology is always also social and human: AI is not only about technology, but also about what humans do with it, how they use it, how they perceive and experience it, and how they embed it in wider social-technical environments' (M. Coeckelbergh, *AI Ethics* (The MIT Press Essential Knowledge Series, 2020), 79.

Design' framework, aimed at integrating AI technologies into business processes and corporate governance structures, while simultaneously addressing risks from privacy and transparency to explainability and accountability. Section 4 advocates for the acknowledgment of the technological dimension as a fundamental component of the corporate structure, alongside the organizational, administrative, and accounting dimensions, consequently recognizing the adequacy of such dimension to emerge as a new director's duty. Section 5 concludes.

II. The Impact of AI on Corporate Governance: Toward a Computational Corporate Governance Model?

In the academic community, it is commonly acknowledged that the advanced capabilities of AI in data collecting, valorisation and processing – particularly through machine learning and deep learning algorithms - will profoundly affect all corporate governance operations: from monitoring function and strategy setting to decision-making and compliance activities.

However, the extent to which AI will affect business processes and corporate governance structure remains controversial. In this regard, it is possible to refer to two macro-opinions.[6]

On the one hand, there are scholars who argue that AI will change the current corporate governance paradigm, addressing longstanding relevant challenges such as the so-called 'agency problem'.[7] This perspective also encompasses the belief that AI's role will evolve beyond merely assisting directors and managers, by replacing them in their decision-making functions, potentially acting as an autonomous board member. In the context of this paper, we refer to them as 'Tech Proponent'.

On the other hand, there is a more moderate opinion which argues that AI will improve governance procedures and practices without making the role of corporate boards and managers obsolete. Proponents of this perspective, while arguing that the functioning of corporate boards will be supported and improved by the implementation of AI, challenge the assumption that AI would entirely or significantly alter the core function of both the board and the management. In the context of this paper, we refer to them as 'Tech Moderates'.

The primary divergence in these opinions primarily revolves around the

[6] For an in-depth analysis of the different positions in scholarship, see L. Enriques and D.A. Zetzsche, 'Corporate Technologies and the Tech Nirvana Fallacy' *Hastings Law Journal*, (2019).

[7] Agency theory predicts that the divergences of interests between managers and shareholders could lead to 'agency problem', that is, managers engage in activities for their own self-interest rather than the benefits of the shareholders. The costs experienced by the principal to limit this misalignment of interests are known as 'agency costs', defined as the sum of the monitoring expenditures by the principal, the bonding expenditures by the agent, and the residual loss. See C. Michael et al eds, 'Theory of the firm: managerial behaviour, agency costs and ownership structure' *Journal of Financial Economics*, 305 (1976).

expected growth in the capabilities of AI, specifically in terms of its prospective applications in corporate governance.

Specifically, Tech Proponents assume that AI can already (i) support corporate functions and improve board's decision-making (the so called 'assisted AI')[8] and/or (ii) assist in resolving complex problems and making informed decisions by formulating and answering relevant questions, along with creating and analysing detailed scenarios and simulations (the so called 'augmented AI').[9]

In this regard, it has been said that assisted and augmented AI will soon be able to replace corporate boards in making the administrative tasks, by doing them faster, better, and at a lower cost.[10]

Tech Proponents also assume that AI will enhance the decision-making process of the board of directors.[11] From an economic perspective, the functions performed by AI will significantly lower the cost of administrative and predictions tasks.[12]

Moreover, Tech Proponents anticipate a future where a traditional board member is replaced by a technological board (the so-called 'Algo-Board'). In contrast to the conventional human-led board, this Algo-Board would operate through algorithms, processing extensive data, assessing strategic alternatives instantaneously, and executing decisions based on data that align with the company's goals and values.

This view is grounded on three assumptions: (i) the improvement of the so-called 'general artificial intelligence' (an AI able to understand or learn any intellectual task that a human being can);[13] (ii) AI solutions will be able to perform both administrative and judgment tasks better than humans;[14] (iii) humans will become less fit to serve as board members than machines, or will be less willing

[8] Examples of commonly used AI systems of this nature are Apple's Siri and Google Assistant.

[9] Examples for the category of advisory or augmented AI include IBM's Watson platform. (C. Forrest, 'IBM Watson: What are companies using it for?' *ZDNet,* available at https://tinyurl.com/yeymk2vr (last visited 30 September 2024).

[10] V. Kolbjørnsrud et al, 'The Promise Of Artificial Intelligence: Redefining Management In The Workforce Of The Future', available at https://tinyurl.com/yzn7d5sf (last visited 30 September 2024). The study mentions tasks such as note taking, scheduling, reporting, maintaining scorecards, managing shift schedules, and generating investor statements and management reports as specific examples of AI-led administrative work.

[11] For instance, the AI will play an important role in the evaluation of a merger or an acquisition, by instantly analysing the amount of data at a firm's disposal, creating accurate reports and suggesting the best decision to take, while considering the relevant regulation. M. Beck et al, 'AI in the Boardroom: The Next Realm of Corporate Governance' *MIT Sloan Management Review*, available at https://tinyurl.com/3u9ea8y2 (last visited 30 September 2024).

[12] A. Agrawal et al, 'The Simple Economics of Machine Intelligence' *Harvard Business Review*, available at: https://tinyurl.com/y8wvj54h (last visited 30 September 2024).

[13] H. Hal, 'DeepMind and Google: the battle to control artificial intelligence' *The Economist*, available at https://tinyurl.com/2frw875h (last visited 30 September 2024). S. Henry et al, 'The limits of machine intelligence: Despite progress in machine intelligence, artificial general intelligence is still a major challenge' *EMBO Reports*, 20 (2019).

[14] M. Petrin, 'Corporate Management in the Age of AI' *UCL Working Paper Series*, 30 (2019).

to do so.[15]

While acknowledging the positive impacts of these technologies, Tech Moderates assume that replacing human board members with AI algorithms may not necessarily improve decision-making from the shareholders' perspective. Therefore, they envision a scenario where such technologies have a more limited role on boards, primarily providing insights about opportunities to board members, without replacing their monitoring and mediating functions.[16]

Despite ongoing debates concerning the extent of AI's impact on corporate governance, there is a continuous and increasing integration of AI into business processes and corporate governance structures.[17]

The extraordinary evolution of AI systems, along with their ability to provide significant competitive advantages in terms of efficiency and cost reduction for enterprises, if maintained over a reasonable period, is likely to lead to the emergence of what can be termed as the 'Computational Corporate Governance Model' - a model that foresees the inextricable integration of AI technologies, such as predictive analysis systems, automated decision-making, and natural language processing, into board functions and corporate processes.[18]

However, the growing complexities and inherent risks associated with AI underscore the need for advocating a responsible and ethical integration of AI into corporate governance and business structure.

To achieve this outcome, there is an urgent need to align the conventional principles of corporate governance and business operations with the main technical characteristics of AI.

[15] M. Fenwick and E.P.M. Vermeulen, 'Technology and Corporate Governance: Blockchain, Crypto, and Artificial Intelligence' 1 *Texas Journal Business Law*, 2 (2019).

[16] L. Enriques and A. Zetzsche, 'Corporate Technologies and the Tech Nirvana Fallacy' *Hastings Law Journal*, 71 (2019).

[17] B. Leavy, 'Integrating AI into business processes and corporate strategies to enhance customer value' 51 *Strategy & Leadership*, 3-9 (2023).

[18] The term 'Computational' in the context of the 'Computational Corporate Governance' model is adopted to highlight the critical role of computation in AI development and operation. 'AI Computing' is defined as 'the math-intensive process of calculating machine learning algorithms, typically using accelerated systems and software. It can extract fresh insights from massive datasets, learning new skills along the way. It's the most transformational technology of our time because we live in a data-centric era, and AI computing can find patterns no human could'. R. Merrit, 'What is AI Computing?' NVIDIA, available at https://tinyurl.com/bdz7aknp (last visited 30 September 2024). Thus, the improvement in computational capacity is strictly connected with AI technological evolution. For more in-depth insight, see also 'Computational Power and AI' *AINowInstitute*, available at https://tinyurl.com/4sb3khwj last visited 30 September 2024); 'Computation used to train notable artificial intelligence systems' *Ourworldindata*, available at https://tinyurl.com/5fr8m7uf (last visited 30 September 2024); J.M. Gòrriz et al, 'Computational approaches to Explainable Artificial Intelligence: Advances in theory, applications and trends' 100 *Information Fusion*, (2023).

III. 'AI by Corporate Design': A Proposed Framework to Manage the Corporate Governance Transition Toward the New Technological Paradigm

The integration of AI systems into business processes and corporate governance structures brings a multitude of challenges and risks related to area such as privacy, security, safety, bias, ethics, transparency, explainability, accountability, and so on.

The implementation of AI within corporations, if not properly managed, could affect the entire organizational structure, potentially jeopardizing both the effectiveness of corporate functions and the rights of stakeholders. Furthermore, this phenomenon could be intensified with the advent of the 'Computational Corporate Governance' model, which envisions a deeper integration of AI into corporate governance and business processes.

Consequently, as observed by Floridi, the primary challenge has shifted from digital innovation to the governance of the digital, which he describes as 'the practice of establishing and implementing policies, procedures, and standards for the proper development, use and management of the infosphere'.[19]

However, within the domain of business and corporate governance, it is crucial to recognize that corporations are bound by their unique regulations, policies, procedures, and standards in pursuing the achievement of their business goals.

Therefore, the uncritical juxtaposition of AI systems alongside established corporate rules is insufficient to ensure a secure, effective, and efficient incorporation of this technology into the business and corporate governance operations. This concept parallels the understanding that simply purchasing and using advanced software does not constitute comprehensive enterprise digitization.

Considering these factors, this paper introduces a framework named 'AI by Corporate Design'. This framework is designed to assist corporations in the effective and ethical integration and management of AI technologies. It focuses on the following key aspects: (i) identifying, assessing, preventing, or mitigating risks associated with AI systems utilization; (ii) maximizing the benefits obtained from AI technologies; (iii) supporting members of the corporate governance structure in executing their strategic, administrative, and oversight responsibilities; (iv) advocating a sustainable and human-centric approach to AI usage.

The 'AI by Corporate Design' framework, as its name suggests, draws significant inspiration from the 'privacy by design' concept, which forms one of its core pillars. Mirroring the approaches used in the privacy field under this concept,[20]

[19] L. Floridi, 'Soft Ethics, and the Governance of the Digital' 31 *Philosophy & Technology*, 3 (2018).

[20] '*Privacy by Design*' is a concept developed by Dr. Ann Cavoukian in the 1990s to address the systemic effects of Information and Communication Technologies and of large-scale data systems. This concept advances 'that future of privacy cannot be assured solely by compliance with regulatory frameworks; rather, privacy assurance must ideally become an organization's default mode of operation'. As Cavoukian stated, the objectives of *Privacy by Design* may be

the framework advocates (i) a preference for proactive measures over reactive responses; (ii) a strong emphasis on conducting preliminary impact analyses of AI on stakeholders' rights; (iii) the integration of AI into the design of both corporate processes and governance structure; (iv) the establishment of clear, phase-specific policies for transparency and accountability across all stages of the AI lifecycle; (v) a commitment to a user-centric approach in the deployment of AI within corporate operations.

Additionally, the 'AI by Corporate Design' framework takes significant insight from various AI-Ethics focused frameworks. These include the '*Ethics Guidelines for Trustworthy AI*' by the European Commission,[21] the '*OECD AI Principles*',[22] the '*Recommendation on the Ethics of Artificial Intelligence*',[23] and the '*Principles for the Ethical Use of Artificial Intelligence in the United Nations System*'.[24] However, the 'AI by Corporate Design' distinguishes itself from such ethics framework by adopting a holistic approach specifically tailored for corporations. This approach distinctively integrates three corporate pivotal dimensions: 1) Corporate Governance and Business Processes, addressing how AI is integrated into a company's core operational processes; 2) Legal Regulation, emphasizing compliance with laws and regulations relevant to AI, such as the Artificial intelligence Act, data privacy laws, anti-discrimination legislation, and intellectual property rights; and 3) Technological Dimension, focusing on the unique characteristics and complexity of the AI technology.

In particular, the 'AI by Corporate Design' framework aims to strategically and ethically integrate AI technologies within two fundamental aspects of corporate structures: 'business processes' and 'corporate governance'.

accomplished by practicing the following seven foundational principles, extensible to the 'AI by Corporate Governance' framework: 1) Proactive not reactive; Preventive not Remedial; 2) Privacy as the Default Setting; 3) Privacy Embedded into Design; 4) Full Functionality – Positive-Sum, not Zero-Sum; 5) End-to-End Security – Full Lifecycle Protection; 6) Visibility and Transparency – Keep it Open; 7) Respect for User Privacy – Keep it User-Centric. See A. Cavoukian, The 7 Foundational Principles, available at https://tinyurl.com/22y3e2jx (last visited 30 September 2024).

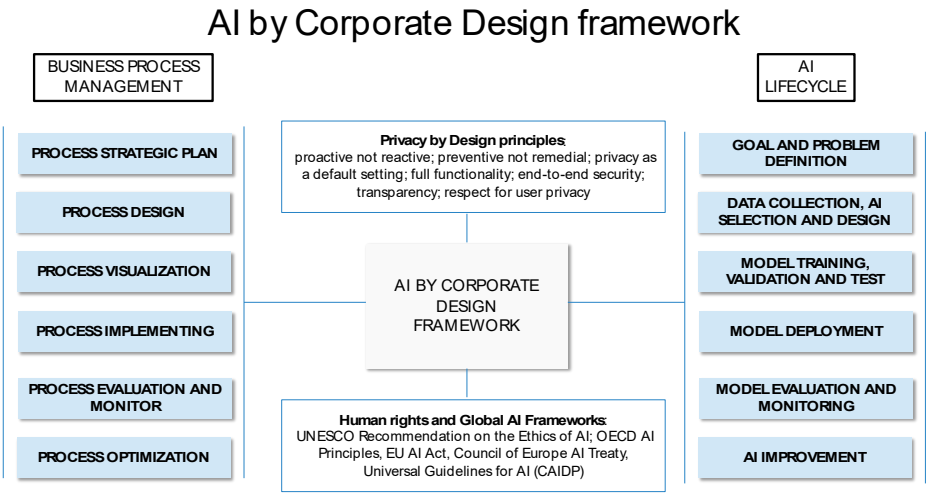
[21] 'Ethics Guidelines for Trustworthy AI' *European Commission*, available at https://tinyurl.com/2cvdrr45 (last visited 30 September 2024).

[22] 'OECD AI Principles', available at https://oecd.ai/en/ai-principles.

[23] 'Recommendation on the Ethics of Artificial Intelligence', available at https://tinyurl.com/bdfu7b7u (last visited 30 September 2024).

[24] 'Principles for the Ethical Use of Artificial Intelligence in the United Nations System', available at https://tinyurl.com/29uhbd6w (last visited 30 September 2024).

Figure 1. The 'AI by Corporate Design Framework'



1. The Synergy Between Business Process Management Techniques and AI Lifecycle in the 'AI By Corporate Design' Framework

With reference to business processes, the cornerstone of the framework is the 'Business Process Management' ('BPM'). BPM is a field in business that encompasses the identification, visualization, design, execution, monitoring, and optimization of business processes. Traditionally, BPM follows a cycle comprising the following stages: 1) process strategic planning; 2) process design; 3) process visualization; 4) process implementing; 5) process evaluation and monitoring; 6) process optimization.[25]

Within the 'AI by Corporate Design' framework, the six phases of BPM are harmonized with the stages of an AI Lifecycle model, which draws inspiration from the Cross-Industry Standard Process for Data Mining (CRISP-DM).[26] A critical feature of this approach is the fundamental difference between developing AI systems and developing traditional software engineering systems.[27]

[25] ABPMP International, BPM CBOK, Guide to Business Process Management Common Body of Knowledge, 29 (2019). See also, M. Szelagowski, 'Evolution of the BPM Lifecycle' *Communication Papers of the Federated Conference on Computer Science and Information Systems*, 205 (2018).

[26] CRISP-DM aims to offer a comprehensive framework for executing any project employing scientific methods to extract value from data, including Machine Learning. CRISP-DM divides a project into six phases: 1) business understanding; 2) data understanding; 3) data preparation; 4) modeling; 5) evaluation; 6) deployment. See, C. Shearer, 'The CRISP-DM model: the new blueprint for data mining' 5 *Data Warehouse*, 13-22 (2000). The choice of CRISP-DM is due to the broad consideration that, although it is twenty years old, it is still considered the *de facto* standard for developing data mining and knowledge discovery projects (see, M. Haakman et al 'AI lifecycle models need to be revised' 26 *Empire Software Eng*, 95 (2021).

[27] A case study at Microsoft identified the following differences: 1) data discovery, management,

To support the integration of AI into corporate processes in line with BPM stages, an AI lifecycle model comprising the following six phases is considered: 1) AI problem and goal definition; 2) AI data collection/pre-processing and AI selection and design; 3) AI training, validation, and testing; 4) AI model deployment; 5) AI evaluation and monitoring; 6) AI improvement.

A critical consideration involving the distinction between in-house and outsourced AI development should be rigorously taken in account, necessitating distinct strategic approaches when setting-up the six phases of the AI lifecycle within the corporation. In-house AI development has an inherent advantage due to the organic knowledge of existing business and corporate processes, which facilitate alignment with the organization's ethical guidelines, cultural values, and corporate strategy. Conversely, the integration of outsourced AI solutions often requires greater effort to align the AI systems with the company's established structure, potentially complicating the harmonization between AI lifecycle and BPM phases. To mitigate these challenges, it is recommended that corporations opting for outsourced AI development provide dedicated measures and protocols to strictly align the external AI development with the corporation's structure and objectives. These measures and protocols should include detailed specifications and formalizations of the existing corporate and business processes, articulation of the main corporate cultural and ethical values, provision of regular meetings between internal and external teams on AI development, and/or the establishment of joint oversight committees. Such measures will ensure that outsourced AI solutions are developed and adapted in accordance with the organization's features, thus preserving the coherence with the BPM stages.

As a result, whether AI development is in-house or outsourced, in the 'AI by Corporate Design' framework the stages of BPM and the phases of AI Lifecycle converge with the aim of developing a technology-driven corporate architecture designed to manage the complexities of AI. To achieve this, the following roadmap can be pursued:

a) BPM Process Strategic Planning & AI Lifecycle Goal and Problem Definition

BPM Process Strategic Planning comprises the subsequent sub-stages:

- Process-driven strategy development: this stage enhances the understanding of organizational structure, strategies, and goals, which are designed to fulfill the corporation's purpose.
- Stakeholder Engagement: this stage involves actively engaging key stakeholders, providing valuable insights for ethics improvement.

and versioning are more complex; 2) practitioners ought to have a broader set of skills; and 3) modular design is not trivial since AI components can be entangled in complex ways. See S. Amershi et al, 'Software engineering for machine learning: a case study, in 'Proceedings of the 41st International conference on software engineering, software engineering in practice' *IEEE Press*, 291–300 (2019).

- Goal Definition: this phase involves establishing clear, quantifiable objectives for business processes. Defining these goals allows corporations to establish benchmark for success, ensuring that reengineered processes and AI systems synergistically work towards achieving the desired outcomes.
- Identification of Key Performance Indicators (KPIs): in this stage, KPIs relevant to business processes and AI technologies are identified. These KPIs are crucial not only for evaluating the effectiveness of processes but also for assessing the integration and performance of AI within the organizational structure. The use of KPIs provides quantitative measures to evaluate the alignment between processes reengineering, AI implementation, and overarching corporate objectives.

AI Lifecycle Goal and Problem Definition, encompasses the following sub-stages:

- Feasibility Analysis: on the basis of the BPM's first phase outcomes, this stage involves an initial assessment to determine whether AI solutions can meet their designates objectives, address inefficiencies in processes, and mitigate potential risks concerning stakeholders' rights. For corporation already utilizing AI technologies, an assessment is conducted to determine their compliance with safeguarding stakeholders' rights.
- Scope of AI Application: this phase entails assessing the potential scope of AI solutions, laying down the foundation for selecting suitable algorithm models.
- Goal Specification: this stage is dedicated to defining clear AI objectives to ensure that the proposed AI interventions are in line with the broader business goals and strategic direction established in the initial phase of BPM.
- Data Mapping: this phase is crucial for understanding and visualizing the data flow within an organization. It involves the identification of data origins, touchpoints, and destinations. Comprehensive data mapping facilitates a better understanding of data movement through various systems and processes, and the identification of potential bottlenecks, redundancies, or gaps. In AI integration, such detailed map is indispensable, as it ensures AI systems receive accurate and relevant data, also in compliance with the relevant regulations.

b) BPM Process Design & AI Lifecycle Data Collection, AI Selection and Design

BPM Process Design, encompasses the following sub-stages:

- Gap Analysis: this phase involves an in-depth review and analysis of existing processes to identifies inefficiencies, redundancies, or bottlenecks. The objective is to gather a comprehensive understanding of areas that might be hindering optimal performance or productivity.
- Processes Reengineering: the goal of this phase is to redesign and refine the processes, leading to the formulation of streamlined, efficient workflows that align with organizational objectives.

AI Lifecycle Data Collection, AI Selection and Design, encompasses the following sub-stages:

- Data Collection: this phase is dedicated to selecting and gathering pertinent data for AI solutions. Emphasis is placed on data quality and volume, ensuring its relevance and suitability for subsequent stages. It's essential that data is acquired and processed ensuring the respect of stakeholder's rights while upholding transparency and accountability, in alignment with best practice and regulatory guidelines. For those corporations which have already adopted AI technologies, an assessment is conducted to verify the data acquisition's compliance with stakeholders' rights. Moreover, at this stage, data is cleansed, normalized, and prepared for model training. Specific techniques, such 'data synthetic', might be chosen to enhance the protection of stakeholder's rights.

- AI Selection and Design: depending on the specific nature of the data available and needed, appropriate algorithms are chosen to best address the identified corporate requirements. Furthermore, frameworks and architectures for the selected AI algorithms are designed, priming them for the training phase.

c) BPM Process Visualization & AI Lifecycle Model Training, Validation and Testing

BPM Process Visualization, encompasses the following sub-stages:

- Future State Visioning: this step involves the visualization of the corporate processes, following both reengineering and the incorporation/analysis of AI solutions.

- Simulation: Using advanced tools, this phase simulates the outcomes of prospective process modifications, thereby forecasting the impacts of AI integration both on business operations and on the safeguarding stakeholders' rights.

AI Lifecycle Model Training, Validation and Testing, encompasses the following sub-stages:

- Training: In this phase, the models undergo comprehensive training using the preprocessed data. The model continually refines its internal parameters and weights to reduce prediction errors and enhance performance, ensuring alignment with the foundational corporate objectives and stakeholders' rights.

- Validation: During this phase, a specific set of data is utilized for the validation of the AI system.

- Testing: Once the model has been trained and validated, it undergoes testing using an entirely new dataset that it hasn't encountered before, referred to as the test set. This stage critically evaluates the model's predictive capabilities in real-world-like scenarios, gauging its readiness for deployment.

d) BPM Process Implementing & AI Lifecycle Model Deployment

BPM Process Implementing, encompasses the following sub-stages:

- Implementation: reengineered processes are operationalized in the corporate structure, encapsulating the outcomes of previous stages. Throughout this phase, an effort is made to ensure that the redefined processes are in alignment with

and respectful of stakeholders' rights

AI Lifecycle Deployment, encompasses the following sub-stages:

- Deployment: AI models are meticulously incorporated into the restructured business processes. This integration aims to maximize the potential of AI, ensuring congruence with the operational framework and effectively addressing the previously identified corporate requirements. Throughout the integration, consistent attention is given to ensure that the deployment of AI solutions remains compliant with and protective of stakeholder rights.

e) BPM Process Evaluation and Monitoring & AI Lifecycle Model Evaluation and Monitoring.

BPM Process Evaluation and Monitoring, encompasses the following sub-stages:

- Real-time Monitoring: advanced tools and specified metrics are deployed to continuously observe and record the performance of the reengineered processes in real-time. This monitoring ensures that the processes remain adaptive and responsive to any discrepancies, while also emphasizing the importance of safeguarding stakeholder rights.

- Performance Analysis: drawing upon the previously defined KPIs, the performance of the processes is periodically scrutinized. This analysis provides a structured feedback loop to assess the effectiveness of the implemented changes, and their alignment with stakeholders' rights.

AI Lifecycle Model Evaluation and Monitoring, encompasses the following sub-stages:

- Model Performance Monitoring: continuous tracking tools evaluate the AI models' performances post-deployment, ensuring their accuracy, efficiency, and compliance with stakeholder rights.

- AI Impact Analysis: periodically, the influence and implications of AI solutions on both the operational and stakeholder dimensions are assessed. This review ensures that the AI implementations remain transparent, ethical, and in line with the broader corporate objectives while respecting stakeholders' rights.

f) BPM Process Optimization & AI Lifecycle Improvement

BPM Process Optimization, encompasses the following sub-stages:

- Feedback Loops: instituted continuous improvement mechanisms capture feedback from various process touchpoints, ensuring iterative refinement of processes. Such loops emphasize not only on operational efficiency but also on ensuring that processes are consistently aligned with the safeguarding of stakeholder rights and interests.

AI Lifecycle Improvement, encompasses the following sub-stages:

- Model Optimization: Informed by real-world performance data, iterative adjustments and refinements are made to AI models. These adjustments aim to bolster accuracy, reduce latency, and enhance other pivotal performance metrics,

all while ensuring that the models' functions remain transparent, ethical, and in compliance with stakeholder rights and expectations.

Through the implementation of the 'AI by Corporate Design' framework, corporations can leverage the synergies between business processes and AI technologies. This approach enables them to strike a balance between structural efficiency, technological innovation, and the protection of stakeholders' rights, with a particular focus on the transparency, explainability, safety and accountability instances of AI.

Specifically, as explained below:

(i) BPM facilitates the adoption of standardized practices and processes, enhancing consistency, efficiency, and clarity in corporate operations. The development and/or deployment of AI aligned with a structured corporate environment not only ensures that AI functions are transparent but also increase trust among stakeholders. The reason is that AI-driven operations and decisions can be methodically understood and reviewed within the established processes and policies.

(ii) With BPM's processes, data mapping and visualization in place, decisions made by AI can be traced back to their source data and logic. This traceability ensures transparency and accountability, enabling stakeholders to understand the rationale behind AI decisions.

(iii) Corporations that methodologically assess and manage AI risks within the corporate structure, can proactively identify and rectify potential biases. This approach safeguards against unintended consequences and promotes explainability in the development, implementation, use, and improvement of AI models.

(iv) By focusing primarily on stakeholders' rights, the framework inherently emphasizes the ethical use of AI. Ethical AI, by design, is transparent and accountable, prioritizing fairness.

(v) The synergy between BPM and AI creates an iterative feedback loop. If an AI system operates unexpectedly or undesirably, this mechanism ensures quick resolution, meanwhile holding corporations accountable for any discrepancies.

(vi) Establishing resilient and robust governance structures leads to clear delineations of responsibilities in AI deployment, implementation, and use. When roles and expectations are clearly defined, accountability is naturally enhanced.

(vii) Prioritizing stakeholders' rights shifts their role from passive observers to active contributors. Their involvement ensures that AI systems are conceived, designed, and iteratively refined in a manner that aligns with their expectations for transparency and accountability.

In essence, the harmonization of BPM's systematic rigor with AI's capabilities creates a symbiotic relationship. This partnership champions the causes of transparency, safety, privacy, explainability, and accountability, ensuring that AI, while innovative, remains ethically grounded, accessible, and understandable to all stakeholders.

2. Common Ethical Principles in AI Utilization Considered in the 'AI by Corporate Design' Framework

The 'AI by Corporate Design' integrates core ethical principles from main AI frameworks established by international organizations, regulatory bodies, and policymakers, including the OECD, UNESCO, Council of Europe, and G7. These principles emphasize the ethical and responsible use and deployment of AI.

Drawing inspiration from such frameworks and embracing their shared principles is pivotal for the 'AI by Corporate Design' framework to emerge as an ethic and sustainable model adoptable by corporations.

Paramount among these frameworks is the emphasis on transparency and explainability, ensuring that AI systems and their operations are comprehensible and accessible to verification.

Another key theme in these frameworks is human-centeredness and fairness, which advocate the safeguarding of human rights and privacy, and the prevention of discriminatory practices and biases in AI applications.

Robustness, safety, and security of AI systems are also consistently emphasized, underscoring the necessity for resilience and reliability throughout their lifecycle.

Accountability is considered as another crucial element across these frameworks, requiring clear delineation of responsibility for those involved in AI development and use.

Within the 'AI by Corporate Design' framework, adherence to these principles is ensured through the integration of BPM techniques with the AI Lifecycle, providing comprehensive knowledge and control over business and AI operations. Furthermore, the adherence with the indications offered by the G20/OECD Principles of Corporate Governance with reference to the digital/technology matters and the establishment of a dedicated committee within this framework ensures supervision, human-oversight, and accountability in the deployment and operation of AI technologies.

3. The G20/OECD Principles of Corporate Governance and the Ethic, Algorithmic, and Legal Committee in the Context of the 'AI by Corporate Design' Framework

On the corporate governance side, significant insights can be drawn from the G20/OECD Principles of Corporate Governance[28] to enhance the governance of AI-related BPM processes by corporate governance bodies. These principles highlight how digital technologies can improve the efficiency and effectiveness of supervisory and enforcement processes, as well as compliance and risk management within corporate structures. Simultaneously, these principles warn against the challenges and risks posed by digital solutions in regulatory and

[28] 'Principles of Corporate Governance' *G20/OECD*, 11, available at https://tinyurl.com/4xa59hh3 (last visited 30 September 2024).

supervisory processes. Specifically, with reference to artificial intelligence and algorithmic decision-making used in supervisory processes, these principles underscore the importance of maintaining a human element to mitigate the risks of incorporating existing biases in algorithmic models and the risks from an overreliance on models and digital technologies. As such, in accordance with the OECD/G20 Principles of Corporate Governance, respect for human agency (and the related accountability principles) must be strictly considered in the context of the 'AI by Corporate Design' framework in the integration of AI-related BPM processes within the corporate governance rules and structures.

Moreover, given the multi-layered complexities that AI introduces in the corporate architecture – particularly in decision-making algorithms and predictive analytics – the establishment of a dedicated committee is considered crucial. The responsibility of this committee would not be limited to merely ensuring adherence to legal standards. It would also encompass the task of guaranteeing that AI implementations align with the broader processes of the corporation. This includes overseeing AI integration, ensuring that all digital/technological implementations align with the company's strategic goals and regulatory requirements, and addressing ethical considerations to maintain trust within the organization.

Consequently, another main component of the 'AI by Corporate Design' framework is the establishment of an Ethic, Algorithmic, and Legal Committee ('EALC') within the corporate governance structure.

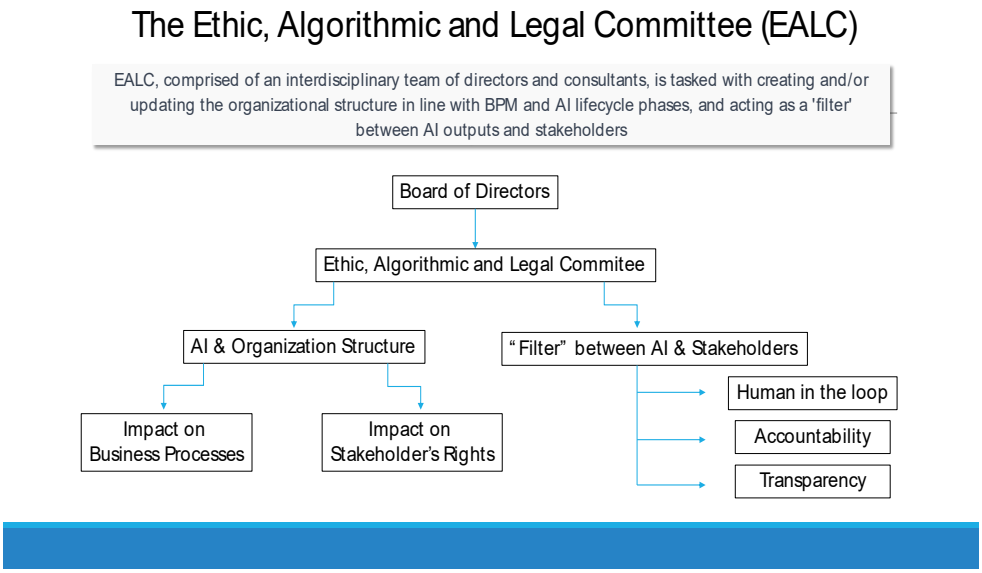
The EALC should be composed of an interdisciplinary team of managers, directors, and consultants. It holds the responsibility and accountability for creating and/or updating the organizational structure to align with both BPM and AI lifecycle phases. The EALC's primary focus is to assess the impact of AI technologies on key business processes and relevant stakeholders' rights.

This committee is also designed to advocate for transparency, safety, and accountability.

Moreover, while acting as a 'filter' between AI outputs and stakeholders, it upholds the 'human in the loop' principle, ensuring human oversight in AI-driven decisions. This approach promotes transparency in the committee's activities, and its accountability for the outcome of AI processes.

Furthermore, adopting this approach has the potential to strengthen the corporation's market position and enhance customers' engagement, due to its emphasis on ethical practices. Additionally, such a framework can also indirectly enable the corporation to better align with European Union and International AI regulations.

Figure 2. The role of EALC.



IV. *De Iure Condendo*: Technology as a Fourth Dimension of an Adequate Corporate's Structure

While corporations can proactively embrace best practices and frameworks, like the one proposed in this paper, the profound impact of AI on stakeholder's rights highlights the necessity for legislative reform.

Although specific regulations address several kind of technology by setting governance standards that influence both corporate governance and business structures (including the EU AI Act, which establishes unified rules on artificial intelligence and the EU Regulation on distributed ledger technology market infrastructures), the presence of many layers of regulations can lead to a fragmented legal and business landscape, potentially hindering the efficient and effective adaptation of corporate governance and business processes to digital and technological challenges.

Given the rapid and unpredictable pace of technological advancements in AI and other technologies (such as big data, blockchain, smart contracts, metaverse, and crypto-assets), an overarching legal intervention is proposed. This intervention aims to broadly recognize and embed the digital-technological infrastructure within the core framework of corporations.

To this end, the Art 2086, para 2 of the Italian Civil Code, can emerge as a pivotal reference. Specifically, it mandates:

> 'The entrepreneur, whether operating in corporate or collective form, has a duty to set up an organizational, administrative, and accounting

> structure appropriate to the nature and size of the enterprise, also with a view to the timely detection of the enterprise's crisis and the loss of business continuity (…)'.

Although these legal provisions promote a shift from a retrospective to a more proactive and forward-looking business approach, they do not specifically address the implications of the ongoing digital and technological revolution on business processes and corporate governance.

Building upon this foundation, it is proposed that the digital-technological dimension should be legislatively recognized as a fourth component within corporate structures, alongside the organizational, administrative, and accounting dimensions outlined in Art 2086, para 2 of the Italian Civil Code.

The proposed legal intervention requires entrepreneurs and managing directors to establish a digital/technological structure that aligns with the corporation's scale and nature, as well as its organizational, administrative, and accounting structures, and the type and degree of advancement of the adopted digital/technological assets.

This legal intervention outlines the roles and responsibilities of governance bodies and fosters the establishment of standardized criteria and practices concerning the digital/technological structure.

Moreover, it specifies the obligations of administrators and outlines the legal remedies available to shareholders and/or third parties in cases of duty violations. For example, within the Italian legal framework,[29] failing to fulfill the duties specified in Art 2086 of the Civil Code by corporate directors can lead to serious consequences. Specifically, under certain conditions, such breaches can (i) enable shareholders to request a judge to replace directors, as provided by Art 2409 of the Civil Code; (ii) induce auditors to convene the directors before the shareholders, in accordance with Art 2406 of the Civil Code; (iii) act as a valid reason for the dismissal of directors under Art 2383 of the Civil Code; (iv) allow shareholders to sue the directors for damages incurred due to the related violation.

Finally, the proposed intervention fosters the corporation's capacity to adapt to rapidly evolving technologies, serving as a protective mechanism in situations where specific regulations might be absent. Accordingly, the prerequisite to establish a robust digital-technological infrastructure prior to adopting any specific technology provides corporations with a 'forward-looking' advantage, potentially enabling them to foresee associated risks and respond effectively.

V. Conclusion

In this remarkable era, characterized by significant advancements in AI

[29] See Tribunale di Catanzaro, 6 February 2024, available at www.dejure.it; Tribunale di Cagliari, Sez. spec. Impr., 2 March 2022, available at www.dejure.it.

technologies, corporations encounter both extraordinary opportunities and challenges. The promise of growing operational efficacy and strategic advantage through AI integration is counterbalanced by emerging responsibilities related to the corporate field.

As innovative models like the 'Computational Corporate Governance' emerge, these issues are likely to intensify.

The 'AI by Corporate Design' proposes a structured method for ethically embedding AI within corporate governance and business processes. It emphasizes compliance to ethical, legal, and technological matters, thus helping corporations navigate the delicate balance between leveraging AI for strategic benefits and managing associated risks and responsibilities.

Finally, the rapid evolution of technology underscores the urgent need for legislative intervention in corporate law to ensure the incorporation of the technological dimension into corporate structures, and consequently into directors' duties and responsibilities.

Corporate and Financial Markets Law

Attempts to Redefine Corporate Purpose and Consequences on Directors' Duties – Enel Use Case

Federico Di Silvestre*

Abstract

Recently, economists and legal scholars have tried to deal with the trade-off between shareholders value maximization and stakeholders' interests. Paragraph 1 will investigate whether companies could create social value and increase their profitability simultaneously. European and Italian soft and hard law has evolved partially in line with such economic theories; paragraph 2 will assess whether such legislative initiatives might foster a redefinition of corporate purpose that would allow companies to enhance stakeholders' interests while pursuing long-term shareholder value maximization. Paragraph 3 will evaluate whether this rethinking of corporate purpose entails creating a new hypothesis of directors' liability. From a practical point of view, companies are directly affected by this change of perspective on corporate purpose. Paragraph 4, using the Enel Use Case as an example, will examine whether a realistic and profitable implementation of sustainable corporate governance could be concretely feasible. Finally, Paragraph 5 will draw the conclusions of the analysis.

I. The Evolution of Corporate Purpose in the Investigations of Economic Scholars

The correct interpretation of the concept of corporate purpose remains one of the most controversial topics among economic and legal scholars.[1]

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[1] In the early twentieth century, part of European scholars adhered to the 'contractual' doctrine of the company. According to this approach, which has become predominant in European legal systems, the company must be legally framed as a collaboration contract between private individuals, with the aim of remunerating the invested capital. Among the many contributions by legal scholars see P.G. Jaeger, *L'interesse sociale* (Milano: Giuffrè, 1964), 133, arguing that the social interest corresponds to the plurality of the interests of the shareholders, taking into account the juxtaposition between majority shareholders and minority shareholders. See also A. Mignoli, 'L'interesse sociale' *Rivista delle società*, 725-727 (1958), stating that corporate purpose must be identified with the common interest of the shareholders. Differently, the 'institutionalist' doctrine of social interest, founded in Germany in the 1920s by Walther Rathenau, see W. Rathenau, 'La realtà della società per azioni. Riflessioni suggerite da un'esperienza degli affari' *Rivista delle Società*, 913, 916-947 (1960), fostered a conception of corporate purpose not focused solely on the interests of shareholders. This theory considers the company a crucial tool for the economic development of a state. For this reason, the proponents of this theory believed that the efficiency of the company must also prevail over the interests of the shareholders. For a description of the main features of this theory, see P.G. Jaeger, ibid 133 and A. Mignoli, 'L'interesse sociale' *Rivista delle società*, 725-763 (1958); for a more recent analysis, see M. Libertini, 'Gestione 'sostenibile' delle imprese e limiti alla discrezionalità imprenditoriale' *Contratto e Impresa*, 1-3 (2023). After the end of the Second World War, the

From an economic theory standpoint, the dialectic between the majority shareholder value theory and the minority stakeholder theory predominated 20th century scholarship.

According to the shareholder value theory, the only duty of companies is to maximise their profits without deception or fraud.[2] Company' directors are considered agents of the shareholders and, therefore, cannot use company's money for purposes not aligned with shareholders' interests.[3] Differently, representatives of the stakeholder value theory believe that shareholder value maximization should not be the exclusive purpose of the company, because specific stakeholder interests should also be duly considered and valued.[4] Directors of companies should thus

contractualist thesis began to gain the upper hand, increasing its success at a global level after the collapse of the communist regimes and the correlative widespread success of the free market ideology. In recent years, however, there has been a partial change in trend, and the idea of corporate social responsibility has begun to gain favor among scholars once again. The phenomenon gradually began to interest the legislative field as well, as further described in para 2 below. For an analysis of the most recent outcomes of the debate, see G. Ferrarini, 'Corporate Purpose and Sustainability' *EUSFiL Research Working Paper Series*, 1-67 (2020); U. Tombari, 'Corporate purpose e diritto societario: dalla 'supremazia degli interessi dei soci' alla libertà di scelta dello 'scopo sociale'?' *Rivista delle Società*, 1-15 (2021); Id, *Corporate Power and Conflicting Interests: What Purpose and Whose Interests Should Corporate Directors Pursue?* (Milano: Giuffrè, 2021); M. Stella Richter, 'Long-Termism' *Rivista delle Società*, 16-52 (2021); C. Angelici, 'Potere e interessi nella grande impresa azionaria: a proposito di un recente libro di Umberto Tombari' *Rivista delle società*, 4-26 (2020); J. Fish and S. Davidoff Solomon, 'Should Corporations Have a Purpose?' 99 *Texas Law Review*, 1309-1346 (2021); E. Rock, 'For Whom Is the Corporation Managed in 2020: The Debate over Corporate Purpose' *European Corporate Governance Institute – Law Working Paper 515/2020*, 1-29 (2021).

[2] M. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), 112. On Friedman's economic philosophy on shareholder value, see also Id, 'The Social Responsibility of Business Is to Increase Its Profits' *The New York Times*, available at https://tinyurl.com/bdf5fux2 (last visited 30 September 2024). Milton Friedman is often considered as the most outstanding representative of the shareholder value theory. According to Milton's philosophy: 'there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud'. Friedman conceded that the long-run interest of a company could lead that company to invest resources for the benefits of the community where it conducts its business, but only because 'that may make it easier to attract desirable employees, it may reduce the wage bill or lessen losses from pilferage or sabotage or have other worthwhile effects'. Consequently, what might appear to be altruistic and socially responsible conduct is actually dictated by self-interest.

[3] M. Friedman, *Capitalism* n 2 above, 113. Friedman's philosophy is believed to have its roots in the judgement *Dodge* v *Ford* of the Supreme Court of Michigan, ruling that 'A business corporation is organized and carried on primarily for the benefit of the stockholders. The powers of directors are to be employed for that end'; see *Dodge* v *Ford*170 NW 668 (1919). These conclusions have been widely invoked to argue that US positive law requires corporations to pursue the goal of profit maximization and that, therefore, directors have an obligation to place the interests of shareholders before all others. However, it was also found that the ruling *Dodge* v *Ford* never stated that directors' exclusive duty is to maximize shareholder profits. Rather, the Court said than profit is the main, but not the exclusive, goal of company directors. See C. Amatucci, 'Responsabilità sociale dell'impresa e nuovi obblighi degli amministratori. La giusta via di alcuni legislatori' *Giurisprudenza Commerciale*, 612, 627 (2022).

[4] In the United States, the stakeholder theory had been strongly advocated by Edward Freeman,

consider management effects on, and responsibilities towards, stakeholders, ie, the individuals or entities whose interests are influenced by the company's activity.[5]

In recent years, there have been growing attempts to argue that companies should not only pursue profits but also stakeholders' interests, to foster a 'sustainable development'.[6] These endeavors also represent a response to a widespread discontent towards a capitalistic system deemed incapable of adequately serving the common good.[7]

The 'enlightened shareholder value theory', a well-received academic thesis, argues that company directors should pay attention to all kinds of constituencies, such as customers, employees, suppliers of capital, communities and so on, because an appropriate management of these constituencies would foster the company's value maximisation in the long run.[8] Establishing of good relationships with stakeholders would integrate an important factor for the success of the company, since the market itself would recognize the real value of the company's business

who believed that 'current approaches to understanding the business environment fail to take account of a wide range of groups who can affect or are affected by the corporation, its stakeholders'. See R.E. Freeman, *Strategic Management. A Stakeholder Approach* (Boston: Pitman, 1984), 1-3. On the same subject-matter, see also D. Busch et al, *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (London: Palgarve Macmillan, 2021), 101. Even before Freeman, a precursor of stakeholder theory in the United States was E. Merrick Dodd. His philosophy is effectively briefed by C. Amatucci, n 3 above, 629-630.

[5] More precisely, stakeholders can be defined as employees, consumers, suppliers, local or global communities concerned with the environment and society as a whole. See R.E. Freeman, *Strategic Management* n 4 above, 1-3. For a more recent analysis, see also D. Busch et al, n 4 above, 101.

[6] The concept of sustainable development, which is widely used in the current debate relating to corporate purpose and the ethics of capitalism in general, found its definition in the report 'Our Common Future', drawn up in 1987 by World Commission on Environment and Development (WCED): 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. G.H. Brundtland, 'Our Common Future: Report of the World Commission on Environment and Development' available at https://tinyurl.com/ybjvcjtk (last visited 30 September 2024). On the definition of 'sustainable development' see also: G. Alpa, 'Responsabilità degli amministratori di società e principio di sostenibilità' *Contratto e impresa*, 721, 723 (2021).

[7] The issue has been precisely analyzed by C. Mayer, *Prosperity* (Oxford: Oxford University Press, 2018), 5, stating that nowadays the company 'is inhumane because we have taken humans and humanity out of it and replaced them with anonymous markets and shareholders over whom we have no control'. On the crisis of capitalism and possible remedies to it, see also A. Edmans, *Grow the Pie. How Great Companies Deliver both Purpose and Profit* (Cambridge: Cambridge University Press, 2020).

[8] The enlightened shareholder value theory is effectively described by the economist Michael Jensen, who argued that social welfare is maximized when all firms in an economy maximize total firm value. Social value is created when a firm produces an output or set of outputs that are valued by its customers more than the value of the inputs it consumes in such production. 'Spend an additional dollar on any constituency to the extent that the long-term value added to the firm from such expenditure is a dollar or more'. M. Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' 7 *Journal of Applied Corporate Finance*, 297-317 (2010). On enlightened shareholder value see also C. Amatucci, n 3 above, 619. However, it has also been argued in literature that if it is true that, in the long run, shareholders' interest and stakeholder value may coincide, this might not always be the case. See M. Stella Richter, 'Long-Termism' n 1 above, 47.

policy in terms of market share, employee loyalty and finally cash flows and risk.[9]

The 'shared value theory' has also gained a high favor.[10] 'Shared value' can be defined as 'policies and operating practices that enhance the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates'.[11] Differently from the opinions that consider the interests of shareholders and stakeholders in opposition to each other, the shared value theory maintains that it is possible creating economic value and at the same time addressing the needs of stakeholders. Accordingly, the purpose of a company should be redefined in terms of shared value, not solely profit, because the creation of shared value 'emphasizes collective well-being as a source of innovation that can lead to greater profitability and competitive advantage'.[12]

Among the books of economists that have proposed a rethinking of corporate purpose, *Prosperity* by Colin Mayer is prominent. Mayer argues that big companies should aim at solving problems for the communities where they operate, making profits in the process.[13] Corporate purpose must emerge from the corporate charter, where it is also necessary to describe how corporate governance mechanisms strive for achieving it in the best possible way.[14] Mayer's corporate governance model assigns to directors the role of balancing the interests of shareholders with those of stakeholders, pursuing the long-term prosperity of the company. Corporate purpose should be defined in the corporate charter, while directors' duties should be based on the corporate purpose so defined.[15]

[9] M. Jensen, n 8 above, 246. According to G. Ferrarini, 'An Alternative View of Corporate Purpose: Colin Mayer on Prosperity' *Rivista delle Società*, 27, 41-42 (2020), the enlightened shareholder value theory is an intermediate perspective, representing a compromise between the traditional shareholder primacy theory and the stakeholder approach.

[10] M. Porter and M. Kramer, 'Creating Shared Value: How to Reinvent Capitalism – And Unleash a Wave of Innovation and Growth' *Harvard Business Review*, January-February 2011.

[11] ibid 6.

[12] M. Kramer, 'Creating shared value to tackle climate change', available at https://tinyurl.com/mu3ud7rd (last visited 30 September 2024), stating that the goal for companies would be to earn profits by benefiting society, thus creating a win-win scenario. As a matter of facts: 'companies need a healthy society and society needs healthy companies'.

[13] In Meyer's view 'purpose is primary and shareholder value derivative', thus inverting the ranking proposed by the shareholder value theory. See C. Mayer, n 7 above, 114. This philosophy is consistent with the proposal of the British Academy and in particular with the eight principles contained in the Principles for Purposeful Business (How to deliver the framework for the Future of the Corporation. An Agenda for business in the 2020s and beyond), stating that: 'the purpose of business and corporations is to solve the problems of people and planet profitably, and not to profit from causing problems'. See P. Marchetti, 'Dalla Business Roundtable ai lavori della British Academy' *Rivista delle Società*, 1303, 1303-1310 (2019).

[14] C. Mayer, n 7 above. This view is opposed by G. Ferrarini, 'An Alternative View' n 9 above, 13, where the author argues that it is unnecessary to specify the corporate purpose in the company's charter, since several documents are periodically approved by the board which clarify the purpose pursued by the company and its management, such as the strategic plans, the financial statements and the non-financial disclosure.

[15] Mayer entrusts the discipline of his model to private law, since, in his opinion, a public regulation would lead to a conflict between the interests of the regulator and those of the

Another recent outstanding work that deals with the issue of corporate purpose is Alex Edmans' 'Grow the Pie'.[16] Under Edmans' view, the company must pursue its purpose for the welfare of all its stakeholders; increasing profits will only be a side effect. The pie symbolizes the value created by a company. Shareholders and stakeholders enjoy different slices of the pie, depending on the business strategy the company elects to adopt.[17] In general, shareholders receive value, while stakeholders enjoy value. Edmans pie-growing mentality sees the pie as expandable and capable of increasing its value for the interests of both shareholders and stakeholders. This theory argues profit is generated in parallel with the creation of value for the whole society. 'Profits, then, are no longer the end goal, but instead arise as a by-product of creating value'.[18]

II. The Evolution of Corporate Purpose Under Corporate Law

The evolution of the concept of corporate purpose that emerged in the writings of economic scholars is also reflected in recent legislative interventions that have involved various jurisdictions.[19] Many legal systems are currently adopting a position somewhere in between shareholder value theory and stakeholder theory.[20]

1. A Brief Comparison of Foreign Legal Systems

Section 172 (1) of the 2006 UK Companies Act provides that: 'A director of a

shareholders. See C. Mayer, n 7 above. A similar solution has recently been adopted also by the French legislator, that allowed companies to define their *raison d'être* in the statute. See Art 1835 of the French Civil Code, as revised by the *PACTE* Act of 22 May 2019. According to some scholars, this model shows limits since the wording of corporate purpose will often be generic; managers will always find ways to circumvent it; shareholders will find it difficult to monitor compliance; enforcement of similar undertakings in cases of breach will be too difficult. See M. Ventoruzzo, 'Brief Remarks on 'Prosperity' by Colin Mayer and the Often Misunderstood Notion of Corporate purpose' *Rivista delle società*, 43, 46 (2020); D. Busch et al, n 4 above, 123-124.

[16] A. Edmans, n 7 above.

[17] Eg, employees receive 'their pay, but also training, advancement opportunities, job security, and the ability to pursue a vocation and make a profound impact on the world'; suppliers gain a stable source of revenue; the local government enjoys tax revenues. See A. Edmans, n 7 above, 19.

[18] A. Edmans, n 7 above, 23-26. Edmans theory has many similarities with the enlighten shareholder value theory, as they both argue that shareholder value and stakeholder interests are highly correlated in the long run. However, under enlighten shareholder value, company's ultimate goal is to generate profits, while the creation of value for stakeholders would be desirable only to the extent that it increases profits in the long term. Differently, Edmans' theory suggests that company's ultimate goal is to create general value for the society, while the creation of shareholder value would be a consequent by-product. See D. Busch et al, n 4 above, 127.

[19] D. Busch et al, n 4 above, 108.

[20] For an overview, see D. Busch et al, n 4 above, 108-120; U. Tombari, 'Corporate purpose' n 1 above, 8-9; J.M. Coutinho de Abreu, 'CSR - 'responsabilità' senza responsabilità (legale)?' *Giurisprudenza Commerciale*, 1088, 1092 (2019); L. Calvosa, 'La governance delle società quotate italiane nella transizione verso la sostenibilità e la digitalizzazione' *Rivista delle Società*, 309, 315 (2022) and C. Amatucci, n 3 above, 632-635.

company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole'. Section 172 (1) further specifies the issues that directors should take in consideration while performing their duties, namely:

> '(a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company'.

Furthermore, the UK Corporate Governance Code (2018) requires the board of directors to promote long-term sustainable success by generating value for shareholders and contributing to the social community.[21] According to certain scholars, these provisions reflect the enlighten shareholder value approach, pursuant to which the balancing of the interests of the stakeholders carried out by the company directors must in any case serve to enhance the interests of the shareholders.[22]

Within the European Union, given the current absence of a harmonizing intervention, Member States have regulated the matter independently.

In German legal system,[23] the first definition of corporate purpose appeared in the Corporate Law of 1937 and was characterized by a reference to the common good of the enterprise, the people, and the Empire.[24] This definition of corporate purpose lasted until the review made by the German Corporate Law of 1965. In that occasion, a first draft of the definition of corporate purpose suggested to entrust the management board with the task of managing the company under its own responsibility, as required for the good of the enterprise, its workers and shareholders, and by the common good.[25] However, the German legislature rejected such proposal and rather stated that 'the management board should

[21] See Section 1 of the UK Code of Corporate Governance.

[22] U. Tombari, 'Corporate purpose' n 1 above, 8-9; D. Busch et al, n 4 above, 115; J.M. Coutinho de Abreu, n 20 above, 1092; L. Calvosa, n 20 above, 314 and C. Amatucci, n 3 above, 632-635, noting also that the three decades of validity of the enlightened shareholder value in the British legal system have recorded critical issues and uncertainties, having recognized the legitimacy to take action against the administrators responsible for the violation of Section 172 only to the shareholders' assembly, with the exclusion of the other stakeholders, due to the fact that the latter have not been invested by the legislator with a real right to set forth a legal claim.

[23] For a specific analysis of the concept of corporate purpose under German law see G.B. Portale, 'La Corporate Social Responsibility alla Ricerca di Effettività' *Banca Borsa Titoli di Credito*, 947, 950-952 (2022).

[24] ibid 950, highlighting that this provision was an expression of the National Socialist ideology of the early twentieth century. See also H. Fleischer, 'La definizione normativa dello scopo dell'impresa azionaria: un inventario comparato' *Rivista delle Società*, 803, 803-817 (2018).

[25] ibid 806.

manage the corporation under its own responsibility'.[26] Also the definition of corporate purpose contained in the German Code of Corporate Governance reflects the continuing debate related to this institute. The original formulation,[27] which referred to long-term value creation, was firstly amended in 2009 to emphasize the role of stakeholders.[28] The definition underwent subsequent amendments in 2017 and 2019, until reaching the current 2022 version, which reads: 'The Management Board is responsible for managing the enterprise in its own best interests'.[29] However, the Foreword of the Code specifies that: 'the Code highlights the obligation of Management Boards and Supervisory Boards – in line with the principles of the social market economy – to consider the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise's best interests). These principles not only require compliance with the law, but also ethically sound and responsible behaviour'.[30] Finally, it is worth highlighting a recent intervention by the German legislature aimed at imposing, on large companies, duties of conduct to protect human rights and the environment in the distribution chains of products and services.[31]

The French legal system also expressed interest in rethinking the concept of corporate purpose. The original version of Article 1833 of the French Civil Code initially provided that companies shall have 'a legal purpose that shall be formed in the common interest of the partners'.[32] In 2019, the *PACTE* Act added a second paragraph to Art 1833,[33] stating that: 'a company shall be managed in its corporate interest, factoring in the social and environmental issues raised by its business activity'.[34] According to some scholars, this new wording reflects an evolution of the concept of corporate purpose, which is no longer limited only to the maximization of shareholder value. However, it also raises questions regarding the scope of the new obligations placed on company directors.[35] Furthermore,

[26] ibid 806.

[27] See Para 4.1.1 of the German Corporate Governance Code 2002.

[28] See Para 4.1.1 of the German Corporate Governance Code 2009.

[29] See Para A(I) of the German Corporate Governance Code 2022.

[30] Foreword of the German Corporate Governance Code 2022. According to G. Ferrarini, 'An Alternative View' n 9 above, 40, in Germany 'corporate law is no doubt stakeholder oriented, but shareholder value concepts have been imported as a consequence of capital market development'.

[31] *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten – Lieferkettensorgfaltspflichtengesetz* [Act on Corporate Due Diligence Obligations in Supply Chains] of 16 July 2021.

[32] See Art 1833 of the French Civil Code.

[33] The reform comes at the end of intense consultations and a lively political debate which found a positive epilogue in the Notat-Sénard Report, entitled 'L'enterprise, objet d'intéret collectif' available at https://tinyurl.com/yft447d6 (last visited 30 September 2024).

[34] See *PACTE* Act.

[35] P. Conac, 'Le nouvel article 1833 du Code Civil Français et l'integration de l'intérêt social et de la responsabilité social d'entreprise: constat ou revolution?' *Orizzonti del diritto commerciale*, 497, 500 (2019); U. Tombari, 'Corporate purpose' n 1 above, 8-9.

the *PACTE*, intervening again on the text of Art 1835, allows companies to specify their purpose ('raison d'être') in their charter.[36] The amendments introduced by the *PACTE* show how French corporate law is tending towards a mixed notion of corporate purpose, in an attempt to reconcile shareholder value with stakeholder interests.[37]

2. Corporate Purpose under Italian Law

In the Italian legal system, the purpose of a company is strongly conditioned by the paradigm of profitability, as expressed by Art 2247 of the Italian Civil Code.[38] However, the theory of the ethical and sustainable success of the company is progressively gaining ground.[39]

The provisions on non-financial declarations[40] require companies to describe not only the main risks associated with social and environmental issues, but also how to manage them.[41] These declarations presuppose the existence of a margin

[36] This purpose is the reason why the company is established. It determines the orientation of the company's management and defines its identity and vocation. See C. Amatucci, n 3 above, 636-638. On this matter, see also C. Angelici, n 1 above, 8, stating that the regulatory intervention of the French legislator under analysis ultimately allows shareholders to individualize the reasons for their participation in the company and concretely define the interests they intend to pursue.

[37] D. Busch et al, n 4 above, 112-113. As happened with the English reform, the difficulty of reconciling conflicting interests was noted in doctrine, even though the impact study of the legislation declared the primacy of the interests of companies, with the consequence that social and environmental issues just have to be taken into consideration. In a nutshell, Art 1833 should never allow directors to take decisions contrary to the company's interest based on social or environmental considerations. C. Amatucci, n 3 above, 636-638.

[38] G. Alpa, n 6 above, 726; U. Tombari, 'Corporate purpose' n 1 above, 12; C. Brescia Morra, 'Chi salverà il pianeta, Lo Stato o le grandi corporation? ESG: una formula ambigua e inutile' *Rivista trimestrale di diritto dell'economia*, 78, 87-88 (2022); G. Ferrarini, 'Corporate Purpose' n 1 above, 31; G.B. Portale, n 23 above, 950. The same rationale characterizes Article 2497 of the Italian Civil Code, concerning companies' management and coordination. See Assonime, 'Doveri degli amministratori e sostenibilità', 1, 6-10, available at https://tinyurl.com/4w3fpbfb (last visited 30 September 2024).

[39] U. Tombari, 'Corporate purpose' n 1 above, 13; G. Alpa, n 6 above, 725-729; M. Libertini, n 1 above, 80-87; D. Palombo, 'The Future of the Corporation: the Avenues for Legal Change' 10 *Journal of the British Academy*, 43-86 (2022); Assonime, n 38 above, 6.

[40] European Parliament and Council Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L182/19; European Parliament and Council Directive (UE) 2014/95/UE of 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1 (the so-called Non-Financial Reporting Directive); European Parliament and Council Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L322/15. For an overview, see R. Ibba, 'L'introduzione di Obblighi Concernenti i Fattori ESG a Livello UE: dalla Direttiva 2014/95 alla Proposta di Direttiva sulla Corporate Sustainability Due Diligence' *Banca Borsa Titoli di Credito*, 433-465 (2023).

[41] Art 3, para 1, letter c) of decreto legislativo 30 December 2016 no 254, as amended by

of discretion for companies in deciding whether and to what extent pursuing sustainable and ethic business objectives.[42]

References to sustainable corporate governance have been inserted also in the Italian Consolidated Law on Finance.[43] Specifically, Art 123-*ter*, para 3-*bis* provides that the remuneration policy of directors, general managers and executives with strategic responsibilities shall contribute to the corporate strategy, the pursuit of long-term interests and the sustainability of the company. Moreover, Art 124-*quinquies*, para 1, requires institutional investors and asset managers to adopt and communicate to the public an engagement policy which describes, among other things, how investee companies are monitored in matters of corporate governance, social and environmental impact, and potential conflicts of interest in relation to their engagement.[44]

Equally important, the Italian Code of Corporate Governance specifies that

legge 30 dicembre 2018 no 145 (Italian Budget Law of 2019).

[42] M. Libertini, n 1 above, 84.

[43] Decreto legislativo 24 February 1998 no 58, as subsequently amended.

[44] Arts 123-*ter* and 124-*quinquies* of decreto legislativo 24 February 1998 no 58. Sensitivity towards the values of social and environmental sustainability has grown significantly in recent years, as demonstrated by the increasingly numerous measures aimed at promoting respect for social and environmental values in the exercise of economic activities. Among the most significant, apart from those just cited, are: (1) legge 11 November 2011 no 180, which indicates among its goals the promotion of the inclusion of social problems and environmental issues in the performance of business activities and in their relations with the social partners (Art1, para 5, letter d); (2) legge 28 December 2015 no 208 (Art 1, paras 376-383), containing the regulation of benefit companies, which provides that, whatever their typological guise, the companies that pursue in the exercise of their activity, in addition to the purpose of the distribution of profits among shareholders (Art 2247 of the Italian Civil Code), one or more purposes of common benefit and operate in a responsible, sustainable and transparent manner towards people, communities, territories and the environment, cultural and social assets and activities, bodies and associations and other stakeholders; (3) the discipline of the social enterprise, introduced by decreto legislativo 24 March 2006 no 155, subsequently repealed by decreto legislativo 3 July 2017 no 112, issued in implementation of the delegation granted to the Government with legge 6 June 2016 no 106, which today regulates this subject-matter; (4) Art 6 of decreto legislativo 19 August 2016 no 175, containing the Consolidated Act on publicly-owned companies, which establishes that in public-controlled companies, without prejudice to the functions of the control bodies envisaged by law and by-laws, in relation to the size and organizational characteristics as well as the activity carried out by the companies themselves, the corporate governance tools can be integrated by providing, among others, their own codes of conduct, or adherence to collective codes of conduct concerning the regulation of entrepreneurial behavior towards consumers, users, employees and collaborators, as well as other holders of legitimate interests involved in the company's activity (Art 6, para 3, letter c) and corporate social responsibility programs, in compliance with the recommendations of the Commission of the European Union (Art 6, para 3, letter d); (5) new Code of Public Contracts, issued with decreto legislativo 31 March 2023 no 36, which will enter into force starting from 1 July 2023, whose Art 57, para 2, provides that the contracting authorities and the granting bodies contribute to the achievement of the environmental objectives set out in the Action Plan for the environmental sustainability of consumption in the public administration sector through the inclusion, in the project and tender documentation, of at least the technical specifications and contractual clauses contained in the minimum environmental criteria, defined for specific categories of contracts and concessions, and which, again, the contracting authorities economically valorize the procedures for awarding contracts and concessions that comply with the minimum environmental criteria.

the board of directors shall guide the company by pursuing its 'sustainable success',[45] defined as the creation of long-term value for the benefit of the shareholders, giving consideration to the interests of other relevant stakeholders.[46] Moreover, the Code states that the remuneration policy for directors, members of the control body and top management is functional to the pursuit of the company's sustainable success.[47] Finally, the Code assigns the task of contributing to the sustainable success of the company also to the internal control and risk management system.[48]

Last but foremost, the newly revised Art 41 of the Italian Constitution prohibits conducting economic initiative in conflict with social utility or in a way that damages health and the environment.[49] Provisions of Art 41 are enforceable on a legislative level, not being directly applicable.[50] However, despite this restrictive reading, it could be possible to identify this provision as an influential statement capable of guiding the continuation of an evolutionary process that, albeit always through the mediation of the legislator, orients companies toward the goal of sustainable development.[51]

The above-mentioned provisions permit an interpretation of the concept of corporate purpose that allows company directors to take into appropriate consideration the interests of stakeholders while pursuing long-term shareholder value maximization.[52]

[45] Art 1 of the Italian Code of Corporate Governance 2020.

[46] Definitions of the Italian Code of Corporate Governance 2020. According to Assonime, n 38 above, 15, this approach does not conflict with the principle according to which the function of the company is to pursue the lucrative interests of the shareholders but enriches the audience of interests that those who manage the company should consider. In a more critical sense, see C. Brescia Morra, n 38 above, 92, where the author states that the Code uses vague formulas, which present margins of ambiguity that are not suitable for translating into preceptive mechanisms. For further thoughts, see M. Stella Richter, 'Profili attuali dell'amministrazione delle società quotate' *Giurisprudenza Commerciale*, 416, 419-422 (2021), arguing that formulas such as sustainable development, sustainability, long-term and similar are not in themselves suitable for translating into preceptive mechanisms. They do not seem to constitute parameters suitable for precisely orienting the action of the corporate bodies.

[47] Art 5 of the Italian Code of Corporate Governance 2020.

[48] Art 6 of the Italian Code of Corporate Governance 2020. For further information on the impact of the implementation of the Italian Corporate Governance Code on the concept of corporate purpose, see D. Stanzione, 'Scopo e oggetto dell'impresa societaria sostenibile' *Giurisprudenza Commerciale*, 1023, 1041 (2022); G. Ferrarini, 'The EU Sustainable Governance Consultation and the Missing Link to Soft Law' *European Corporate Governance Institute – Law Working Paper 576/2021*, 1, 9-16 (2021). Regarding the political choice to leave the regulation of company governance rules to soft law, see G. Alpa, n 6 above, 731-732.

[49] Legge costituzionale 11 February 2022 no 1 ordered the modification of the Art 41, second para and the modification of the Art 41, third para. For an analysis of the consequences of such amendments, see M. Libertini, n 1 above, 71-87; G. Capo, 'Libertà d'iniziativa economica, responsabilità sociale e sostenibilità dell'impresa: appunti a margine della riforma dell'articolo 41 della Costituzione' *Giustizia Civile*, 81, 99-104 (2023).

[50] G. Alpa, n 6 above, 725; G. Capo, n 49 above, 99-104; M. Libertini, n 1 above, 71-87.

[51] G. Capo, n 49 above, 99-104; Assonime, n 38 above.

[52] U. Tombari, 'Corporate purpose' n 1 above, 13; G. Racugno and D. Scano, 'Il dovere di diligenza delle imprese ai fini della sostenibilità: verso un Green Deal europeo' *Rivista delle*

3. A New European Approach: the Directive on Corporate Sustainability Due Diligence

The debate on the definition of an appropriate form of sustainable corporate governance is also part of the European Union institutions' agenda.[53]

The European Strategy on Sustainable Finance, renewed in implementation of the European Green Deal, aims at creating a regulatory system that guarantees an adequate flow of information on companies' policies related to environmental, social and governance issues.[54]

So far, the most influential EU intervention in the field of corporate purpose is the recent directive on corporate sustainability due diligence (CSDDD).[55] The CSDDD marks a change in EU strategy on corporate sustainability, introducing a duty for companies not only to identify negative impacts of their activities on human rights and the environment and publicly account for them, but also to develop a strategy to prevent or reduce those impacts.[56] The overall objective of the CSDDD is to promote sustainable value creation and improve the long-term performance and resilience of EU companies.[57]

Società, 726, 744 (2022).

[53] As a matter of facts, one of the aims of the European Union is to work towards the sustainable development of Europe. See Art 3, para 3, Treaty on European Union (Consolidated Version of the Treaty on European Union [2008] OJ C115/13).

[54] Within this framework, without any claim to completeness, it would be appropriate to highlight: (1) the European directives on non-financial reporting (cf n 23 above); (2) the regulation on sustainability reporting in the financial services sector,ie, European Parliament and Council Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L317/1; (3) Shareholder Rights Directive II, ie, European Parliament and Council Directive (EU) 2017/828 of 17 May 2017 amending Directive 2007/36/EC [2017] OJ L132/1; and (4) the regulation on the so-called environmental taxonomy ie, European Parliament and Council Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088 [2020] OJ L198/13. For a detailed overview, see T. Di Marcello, 'Strategia europea sulla finanza sostenibile, informazione societaria e possibili riflessi sulla gestione della società' *Giurisprudenza commerciale*, 607-623 (2023); L. Calvosa, n 20 above.

[55] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L, 5.7.2024. For an overview, see R. Ibba, n 40 above, 460; M. Stella Richter, 'Corporate Sustainability Due Diligence: noterelle semiserie su problemi serissimi' *Rivista delle Società*, 714, 719-720 (2022), where, however, it is specified that the CSDDD constitutes an attempt at innovation that is still embryonic and uncertain; G. Racugno and D. Scano, n 52 above, 726-733; M. Libertini, n 1 above, 65.

[56] R. Ibba, n 40 above, 460. On the issue, see also M. Stella Richter, *Corporate Sustainability* n 55 above, 719-720, where the author states that with the CSDDD the European Union has begun to abandon a purely market approach, although this is still an embryonic and uncertain departure. In particular, according to the author, the use of the due diligence formula seems to suggest the attempt by the European legislator to seek space in a sort of border area between suggested but not imposed virtuous behaviors and actual hard law. For further thoughts, see also G. Racugno and D. Scano, n 52 above, 733; M. Libertini, n 1 above, 65.

[57] Commission Staff Working Document Impact Assessment Report. Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Corporate

The core duties envisaged by the CSDDD are identifying, preventing, mitigating and accounting for negative impacts on human rights and the environment caused by companies' activity and their value chains.[58] In addition, certain large companies are required to establish a plan to ensure that their business strategy is compatible with the Paris Agreement's goal of limiting global warming to 1.5 °C.[59] Moreover, the Directive shall not constitute ground for decreasing the level of protection of human rights and the environment already envisaged by EU and Member States' law.[60]

The CSDDD aims at increasing the relevance of stakeholders' interests in target companies' corporate purpose.[61] However, it does not introduce a groundbreaking turnaround in the actual governance system of EU companies.[62] As a matter of facts, according to many legal scholars, the most appropriate interpretation of the CSDDD appears to be the one requiring company directors to pursue shareholders' value maximization, in compliance with the already existing applicable mandatory rules that protect the interests of the relevant stakeholders (employees, consumers, suppliers, local or global communities concerned with the environment and society as a whole).[63]

Sustainability Due Diligence and amending Directive (EU) 2019/1937, SWD/2022/42 final, available at https://tinyurl.com/34cbedbh (last visited 30 September 2024).

[58] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L, 5.7.2024, Art 1.

[59] ibid Art 22.

[60] ibid Art 1. In its first version proposed by the Commission, the Directive also provided that company directors, when fulfilling their duty to act in the best interest of the company, must take into consideration human rights, fight against climate change and environmental damage. See Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 February 2022 COM(2022) 71 final 2022/0051 (COD), Art 25. However, this provision was eliminated from the final version of the CSDDD.

[61] G. Racugno and D. Scano, n 52 above, 744.

[62] S. Rossi, 'Il diritto della Corporate Social Responsibility' *Orizzonti del Diritto Commerciale*, 99, 121 (2021). In a partially different sense, see G. Racugno and D. Scano, n 52 above, 733-738, according to which the detailed provisions of the Directive should make it possible to overcome that generality and vagueness which, until now, has prevented, with a generic recourse to the Corporate Social Responsibility formula, the identification of the contents of corporate social responsibility, the means by which to pursue it, the monitoring tools and the relative sanctioning system. The author, however, recognizes that the protection of the interests of the stakeholders must be seen as functional and complementary to the maximization of shareholders' profit: the sacrifice of profit in the short term can undoubtedly be legitimized by a managerial conduct of the directors aimed at a useful result for the shareholders in the long term. According to other legal scholars, the CSDDD constitutes a first step, which should be followed by further, more incisive measures. The juridical-economic debate on the subject, in fact, is far from closed. In this sense, see R. Ibba, n 40 above, 463.

[63] G. Racugno and D. Scano, n 52 above, 738; E. Barcellona, 'La sustainable corporate governance nelle proposte di riforma del diritto europeo: a proposito dei limiti strutturali del c.d. stakeholderism' *Rivista delle Società*, 1, 45 (2022); R. Ibba, n 40 above, 458. In additions some scholars have also argued that sustaining that the aim of the CSDDD is to equalize the interests of stakeholders with those of shareholders, not only appears difficult to implement, but would also conflict with the fundamental values of the European Union, as well as of the Italian legal

III. Consequences on Company Directors' Liability of the Recent Rethinking of Corporate Purpose

Moving within this constantly evolving framework, it is useful to assess whether recent attempts to redefine corporate purpose may have consequences in terms of company directors' liability.

If the only purpose of a company was the generation of profit, shareholders could file a liability claim against the directors in case the company's net profit was sacrificed to create value for the stakeholders. Conversely, if the directors had the right, but not the obligation, to give up a portion of the company's net profit to allocate it to projects of stakeholders' interest, no liability claim could be brought by the shareholders against the directors were such a strategy implemented. If, otherwise, directors had the obligation to balance the interests of the shareholders and those of the stakeholders, the latter could undertake a liability claim against the directors in case of failure to achieve such balance.[64]

The orientations described above may suggest that a progressive reform of corporate purpose is underway, leading to an obligation for company directors to orient business activities towards sustainable development strategies. However, fascinating such a thesis may seem from an ethical point of view, it would be difficult to support under current positive law.

It might be useful to consider the example of a company carrying out a business that causes the release of polluting substances in the environment but does so in compliance with the limits imposed by applicable law. Arguing that this negative impact on the environment, even if not causing any violation of the law, may create hypothesis of liability would cause a contradiction. If the law intended to prohibit any kind of polluting activity, or at least lower the tolerance thresholds, the law itself would have provided for such an obligation. But if the relevant legal framework allowed polluting activities below specific thresholds, no detrimental consequences could be coherently imposed on a company which pollutes the environment, while staying in compliance with the limits imposed by applicable law.[65]

system. If it were accepted that the pursuit of the interests of stakeholders assumes equal dignity with respect to shareholder value maximization, this would be equal to imposing on company directors an unspecified duty of distribution of wealth at the expense of shareholders and for the benefit of stakeholders. However, such a task, in a system that incorporates the principles of market economy based on competition, is the responsibility of the public sector, not of the private sector.

[64] E. Barcellona, 'La sustainable corporate governance' n 63 above, 1-4; L. Calvosa, n 20 above, 315-316.

[65] Another example would be a European company which, within its supply chain, purchases goods that incorporate child labor permitted by the law of the country where these goods are produced. Again, either European law introduces a clear prohibition on the purchase of goods incorporating child labor; or, if such a prohibition were not instituted, it would become contradictory to impose on a company consequence detrimental to the performance of an activity, perhaps ethically despicable, but nevertheless permitted by applicable law. For an overview of more examples that explains in detail such contradiction, see E. Barcellona, 'La sustainable corporate governance' n 63 above, 18-20.

Furthermore, also assuming the level of diligence required of directors was higher than that prescribed by current legislation, this obligation would still be unenforceable. In fact, there would be no reference threshold to determine the amount of additional diligence that would be required of the directors.[66]

In addition, the same concept of sustainability, if applied to a company's business activity, can lead to divergent and possibly even conflicting interpretations:[67] (i) on the one hand, company sustainability over time, ie, the company's capability to preserve financial stability in the long run;[68] (ii) on the other hand, company sustainability from an environmental and social point of view, ie, the company's ability not to create detrimental externalities affecting the environment and human rights. It is possible (and desirable) that these two concepts of sustainability go hand in hand, but they could also conflict. Consider the case of a company that, to pursue sustainability from an environmental and social point of view, takes on costs that jeopardize its sustainability from an economic standpoint.[69] Furthermore, even environmental and social interests can, in practice, come into conflict. An example might be the possible clash between the need to protect the environment by interrupting the activity of a particularly polluting production site and the necessity to keep the activity running due to the social interest of avoiding prejudicial effects on employment.[70] If these different concepts of sustainability were to clash with each other, a trade-off would be inevitable.[71]

However, the task of establishing how and to what extent the interests of an organized social community shall be protected does not belong to company directors but to politics, acting as the representative of the relevant organized social communities.[72] Rather, company directors should pursue the goal of

[66] E. Barcellona, 'A cosa serve il corporate purpose?' speech held during the conference in Venice 'Convegno internazionale di studi per i settant'anni della Rivista – La s.p.a. nell'epoca della sostenibilità e della transizione tecnologica', 10-11 November 2023. See also R. Ibba, n 40 above, 456-457.

[67] M. Stella Richter, 'Long-Termism' n 1 above, 29-32.

[68] Company directors' duty to pursue this kind of sustainability is hardly deniable. In Italy, this obligation is provided for by Art 2086 of the Italian Civil Code.

[69] M. Stella Richter, 'Long-Termism' n 1 above, 29-32; Id, 'Corporate Sustainability' n 55 above, 721-723.

[70] M. Stella Richter, 'Long-Termism' n 1 above, 29-32.

[71] M. Stella Richter, 'Corporate Sustainability' n 55 above, 721-723, explaining that if the goals that must be pursued by the company directors were not adequately selected, leaving it to their discretion to weigh between an enormous variety of interests, the inevitable consequence would be that the directors will not be accountable at all (accountability to everyone means accountability to no one), because they will always be able to balance conflicting interests availing themselves of the benefits of the business judgment rule. Similar arguments are also expressed by: M. Stella Richter, 'Long-Termism' n 1 above, 33. See also M. Jensen, n 8 above, 238: 'telling a manager to maximize current profits, market share, future growth in profits, and anything else one pleases will leave the manager with no way to make a reasoned decision'.

[72] E. Barcellona, 'La sustainable corporate governance' n 63 above, 35; C. Brescia Morra, n 38 above, 95-99. On this point, se also M. Stella Richter, 'Corporate Sustainability' n 55 above, 724-725, expressed himself in a more moderate sense: the author does not deny that companies, especially very large ones, have been, are and will be political bodies; nor, according to the author,

shareholder value maximization and, at the same time, take into consideration the stakeholders' interests to the extent prescribed by relevant rules issued by politics.[73]

As a matter of fact, according to the fundamental principles of modern Western democracies, the definition and implementation of the purposes and values of a given organized social community is entrusted to parliaments and governments elected according to constitutional rules. Delegating these tasks to private entities lacking democratic legitimacy but holding large market power, such as company directors, would lead to an illegitimate removal of responsibility from the state and a consequent erosion of the power democratically vested in the people of such state.

Considering the above constrains, even if one accepts an evolutionary interpretation of the concept of corporate purpose requiring company directors to take due consideration of human rights and the environment, the measures that company directors would concretely be required to implement would be those already envisaged by pre-existing applicable law. Therefore, stakeholders would be unable to bring liability actions against company directors who have not protected human rights and environment more than what is required by applicable law.[74]

As a consequence, it would be irrelevant in terms of directors' liability if, among a number of management choices not prohibited under applicable law, company directors opted for the one with the highest negative impact on human rights or on the environment would be irrelevant in terms of directors' liability. Indeed, if the directors' conduct caused a legally relevant damage, the directors would be found liable under applicable law irrespective of whether they have acted in compliance with general sustainability principles. If, on the other hand, no legally relevant damage occurred, directors could not be considered liable due solely to the circumstance that it would have been possible to adopt a business decision with less environmental impact.[75]

The current regulatory framework regarding corporate purpose summarized above would seem to offer directors the possibility – and not the obligation – to implement a corporate strategy that takes into consideration also the interests of stakeholders, to the extent that this is in line with the purpose of maximizing shareholders' profit.[76] Consequently, if the directors, acting under the aegis of the

would it make sense to say that such companies should not engage in politics. Instead, it is a question of evaluating whether it is appropriate for the legal systems to leave the large companies an almost unlimited space to engage in politics, moreover on issues of close interest to the community. See also M. Libertini, n 1 above, 69, arguing that the CSDDD would require regulatory integration to guarantee a coherent assessment of the various ethical principles to which the Directive refers.

[73] E. Barcellona, 'La sustainable corporate governance' n 63 above, 36.

[74] Of course, nothing would prevent target companies from taking on a voluntary commitment to do more. But in this hypothesis, the liability in the case non-compliance would not be a tort liability, but rather a contractual liability. See E. Barcellona, 'La sustainable corporate governance' n 63 above, 20.

[75] T. Di Marcello, n 54 above, 621.

[76] M. Libertini, n 1 above, 85.

business judgment rule, opted for the implementation of such a strategy, no liability claim could be brought by the shareholders against the directors who had invested a part of the company's profit in initiatives of stakeholders' interest. Suchan interpretation of corporate purpose would legitimize the company management models capable of maximizing shareholders' profits while creating value also for shareholders.[77]

IV. Enel Use Case: Embedding Sustainable Progress on Business Strategy

The necessity to explore business strategies that effectively deal with the trade-off between shareholder value maximisation and stakeholder interests is a particularly current relevant topic in the energy sector.

While on the one hand energy industry constitutes one of the economic activities with the greatest environmental impact, on the other hand recent years have seen an acceleration of the transition from fossil-based to renewable power.[78] This transition not only poses significant business challenges on companies, but also offers the opportunity and responsibility to have a leading role in the conception of sustainable business strategies.

This brief case study investigates how Enel, one of the most significant energy companies in the world,[79] has addressed these challenges. Specifically, para 4.1 will provide an overview of the main features of Enel's sustainable business model; para 4.2 will investigate whether, within this sustainable business model, the creation of value for stakeholders is functional to shareholder value maximization; finally, para 4.3 will analyze if the implementation of Enel's sustainable business model is covered by the business judgment rule.

1. A Sustainable Business Model

Enel is one of the first signatories of the 2019 'Business Ambition for 1.5 °C' campaign promoted by the United Nations. On such occasion, Enel has publicly declared its commitment to develop a business model in line with the Paris

[77] See previous paragraph 2, containing a brief commentary on M. Jensen, n 8 above; M. Porter and M. Kramer, n 10 above; C. Mayer, n 7 above; A. Edmans, n 7 above.

[78] According to 'bp Statistical Review of World Energy' (2022): Encouragingly, renewable energy, led by wind and solar power, continued to grow strongly and now accounts for 13% of total power generation. Renewable generation increased by almost 17% in 2021 and accounted for over half of the increase in global power generation over the past two years. See 'bp Statistical Review of World Energy' (2022), 4, available at https://tinyurl.com/z2uedv26 (last visited 30 September 2024).

[79] In 2023, Enel accounted as one of the world's largest private electricity distribution companies, with about 70 million end users connected to its grids, including 45.2 million users with active smart meters. Enel also managed one of the largest customer bases of any private company, with more than 61 million customers. See Enel's 'Sustainability Report 2023', available at https://tinyurl.com/5n6vm5rw (last visited 30 September 2024).

Agreement's goal to limit the average global temperature increase to 1.5 °C.[80]

The core of Enel's sustainable business model is the ambition to achieve zero emissions by 2040. The achievement of this target is based on development of energy generation from renewable sources, a secure and reliable electric grid, and a clean electrification of consumption.[81] In 2022, Enel defined a decarbonization roadmap, which have been certified by the Science-Based Targets initiative.[82]

In 2023, Enel's net renewable installed maximum capacity reached 55.5 GW, corresponding to 68.2% of the total net installed maximum capacity.[83] In parallel, Enel proceeded with the process of dismantling coal-fired power plants. In 2022, Enel shut down the last coal-fired unit at the Bocamina power plant in Chile and the Teruel thermal power plant in Spain.[84]

Furthermore, Enel aims at promoting electrification solutions powered by renewable sources, in order to achieve a clean electrification. Despite the current geopolitical crisis, in 2023 Enel generated around 127 TWh of electricity from renewable sources,[85] recording a 13% increase compared to the 112.4 TWh generated in 2022,[86] and reached 1,730 MW of battery storage, an element of flexibility that is becoming increasingly strategic in the energy transition process.[87]

[80] Details available at https://tinyurl.com/7m82vnh9 (last visited 30 September 2024).

[81] In order to achieve this objective, Enel plans to accelerate the decarbonization of the energy production process, through the combination of the development of renewable generation plants, storage systems and the progressive decommissioning of thermal power plants. At the same time, investments are being made in strengthening distribution networks, enablers of the energy transition already underway, allowing electricity networks to accommodate greater volumes of renewable energy. See Enel's 2023 Report and Financial Statements, available at https://tinyurl.com/wwmb8kvb (last visited 30 September 2024).

[82] The roadmap envisaged a reduction of all direct and indirect greenhouse gas emissions by around 99% by 2040 compared to 2017 throughout the value chain. By 2025, Enel plans to add around 21 GW of installed renewable capacity, reaching a total managed capacity of around 75 GW (including around 4 GW from BESS - Battery Energy Storage Systems, ie, batteries for storing electricity). The outcome would be the increase of the percentage of energy generated from zero-emission to around 83%. This will mark a further significant step by Enel toward achieving its decarbonization goals, in line with the 1.5 °C objective established by the Paris Agreement. See 'Enel's Zero Emission Ambition', available at https://tinyurl.com/3mct3kuz (last visited 30 September 2024). A strategic lever to support Enel's decarbonization strategy and the path to a fair and inclusive transition is circular economy. Enel aims at progressively applying circular economy to its entire business model, so that it becomes increasingly sustainable, resilient, and competitive. Circular economy aims at creating benefits both by reducing costs and risks related to the supply of raw materials and in terms of generating additional revenues through the continued use of assets and materials. An example of circular economy application is the development of circular smart meters made of fully regenerated plastic, purposely conceived to be circular right from the design phase. For an overview of Enel's circular economy strategy, see Enel's position paper 'A journey into Enel's Circular Economy', available at https://tinyurl.com/36xbkemz (last visited 30 September 2024).

[83] Enel's '2023 Sustainability Report' n 79 above, 15.

[84] Enel's '2022 Sustainability Report', available at https://tinyurl.com/5n6vm5rw (last visited 30 September 2024), 168.

[85] Enel's '2023 Sustainability Report' n 79 above, 72.

[86] ibid

[87] ibid 95.

Enel's sustainability performance in terms of environmental, social and governance (ESG) principles is subject to the monitoring of ESG analysts and rating agencies.[88] In 2023, Enel maintained a top positioning in the main ESG indices and rankings.[89]

Enel plays an active role in various energy-related and multi-stakeholder organizations focused on the promotion of energy transition and fight against climate change, both nationally and globally.[90]

Since 2004, Enel has been committed to the United Nations Global Compact, adhering to its ten founding principles relating to human rights, labor standards, environmental protection, and the fight against corruption.[91] In 2011, Enel joined the Global Compact LEAD, a small group of leading companies in the field of sustainability at a global level. Enel's position in the LEAD group was confirmed in 2018.

2. Harmonizing the Creation of Profit for Shareholders and Stakeholders' Interests

Enel's sustainable business model does not represent an act of pure philanthropy, but rather a strategy to optimally achieve shareholder value maximization in the long term.

Since 2011, drawing inspiration from the teachings of Porter and Kramer,[92] Enel has been committed to integrating shared value creation in its business activity.[93] The nuts and bolts of this strategy are represented by the idea that

[88] ESG ratings plays a strategic role to support investors in assessing sustainable business models and identifying risks and opportunities linked to sustainability in their investment portfolio.

[89] By way of example, see (1) S&P ESG Scores, rating 84/100 (average score: 35); (2) MSCI, rating: AAA (average score: BBB); (3) FTSE Russel ESG Rating, rating: 4,9/5 (average score: 2,7); (4) Refinitiv ESG Rating, score 91/100; (5) Bloomberg ESG, rating 80/100. For a more detailed list see Enel's '2023 Sustainability Report' n 79 above, 25. Enel was also the first company to fully align its company reporting to the Net-Zero Company CA100+ Benchmark and was included in the Just Transition Assessment of the World Benchmarking Alliance. See Enel's '2022 Sustainability Report' n 84 above, 43. Moreover, for transparency purposes, Enel draws up its 'Sustainability Report' in line with the 'Consolidated set of GRI Standards' on reporting defined by the Global Reporting Initiative, available at https://tinyurl.com/5d8d8b98 (last visited 30 September 2024), taking into account also the supplement dedicated to the Electric Utilities Disclosure sector issued in 2013 by the GRI, available at https://tinyurl.com/43dwpxt9 (last visited 30 September 2024). See Enel's '2023 Sustainability Report' n 79 above, 366.

[90] eg, (1) United Nations Global Compact (UNGC); (2) Sustainable Energy for All (SEforALL); (3) CSR Europe; (4) World Business Council for Sustainable Development (WBCSD); (5) Global Reporting Inititative (GRI); (6) IFRS Sustainability Alliance; ; (7) Global Investors for Sustainable Development (GISD) Alliance;; (8) Science Based Target Network (SBTN) for Nature; (9) Taskforce on Nature-related Financial Disclosures (TNFD) Forum;; (10) First Movers Coalition; (11) Sustainable Stock Exchanges Initiative; (12) World Climate Foundation. See Enel's '2023 Sustainability Report' n 79 above, 11-13.

[91] The list of the ten principles is available at https://tinyurl.com/4s2wzuh2 (last visited 30 September 2024).

[92] M. Porter and M. Kramer, n 10 above.

[93] M. Kramer, n 12 above.

long-term success of a company depends on creating value for both shareholders and the communities interested by its activity. Accordingly, a company is successful when its stakeholders are also prospering.[94]

Enel' strategy to create shared value with local communities consists of several phases. First, it is necessary to understand the local context, assessing potential positive and negative impacts of Enel activities on local communities. This analysis aims at identifying common needs between Enel and its stakeholders. Following steps require the definition and execution of a business plan that maximizes the potential positive impacts and minimizes the potential negative impacts. Finally, the time comes to monitor, evaluate, and report on the results of the adopted strategy both on shareholder interests and on the creation of value for stakeholders.[95]

According to Enel '2023 Sustainability Report', in 2023 Enel's strategy aimed at creating value for local communities involved approximately 3,9 million beneficiaries. These projects involve infrastructure development, education and vocational training programs, support to cultural and economic activities, access to energy, rural and suburban electrification, and promotion of social inclusion for the most vulnerable groups of the population.[96]

Enel adopted the London Benchmarking Group (LBG) method to determine its contribution toward the development of the communities where it operates.

[94] ibid

[95] Enel's '2023 Sustainability Report' n 79 above, 222.

[95] Furthermore, to ensure the application of the shared value creation strategy in all the companies of the Enel Group, Enel has established dedicated functions in all of its global business lines.

[96] Enel 2023's 'Sustainability Report' n 79 above, 220-221. A first example is the *Hortas em Rede* project, managed by *Enel Distribuição São Paulo*, with the support of the NGO Cidades Sem Fome. The underlying idea, strongly inspired by the concept of circular economy, is to improve the quality of the areas under electricity transmission lines, through the creation and development of urban gardens. The project is intended for São Paulo's peripheral areas with a high population concentration and aims at demonstrating how a sustainable infrastructure can be integrated into the territory by responding to the needs of communities and contributing to the enhancement of the landscape. From its inception in 2018 until March 2022, *Hortas em Rede* has generated 1.5 hectares of urban gardens, more than 50 tons of food grown and approximately $1.1 million in income generated. See on Enel's '2022 Sustainability Report' n 84 above, 259. Another typical case is the shared value creation that accompanies the construction and operation of power plants for the generation of electricity from renewable sources, like the Rattlesnake Creek Wind Farm in Nebraska, which brings a wide amount of wind energy into Nebraska's electric grid and gives a boost to local investments and job opportunities. The construction of the power plant required an investment of over 430 million dollars and, once completely operational, will generate about 1300 GWh of sustainable energy per year. This amount of energy will help to avoid the emission of over 940,000 tons of CO_2 each year. Furthermore, Enel has cooperated with associations that protect wildlife to minimize the threat to the local environment. Rattlesnake Creek project also involved the building of almost 50 kilometers of new roads and the creation of about 300 new jobs during the plant's construction. Enel contributed significantly to the Rural Workforce Housing Investment Fund in the city of Wakefield, used by local community to remodel or build new homes to attract and maintain a rural workforce. Moreover, Enel has sponsored scholarships in science, technology and renewable energy local students. More details on Rattlesnake Creek plant are available at https://tinyurl.com/2p8j22em (last visited 30 September 2024).

In 2023, the registered contribution was about 118 million euro.[97]

3. Compliance with Business Judgement Rule

As illustrated in previous paragraph 2, recent legislative measures tend towards a partial rethinking of the concept of corporate purpose, allowing company directors to adopt a business strategy that takes into consideration also the interests of stakeholders, at least to the extent that this is beneficial to the achievement of shareholder value maximization.

Enel's sustainable business model seems to fall within this parameter, as the creation of value for stakeholders it envisages does not represent a mere pauperization of shareholders' income, but rather an investment for creating profit in the long run for shareholders (and consequently one of the possible strategies suitable for achieving shareholders' interests).[98] Thus, Enel's administrative body, protected by the business judgment rule, could legitimately chose this strategy to achieve the maximization of shareholders' profit, provided of course that directors do not act manifestly for selfish purposes, in an uninformed or negligent manner, or in violation of specific provisions established by applicable law.[99]

The business strategies aimed at generating profit are inherently indeterminate and, above all, characterized by structural uncertainty. It is precisely due to this framework of uncertainty that the business judgment rule finds its very reason for being. The rationale that lies beneath the business judgment rule is precisely to exempt from liability directors who, despite failure to achieve the objectives entrusted to them by the shareholders, nevertheless acted free from malice and manifest irrationality.[100] Through the business judgment rule, the legal system intends to set company directors free to assume reasonable economic risks for the good of the company, as long as the decision-making process meets certain standards of caution and preventive information.

In the Italian legal system, the business judgement rule has been recently

[97] For an overview of Enel's approach to measure the value of its commitment for local communities Enel's '2023 Sustainability Report' n 79 above, 223-224.

[98] See the combined provisions of the previous paras 1 and 4.2.

[99] See the arguments outlined in previous para 3. The business judgment rule originated in common law jurisdictions, and then became one of the key elements for assessing the liability of directors in many corporate law systems worldwide. Even in legal systems in which this principle is not explicitly codified in law, judges tend to implement it through case law, avoiding substituting their own management assessments for those of administrators. For an overview, see C. Gerner-Beuerle, 'The Duty of Care and the Business Judgement Rule: a Case Study in Legal Transplants and Local Narratives', in A. Afsharipour and M. Gelter eds, *Comparative corporate governance* (Cheltenham: Edward Elgar Publishing, 2021), 220-221, arguing, that 'the business judgment rule gives legal expression to the idea that questions of business judgment are best left to the honest decision of the directors' since 'Courts are not well placed to substitute their own discretion for that of the directors, since they typically lack the necessary expertise and act with the benefit of hindsight'. See also D. Kershaw, 'The Foundations of Anglo-American Corporate Fiduciary Law' *LSE Law, Society and Economy Working Papers 15/2018*, 1-20 (2018).

[100] See E. Barcellona, 'La sustainable corporate governance' n 63 above, 46.

reaffirmed by the Italian Supreme Court, ruling that company directors' management choices are unquestionable on their merits by judges, since such choices are often made in conditions of market uncertainty. What the judges can instead evaluate is whether the decision-making process was implemented correctly and in an informed manner, taking into account the preventive adoption of the necessary precautions, as well as the diligence shown in appreciating in advance the relevant risks.[101] If those standards are met, the management choices of the company directors shall not entail a source of liability, but possibly just a cause for the director's dismissal.[102]

Given the foregoing, and retracing the arguments referred to above in para 3, it seems that the administrative body of Enel, acting under the business judgment rule, could well choose to adopt an ethical and sustainable strategy of shareholder value maximization without risking liability claims from shareholders.[103] Therefore, the adoption of a credible and all-round sustainable business approach, which aims at enhancing the interests of both the company and the communities interested by the company's activity, would not only have sound grounds for being economically convenient,[104] but would also find legal legitimization.

V. Conclusive Thoughts

Faced with the crisis of capitalism, economic scholars have attempted to theorize a definition of corporate purpose that would allow company directors to pursue not only the interests of shareholder, but also the creation of value for stakeholders. However, it is worth noting that this is not a purely academic orientation. It is the global community itself, where large companies necessarily operate, that has repeatedly expressed its support for the adoption of sustainable and ethical business models.[105] Furthermore, the economic convenience stemming

[101] Corte di Cassazione 19 January 2023 no 1678, available at www.dejure.it; Corte di Cassazione 22 June 2020 no 12108, available at www.dejure.it; Corte d'Appello di Torino 8 September 2022 no 965, available at www.dejure.it.

[102] Tribunale di Roma 16 October 2019 no 19881, available at www.dejure.it. In general, each jurisdiction declines the business judgment rule according to its own rules, but some common traits may nevertheless be found, such as the absence of conflicts of interest, the duty to act on a well-informed basis and the abstract suitability of decisions adopted to serve the best interests of the company. See G.B. Portale, n 23 above, 954; C. Gerner-Beuerle, n 99 above, 220.

[103] Company directors are expected to pursue profit. With respect to this objective, they enjoy the discretion associated with the business judgment rule. Directors can, of course, consider the interests of stakeholders, but only to the extent that this is functional to maximizing the benefits for the company. In pursuing profit, directors obviously also maintain the legal duty to respect all mandatory rules established to protect stakeholders. With respect to this duty, there is in fact no discretion, nor any relevance of the business judgment rule. See E. Barcellona, 'La sustainable corporate governance' n 63 above, 50.

[104] See the economic theories outlined under previous para 1.

[105] Among others, see the study carried out on 17 countries, including Italy, by Simon Kucher& Partners, 'The Global Sustainability Study 2021' available at https://tinyurl.com/3whe3tn3 (last

from the attention paid by companies to sustainability issues is also highlighted by Blackrock's 2022 letter to the CEOs: 'we focus on sustainability not because we're environmentalists, but because we are capitalists and fiduciaries to our clients'.[106] Companies that remained indifferent to the consequences of the increasingly widespread interest in sustainability issues coming both from legislators and the civil society would face a serious entrepreneurial risk in the long term.[107]

Many modern legal systems do not prohibit the implementation of more ethical and environmentally friendly business strategies. Indeed, in some cases, they even encourage them. As a matter of fact, some jurisdiction, aware of the growing importance that sustainability is assuming in contemporary economies, have started to reshape the concept of corporate purpose, in order to allow company directors to take into account also the needs of stakeholders, as long as this is in line with the goal of increasing the company's profits.

This trend must not lead to the belief that company directors are required to do more than what is required by applicable law while evaluating the consequences of their business decisions on stakeholders. Otherwise, the legal system would end up contradicting itself, as argued above in para 3. The task of protecting human rights and the environment belongs to the democratically elected institutions representing the relevant organized social communities and cannot be delegated to companies.[108] It would therefore be desirable to have political interventions resulting as multilateral and coordinated as possible at a global level, ensuring that polluting and violating human rights becomes, even if not totally forbidden, at least economically inconvenient.

Nonetheless, without prejudice to the foregoing, it would still be advisable

visited 30 September 2024), which shows that over 34% of the population is willing to pay more for a sustainable product or service. See also the research carried out in 2022 by Deloitte in the United Kingdom, available at https://tinyurl.com/uwmzevb2 (last visited 30 September 2024), confirms the considerable attention paid by consumers to issues of sustainability, so much as to guide their purchasing choices. See also M. Campobasso, 'Doveri degli amministratori e successo sostenibile', speech held during the conference in Venice 'Convegno internazionale' n 66 above.

[106] Larry Fink's 2022 letter to CEOs, 'The power of capitalism', in https://tinyurl.com/3kvfp377 (last visited 30 September 2024).

[107] C. Brescia Morra, n 38 above, 97-98. In addition, stakeholder protection in corporate governance not only can be a strategy to give a boost to long-term value maximization, but also as an outcome of the compliance with applicable legal rules and ethical standards. In this sense, see D. Busch et al, n 4 above, 139. See also P. Grieco 'Saluto introduttivo' speech held during the conference in Venice 'Convegno internazionale' n 66 above, arguing that sound governance is an essential asset for the development of businesses and the market, as it also allows companies to increase the resilience to the occurrence of extraordinary events. However, as argued also by Nobel laureates George Akerlof and Robert Shiller, markets have no moral and a deceptive commercial behavior may often result profitable, at least in the short term. Nowadays, creating profit by adopting an ethical and sustainable business model remains a challenging and innovative choice, despite the considerable amount of authoritative studies that argue in favor the convenience and feasibility of such strategy. For this reason, a boost by regulatory support appears as necessary for a widespread implementation of sustainable corporate governance. This opinion is shared, among others, by D. Busch et al, n 4 above, 137-150.

[108] U. Tombari, 'Corporate purpose' n 1 above, 3; M. Libertini, n 1 above, 77-78.

for companies to have the courage to play their part when the essential cornerstones of society are in crisis, at least because in the long-term such crisis will end up affecting their very ability to generate profits.[109] Empirical analyses show that at least part of world industry has not remained indifferent to the recent trends towards the reshaping of corporate purpose. The Enel Use Case provides a practical example of a business strategy aimed at creating shared value for both shareholders and stakeholders, taking advantage of the new earning opportunities that such a strategy may entail.

However, it is appropriate to keep in mind that the adoption of a sustainable business model does not prevent companies from being primarily profit-making entities: companies would not undertake a sustainable business strategy out of pure altruism, but to the extent they find it an appropriate mean to reach the maximization of profitability. Therefore, to make this system work in practice, all the actors involved would be required to play their part. Not only it would be necessary for companies to implement a sustainable business strategy, but also for stakeholders to reward such companies by means of market share, employee loyalty and cash flows. Acting this way, stakeholders would make failing to respect human rights and the environment less profitable than not doing so.[110] Such a course of actions could make it possible to overcome the conflict between shareholders and stakeholders and move towards a constructive and beneficial dialogue for both parties.

In conclusion, and to give an answer to the questions posed in the abstract, this article has argued that the adoption of a sustainable governance system, which takes into due consideration both long-term shareholder value maximization and stakeholders interests: (i) is suitable, from a theoretical point of view, to generate wealth both for the company and the local communities concerned by the company's activity; (ii) finds legitimacy in the Italian and EU regulatory framework; and (iii) proves to have ground for being feasible and profitable from an empirical standpoint. Those who have the foresight to apply this new business strategies today might be the first to reap its benefits in the next future.

[109] U. Tombari, 'Corporate purpose' n 1 above, 3; M. Libertini, n 1 above, 77-78. See also U. Tombari, 'Il futuro della s.p.a.' speech held during the conference in Venice 'Convegno internazionale' n 66 above, where the author maintains that a company, if it does not take the interests of its stakeholders into consideration, will have difficulty achieving growth in the medium to long term.

[110] On this argument, see the work of M. Jensen on enlightened shareholder value theory, referred to above in para 1.

Malebolge

Gaza's Young Adult Male Noncombatant as a Legitimised Target Under Patriarchal Laws of War:
Probing the Routine Killing of Civilian Men Amid Feminist Abstention, Terrorism Ambiguities, and Genocidal Tensions

Riccardo Vecellio Segate*

Abstract

Unlike torture or slavery, war was never outlawed by international lawmakers. International humanitarian law, and the laws of war generally, have merely instituted minimal protection requirements for civilians, aligned with longstanding customs. Contemporary 'humanising' developments, fostered *inter alia* by feminist advocacy, have deepened the interfaces between such requirements and international human rights law doctrines of intersectional vulnerability, advocating enhanced protection for vulnerable groups of noncombatants. In pledging their waging of compliant, or even 'humanised' wars, today's armies emphasise their minimisation of casualties among mentioned groups, primarily 'women and children'. The cognitive habit is so profound that the media applaud, institutions acquiesce, public opinions are appeased. Meanwhile, a victim of ancestral tropes and nonevidential beliefs, the male noncombatant has further slipped into disposable invisibility. Killing civilian men attracts only residual blame, and responds to ancient mating competition instincts. Men are dangerous, suspicious, probably terrorists, gene-spreaders, and worth exterminating; 'their' women will be violated, but their life spared. Except for, eg, Cavarero, with her work on female horrorism, feminists have refrained from challenging the wartime massacre of male civilians, apparently accepting enemy sexual subjugation as relatively preferable. Not even counted, Gaza's annihilated men represent the latest embodiment of feminist male-discriminative normalised hypocrisy.

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I. Introduction

There are practices, such as torture or slavery, which have accompanied humanity and expressed its daily normalcy for thousands of years, but that societies find generally repugnant and unacceptable today. War is still missing from that list, and this is strikingly reflected in international law. While torture, slavery, and a few other practices such as piracy have been outlawed under domestic and international law, humanity has been unable (or unwilling?) to eradicate war and place an embargo thereon as a legal category. *Ius cogens* prohibits slavery and piracy, and arguably[1] torture, in the absolute, but does not forbid the killing of human beings at war and even at peace – under certain conditions. We cannot enslave (at least on paper), and we cannot torture; but we can kill, so long as we do it *lawfully*. Under international humanitarian law (IHL) and international human rights law (IHRL), the right to life is not a peremptory norm: humans can be killed, so long as this meets a number of requirements, formulated as exceptions to the right to life. IHL, or *ius in bello*, enumerates the conditions for human killing to be lawful in the battlefield, yet for certain imposing jurisdictions, including China, it is the *ius ad bellum* (the reasons why a war is waged) that ultimately justifies the (or a given) conduct of hostilities.[2] Whichever the case, human killing may find justification – after all, is that not the essence of waging war? Discussions are flourishing in legal philosophy and bioethics as to the legitimacy of killing embryos, plants, other animals, or even robots, but as the law stands, human beings can lawfully be killed in certain circumstances. In particular, the 'combatants' are those who can be killed *in bello*.

The above is not to say that the law has not attempted at restraining force or minimising lawful killings, which is why modern laws of war (LoW) have been gradually developed from long-standing customary norms[3] and eventually codified into a complex framework, most famously epitomised by the Geneva Conventions. And yet, any minimisation involves a discriminatory exercise of sorting those who can be lawfully killed from those who cannot, with each of these choices becoming a natural terrain for contestation; and the narrower the pool of lawful targets, the deeper the contestation about its demographics. To further entangle an already controversial sorting exercise, the Conventions and related norms are not standing

[1] See further J. Clemens and R. Grigg, 'A Note on Psychoanalysis and the Crime of Torture' 24(1) *Australian Feminist Law Journal*, 160 (2006).

[2] See Z. Liang, 'Chinese Perspectives on the *ad bellum/in bello* Relationship and a Cultural Critique of the *ad bellum/in bello* Separation in International Humanitarian Law' 34(2) *Leiden Journal of International Law*, 317 (2021); R. Vecellio Segate, 'Resisting Domestic Courts' Universal Jurisdiction over International Crimes: Comparative Notes on China and Italy', in P.K. Grzebyk ed, *International Crimes in National Regulations of Selected States* (Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2022), 259; E. Lieblich, 'The Humanization of *Jus ad Bellum*: Prospects and Perils' 32(2) *European Journal of International Law* (2021).

[3] Read also A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford UP, 2004), 91-156.

in a vacuum; they are somewhat 'living' instruments whose interpretation is susceptible to appreciable degrees of fluctuation, depending on broader societal trends and normative developments. Of relevance here, LoW which were once conceived for symmetrical, military combat are undergoing a process of factual reevaluation in light of increasingly hybrid, by-proxy, and irregular forms of warfare. And infrastructure which is struck as 'military' expands the scope of 'lawful' military targeting alongside those who find themselves in its vicinity. This broadening 'remilitarisation' of humans as intended or 'incidental' targets,[4] and consequent loosening restraint on the side of warriors, has prompted conceptual and legal frameworks such as 'human security' and the 'responsibility to protect'[5] (R2P) to encourage a shift in focus from combatants to civilians *and all shades in between*,[6] alongside the blurring line between combatants and noncombatants but also between domestic and international conflicts.[7] This focus shift has, in turn, compelled novel streams of scholarship on the readability of wartime practices through the prism of social justice and political violence theories.[8] Even assuming that the LoW are humanising,[9] with IHRL increasingly permeating IHL and defining the lawfulness of wartime conduct, are they humanising for everyone alike? Is legal protection being enhanced for all noncombatants to comparable extents?

The young adult healthy civilian man, who does not fit into any of such categories as 'child', 'elderly', 'sick', or 'woman', is factually and discursively unprotected in times of conflict, despite his status as noncombatant. He is so

[4] See further L. Daniele, 'Incidentality of the Civilian Harm in International Humanitarian Law and its *Contra Legem* Antonyms in Recent Discourses on the Laws of War' 29(1) *Journal of Conflict & Security Law*, (2024).

[5] On this doctrine, see eg United Nations General Assembly, Report of the Secretary-General: 'Development and the Responsibility to Protect: Recognizing and Addressing Embedded Risks and Drivers of Atrocity Crimes', A/77/910-S/2023/409, 6 June 2023; R. Vecellio Segate, 'Hidden Hunger in Peacetime and Wartime: Retailoring the 'Responsibility to Protect' to Food-Power Discourses in Burundi and North Korea, Between International Politics and International Law' 46(1) *North Carolina Journal of International Law and Commercial Regulation* (2021); J. Scherzinger, 'Unbowed, Unbent, Unbroken? Examining the Validity of the Responsibility to Protect' 58(1) *Cooperation and Conflict*, (2023).

[6] See also B. Bliesemann de Guevara et al, 'Enacting Peace Amid Violence: Nonviolent Civilian Agency in Violent Conflict' 1(2) *Journal of Pacifism and Nonviolence*, (2023).

[7] See also R.J. Goldstone, 'The International Criminal Court Origins, Challenges and Desirable Reforms to Strengthen It', in R. Falk and A. Lopez-Claros eds, *Global Governance and International Cooperation: Managing Global Catastrophic Risks in the 21st Century*, (Abingdon-on-Thames: Routledge, 2024), 373.

[8] See eg C.J. Finlay, 'The concept of violence in international theory: a Double-Intent Account' 9(1) *International Theory*, (2017).

[9] See eg C.M.J. Ryngaert, 'The Humanization of International Law: Reflections on Theodor Meron's Hague Lecture' 1 *Human Rights and International Legal Discourse*, 425 (2007); A. Gilder, 'International law and human security in a kaleidoscopic world' 59 *Indian Journal of International Law*, (2020); D. Traven, *Law and Sentiment in International Politics: Ethics, Emotions, and the Evolution of the Laws of War* (Cambridge: Cambridge UP, 2021), 193-237; H. Jöbstl and D. Rosenberg, 'The Humanization of War Reparations: Combatant Deaths and Compensation in Unlawful Wars' 45(1) *Michigan Journal of International Law*, (2024).

precisely because IHL, which roughly protects all noncombatants alike, is increasingly interfaced with IHRL to establish a factual hierarchy of protection that draws on 'vulnerability' narratives to justify uneven treatment of different 'categories' of noncombatants. This observation, per se, is no news:

> the target is gendered: "civilians" become "women" and "combatants" become "men". (… T)he binary-gendered notion of the "human" in IHL (combatant/man, civilian/woman) (…) requires us to rethink the boundaries of responsibility and accountability.[10]

In fact, there is an entire strand of literature on the discrimination of the man in times of conflicts, with four articles being of special background salience to the arguments being advanced here. The first contests a genderised rhetoric around the exclusive vulnerability of 'women and children' as harmful to the protection of all civilians, examining transnational networks where this rhetoric finds fertile promotion, but also seeds of resistance thereto.[11] The second empirically finds that '(i)n war, dominant narratives construe women as paradigmatic victims, even while civilian men are disproportionately targeted in the most lethal forms of violence', and offers survey-based insights to confirm that 'respondents consistently underestimate the victimization of men, perceive civilian male victims as less innocent, and hold anti-male biases'.[12] The third inspects healthcare systems and their readiness to accept that

> 'male civilians have also been victims of gender-based violence during conflict, invisible due to stereotypes surrounding masculinity and a culturally permissive approach towards violence perpetrated against men, especially at times of war'.[13]

The fourth insists on gendered forms of violence, to argue that

> 'addressing gender-based violence against women and girls in conflict situations is inseparable from addressing the forms of violence to which civilian men are specifically vulnerable',

and this shall be pursued within a coherent 'human security' agenda that refrains

[10] M. Arvidsson, 'Targeting, Gender, and International *Post huma*nitarian Law and Practice: Framing the Question of the Human in International Humanitarian Law' 44(1) *Australian Feminist Law Journal*, 14 (2018).

[11] Check R.C. Carpenter, ' "Women, Children and Other Vulnerable Groups': Gender, Strategic Frames and the Protection of Civilians as a Transnational Issue' 49(2) *International Studies Quarterly*, 295 (2005).

[12] Check A.K. Kreft and M. Agerberg, 'Imperfect Victims? Civilian Men, Vulnerability, and Policy Preferences' 118(1) *American Political Science Review*, 274 (2024).

[13] Check N. Linos, 'Rethinking gender-based violence during war: Is violence against civilian men a problem worth addressing?' 68(8) *Social Science & Medicine* (2009).

from rigid assumptions as to the exclusive vulnerability of females to given types of wartime violence.[14]

The reader will have appreciated how pertinent and resolute this literature is; nevertheless, the discrimination of men has not nearly received the attention it deserves: relative to other debates, and especially to (praiseworthy, and very much needed)[15] genderised debates around the protection of women, this issue is neglected in policy circles and practically absent from public debates. On wartime sexual violence against men, 'relatively little material exists (…) and the issue tends to be relegated to a footnote';[16] the same holds true with the disproportionate extermination of civilian men. As a disclaimer, observing that men are often discriminated is not intended to discredit, disqualify, or downsize the discrimination and discomfort experienced by women in times of war. Rather, the necessity of fostering the debate about discriminated men arises because while the focus on stereotypes against women as well as on women suffering is overwhelmingly extensive (especially on sexual violence and victimisation in times of war),[17] and it is probably time for action as little more could be advanced on paper, any intellectual focus on men is met with resistance, dismissal, ridicule, or parody, and is anyway severely sided in scholarship and policy discourse alike: a phenomenon known as 'reverse discrimination' or 'reverse sexism'.[18] From domestic violence and carceral mistreatment to workplace exploitation and wartime abuses, men grievances are routinely dismissed as hyperbolic or untrustworthy;[19] yet, there

[14] Check R.C. Carpenter, 'Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations' 37(1) *Security Dialogue*, 83 (2006).

[15] See eg L. Harding, 'The other prisoners' *The Guardian* (2004), available at https://tinyurl.com/5n7rz58x (last visited 30 September 2024).

[16] S. Sivakumaran, 'Sexual Violence Against Men in Armed Conflict' 18(2) *European Journal of International Law*, 253 (2007). See also V. Hospodaryk, 'Male and Gender-Diverse Victims of Sexual Violence in the Rohingya Genocide: The Selective Narrative of International Courts' 17(2) *International Journal of Transitional Justice*, 252 (2023); D. Eichert, '(Re)Constructing an International Crime: Interpreting Sexual Victimhood in the Rohingya Genocide and Beyond' 45(2) *University of Pennsylvania Journal of International Law*, 304 (2024).

[17] See eg, recently, O. Torrisi, 'Young-age exposure to armed conflict and women's experiences of intimate partner violence' 85(1) *Journal of Marriage and Family* (2023).

[18] Refer generally to D. Benatar, *The Second Sexism: Discrimination Against Men and Boys* (Hoboken: Wiley, 2012); A. Siddiqi, 'A Clinical Guide to Discussing Prejudice Against Men' - A Dissertation Submitted to the Faculty of The Chicago School of Professional Psychology (2021), available at https://tinyurl.com/4s4rpsm4 (last visited 30 September 2024); J. Barry et al, 'Reactions to Contemporary Narratives about Masculinity: A Pilot Study' 4(2) *Psychreg: Journal of Psychology*, 8 (2020); A. Walker et al, 'Male victims of female-perpetrated intimate partner violence, help-seeking, and reporting behaviors: A qualitative study' 21(2) *Psychology of Men & Masculinities*, 213 (2020); E. Feess et al, 'People Judge Discrimination Against Women More Harshly Than Discrimination Against Men – Does Statistical Fairness Discrimination Explain Why?' 12 *Frontiers in Psychology* (2021).

[19] See also R.V. Reeves, *Of Boys and Men: Why the modern male is struggling, why it matters, and what to do about it* (Swift, 2022); P. Malmi, 'Discrimination Against Men: Appearance and Causes in the Context of a Modern Welfare State' - PhD Thesis in Social Sciences at the University of Lapland (2009), available at https://tinyurl.com/bdj2vz9 (last visited 30 September 2024).

are compelling reasons to posit that the discrimination of women will not improve by discriminating men more: human rights (HR) never are a zero-sum game. It is all about joining forces, so to improve human living and catalyse systemic change for all. Only by addressing all discriminations will we be able to pave the way towards a fairer society for everyone; after all, that feminism should turn into a liberatory movement for men themselves, so to free them from the roles and burdens society typically expects and places thereon, has long been held by feminists themselves.

Despite these unbalances, as emphasised *supra*, some cogent literature admittedly does exist: the present paper seeks to contribute thereto in at least four distinct ways. First, it advances new potential explanations for this discriminatory phenomenon, linking diminished protection to 'the terrorist' as a male-depicted combatant-noncombatant hybrid that falls beyond the protective scope of the law – namely of IHL, that 'percolates' into domestic legislation (eg military codes and rules of engagement) as well, and interfaces with IHRL on the battlefield and beyond. It will trace the chain from the man as dangerous and powerful and thus 'worth killing' to the man as a legitimised, somehow justifiable target. Contrariwise, female civilians are deemed 'not worthy a bullet'.[20] Scholarship on female horror and terror by the Italian feminist political philosopher Cavarero will serve as a bridge to the second contribution marked by the present work. The latter will ground the discussion in feminist literature, thus proving that the diminished protection afforded to men is also caused by the LoW still expressing an essentially patriarchal view of hostilities, and noting that despite such patriarchal legacy, feminists have long refrained from engaging with the matter under a long set of false, nonevidential assumptions and cognitive biases. If research has long been acknowledging the wrongfulness and undesirability of this unbalance, then why is nothing being done to address it? Could it also be owing to feminists not having campaigned for making this their cause too? In the positive, this deliberate disengagement would be extremely problematic towards any assessment of the genuineness of the feminist cause more widely. Worse even, it is precisely the exclusion and neglection of men from equal-protection discourses that prepares the ground for their dehumanisation and extermination – not rarely within genocidal modes of speech and frames of action. This means that there is a strong case not just legally, politically, sociologically, but also anthropologically and neuroscientifically for making sure that the man is welcomed back to protection discourses as a victim, too, and not always as a perpetrator. Third, this paper illustrates how the perpetuation of this hidden discrimination has turned into a cognitive habit that features in the media so frequently and normalisedly as to crystallise the acceptance of diminished protection as unavoidable or even fair. Indeed, this relentless framing popularises the stereotypical dangerous man,

[20] A. Marino, '*Bosnia* v *Serbia* and the Status of Rape as Genocide under International Law' 27 *Boston University International Law Journal*, 205 (2009).

polarises narratives thereabout, and defeats the supposed purpose of LoW and especially of IHL by not lessening the overall brutalisation of conflicts, while not fostering women and children's protection either. In fact, the normalisation of killing men has often bordered extermination intents and *modi operandi* that resonate with genocide and brutalise women and children as well. This brings the paper to its fourth contribution: situating the findings above into a case-study on the latest Israel-Hamas conflict in Gaza, a regrettably suitable laboratory for the mass extermination of 'terrorist' men – with women and children not being spared, either.

The reasoning will be structured as follows. Section II will substantiate the premise that the man is indeed 'differentially protected' – if at all – in times of war: he is liquidated both within and outside combat, without significant blame from the international community, and regularly forced to serve his country's army regardless of consent. Section III will illustrate the blurring line between combatants and noncombatants due to the ever-escalating reference to 'terrorists', and the misleading assumption that these are men and expressive of 'masculine' instinctual, irrational violence. Sections IV to VII will thus delve into feminism. More in detail, section IV will argue that despite LoW being of patriarchal legacy, feminists have not contributed substantially to the 'reframing' of the debate around civilians, nor to questioning and unwiring the normalisation of killing male noncombatants. As for sections V to VII, they will offer selected explanations for this hesitancy. It is contended here that feminists' selective withdrawal from these debates is motivated by a portfolio of (plausible) cognitive biases and nonevidential beliefs, namely: that killing men helps prioritise saving women and children – a rather trenchant exemplification of feminists' usual self-accommodating selectivity (section V); that men's destiny does not fall within the aspirational mandate of global feminism, so that the wartime killing of men may stay at the bottom of feminist agendas (section VI); and that systemic change will remain inactionable so long as men are in power, war being an inherently masculine resort for solving disputes (section VII). The latter assumption is the most controversial, not merely in itself but with regards to its implications: even assuming, for the sake of argument, that the claim is true, should society accept diminished protection for men just because the fault for men being killed falls on other men? Section VIII will contend that the patriarchal normative legacy and masculinity tropes recounted above, jointly with feminists' selective retraction and silence, as well as neocolonial discourses around 'the terrorist', have coalesced into a cognitive habit around normalising the wartime killing of men. This habit leads *inter alia* to finding it normal (or even 'best practice'!) that headlines report casualty counts under the including-women-and-children formula, as if killing men was absolutely ordinary and somewhat fine – less blameworthy, more justifiable – while the other casualties constituted the regrettable 'excess' inventory. Section IX will move on to argue that this normalisation defeats the very purpose of striving for inclusive and 'humanised' LoW, especially *vis-à-vis* the risk to enable a core underpinning of genocidal plans: the resolution of

killing men so to pave the way for the extermination (or 'blending') of the genos they represent. Section X will draw on the Gaza case-study to illustrate these dynamics, exacerbated to the point of invisibility, whereby massacred male noncombatants are not even worth featuring in casualty counts. Section XI will formulate seven *de minimis* policy recommendations to change course in a timely fashion. Section XII will conclude.

On the whole, the present paper seeks to answer two mutually intertwined research questions: How has the wartime killing of civilian men been societally and legally normalised? And why have feminist reflections on gender and conflict failed to question and resist such normalisation? Before turning to the analysis, a couple of notes on terminology are due. First, unless otherwise specified, I will avail myself of the LoW expression as to encompass the *ius in bello* (IHL), the *ius ad bellum*, and all other domestic and international frameworks applicable to the conduct of hostilities but also to pre- and post-conflict scenarios of transitional justice, as well as to civil conflicts broadly understood, including their rhetorical and operational setup. Second, I will occasionally refer to 'sex' as opposed to 'gender' in order to characterise the classical distinction between men and women – which is the relevant one for LoW as they were negotiated and conceived. Nonetheless, in certain passages I will prefer 'gender' terminological derivatives – for instance, 'along genderised lines' reads more accurate than 'along sexualised lines'.

II. The Diminished Protection of the Man

As humanity, we have made significant progress across a number of areas, extirpating some extremes from the spectrum of violent actions we consider acceptable. For instance, we have defeated or significantly reduced slavery and torture. We find them repugnant, and although they do survive in practice for subaltern groups across vulnerable societies, a moratorium is generally placed on such practices – not least from a legal perspective. Modern slavery does persist, and claims have been submitted to justify preemptive strikes and 'enhanced interrogations', but the law is generally consistent across States as to ban both slavery and torture – at least as legal and 'moral' categories. Despite atrocities still occurring, the 'slave master' or the 'torturer' are no longer accepted as legal categories across contemporary legal systems. Yet, the same cannot be argued with regards to the sacrality of life per se: the death penalty persists across dozens of jurisdictions as a legal category (albeit a residual one), we still witness extreme forms of individual and collective self-defence being lawful, and especially, we still enforce fairly surgical legal categorisations to sort those who can be 'lawfully' killed –mostly at war –from those who cannot: we call the first 'combatants'.

In upholding the principle of distinction between civilians and noncivilians,

combatants are those who can be lawfully killed under IHL.[21] The latter is a complex texture of norms that transcends the Geneva Conventions as to encompass evolutionary interpretations thereof, not least by unaccountable government counsels, but also emerging customs and systemic resistance (technically 'persistent objection') thereto.[22] There is at least a couple of reasons why IHL in itself is *factually* and *formally* discriminatory of men: first, and most straightforwardly, if men are those who combat wars, men are going to be those who are killed; second, and more sophisticatedly, IHL's inability to address the untenable combatant/ noncombatant dichotomy in contemporary warfare has led to placing anyone in between (usually labeled as 'terrorist' or the like) outside its protective scope. Both these choices, which run in word and deed against the protection of men, paradoxically represent an expression of the patriarchal structure of men-made[23] IHL – and public international law (PIL) more generally. On top of this, when feminist thinkers entered the debate, they failed to question the untenability of the aforementioned dichotomy and its consequences for men; rather, they focused on marking an even sharper boundary between the (stereotypically male) quasi-civilians, and the (stereotypically female) civilians *par excellence*: 'women and children'. What were once cursory, yet not trivial, IHL references to other PIL regimes, and especially to IHRL, have been mainstreamed to the effect of further sharpening the just-mentioned boundary. The interfaces between IHRL and IHL of relevance for the standard of protection of civilians under *de facto* control of a military power – including standards of dignity, equality, and nondiscrimination[24]– have been elaborated upon.[25] Similarly, the intersectionality of human rights has been emphasised, most prominently to disrupt the cumulative effect of disadvantages experienced by women in times of war:

> 'women are treated as a group that may require further protection, where gender operates as a qualified identity that supplements the category of civilian (or indeed, comes to define the category of civilian)'.[26]

[21] See also M. Arvidsson, n 10 above; E.C. Gillard, *Enhancing the security of civilians in conflict* (London: Chatham House, 2024), 9.

[22] See G. Mantilla, 'From treaty to custom: Shifting paths in the recent development of international humanitarian law', *Leiden Journal of International Law*, 359 (2024); L. Parsi, 'Fabricated Legality: The Role of Legal Advisers in the Commission of International Crimes', *Journal of International Criminal Justice*, 19 (2024).

[23] A few exceptions do exist. Refer eg to B. van Dijk, 'Marguerite Frick-Cramer: A Life Spent Shaping the Geneva Conventions', in I. Tallgren ed, *Portraits of Women in International Law: New Names and Forgotten Faces?* (Oxford: Oxford UP, 2023).

[24] See further G. Dvaladze, *Equality and Non-Discrimination in Armed Conflict: Humanitarian and Human Rights Law in Practice* (Cheltenham: Elgar, 2023).

[25] Refer eg to K. Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford: Oxford UP), 15.

[26] E. Jones et al, 'Gender, War, and Technology: Peace and Armed Conflict in the Twenty-First Century' 44(1) *Australian Feminist Law Journal*, 3 (2018).

In itself, this is self-evidently praiseworthy a scholarly exercise; the problem rests with its relative implications for men. These welcome feminist contributions have inadvertently widened an already problematic protection gap, and once this trend could not be neglected anymore, feminist thinking has not even tried to remedy thereto. Intellectually, feminism is cultivated across a number of environments, academic ones being the most prominent; as it was tweeted[27] with reference to Gaza,

> (w)orking in academia is knowing that someone who is steadfastly silent today will be making one of those 'delighted to announce' posts, in about fifteen years' time, about their new book, *Intersectional Reflections on the Gaza Genocide*.[28]

We are therefore on a mission, as the 'invisible college of international lawyers'[29] and global scholarly community, to problematise these hypocrisies on display as they happen – including from feminists.

According to the symmetry moral theory of war, 'combatants have the licence to try to injure and kill each other as long as they stand in a relationship of mutual risk'.[30] The LoW regulate the killing of humans, they do not prohibit it. One uncomfortable implication is that humanity has chosen that killing is legitimate, or that in certain circumstances killing is 'the norm': in war, annihilating combatants is legitimate and should be pursued; as many combatants as necessary should be liquidated. *Prima facie*, it could be argued that IHL is the best possible compromise: in the tragedy of war, loss of human life is inevitable.[31] Upon deeper scrutiny, this turns unsettling, as any argumentation around 'inevitability' reads unpersuasive. To demonstrate superiority and cause the enemy's techno-economic collapse, we could fight entirely robotic wars nowadays, where robots kill each other up to defeating the other side's robotic army. This way, which is else from engineering drones to remotely kill humans, human life could be totally spared. In accepting that this is utopian, we also accept that humans fight war to annihilate other humans, and not to gain strategic advantages or resolve disputes through force – the latter objectives could be attained via robotic wars just as much. Even considering that fully robotic wars were not technically conceivable at the time the Geneva Conventions were drafted, why are not we redrafting them? Or deciding for specific customary norms to outlaw human massacres? Yet the question exceeds

[27] Throughout this work, posts on the *X* platform will be referred to with their previous *Twitter* denomination.

[28] M. Pierse, available at https://tinyurl.com/bdzuju5s (last visited 30 September 2024).

[29] On this expression and its half-a-century-long history, *refer eg to* L.L. Soares Pereira and N. Ridi, 'Mapping the "invisible college of international lawyers" through obituaries' 34(1) *Leiden Journal of International Law*, 67 (2021).

[30] M. Prieto Rudolphy, *The Morality of the Laws of War: War, Law, and Murder* (Oxford: Oxford UP, 2023), 251.

[31] ibid 21.

robots in several respects, meaning that human-killing-free solutions could have been devised regardless. To exemplify, the parties to a conflict could decide to engage against pre-identified assets, or nonliving targets, as opposed to humans; they could identify the perimeter of a civilian-freed battlefield, move vital assets thereto and certify their value through mutual inspection, and validate their superiority claims by trying to destroying such assets: the party which destroys the more assets and faster, demonstrates its superior capabilities and wins. This would represent a smart and blood-free way of engaging in hostilities in order to gain advantage and impose strategic victory; if we choose otherwise, it is because humanity still fights wars like hundreds of thousand years ago, to annihilate other members of their own species. In 2024 DC, wars are still being fought to exterminate as many enemy humans as possible, and LoW 'regulate' precisely this mass extermination. Humans do not seek a cold victory, made of territories and resource extraction alone; they want to go after other humans.

In practice, going after other humans means massively killing enemy men. In most conflicts, men are going to die *en masse* – both combatants and noncombatants. In the Russia-Ukraine conflict alone, the overall death-toll already exceeds half a million humans – the overwhelming majority of whom is made of young adult men. Because the Russia-Ukraine war is an extremely violent but also somewhat 'regular' conflict, where two armies face each other and only relatively rarely hit civilians, most of those killed men are combatants. And yet, even among the noncombatants,

> '(a)ccording to the UN Human Rights Office's monitoring mission in Ukraine, of the adult civilian casualties whose sex was known, men accounted for 61.1 per cent of civilian casualties [so far] and women for 39.9 per cent'.[32]

The Bucha massacre alone left hundreds of dead *male* bodies in mass graves or the street mud.[33] This is not by coincidence. In this conflict, just like in any others, the factual situation is that some effort is made (or reportedly made) to spare women and children, and sometimes the elderly and sick, but mid-age men are ruthlessly murdered. Self-evidently, this is not what LoW mandate, yet it is the factual outcome of the values they have long been encoded with, alongside human-rights interpretative integrations that have (rightly) addressed female intersectional disadvantages while dismissing or omitting male plights from their protection campaigns.

The core legal notion that feminists deployed to 'humanise' war is that of vulnerability; today, a complex tangle of hard and soft provisions is in place both domestically and internationally to 'especially protect' children and women as

[32] UN Office of the High Commissioner for Human Rights, Press Release: 'Türk deplores human cost of Russia's war against Ukraine as verified civilian casualties for last year pass 21,000', 21 February 2023, available at https://tinyurl.com/ms7m43vy (last visited 30 September 2024).

[33] Check O. Rudenko, 'Hundreds of murdered civilians discovered as Russians withdraw from towns near Kyiv' *The Kyiv Independent* (2022), available at https://tinyurl.com/y5kfymk4 (last visited 30 September 2024).

vulnerable. As the present paper seeks to problematise genderised dichotomies of protection, children will not be addressed here – though this narrative is dangerous for them, too, especially for late-adolescent combatants and 'child soldiers' who can easily be mistaken as adult men and thus 'lawfully' killed.[34] Notably, not even children are protected equally: the 'children as women, or as accessories to women' normative trend builds on 'the impetus for the popular use of the concepts of 'women and children' and 'children as girls only' visible in certain UN policy'.[35] For instance, in its report on the R2P and youth, the United Nations noted that 'young people in particular, *especially young women*, are adversely affected by armed conflict'.[36] I will briefly return to this later, but the bulk of this discussion revolves around adult women. Against a backdrop of equality advocacy that aims at levelling any difference between men and women, and thus rejects long-held customary acts (or at least promises) of wartime chivalry, is there any principled reason to protect (non-pregnant) women more than men? Most cogently, is there any *legal* principled reason to do so? Why is vulnerability still dependent on sex? Does it depend on selective contextual convenience? Is this aprioristic prioritisation even fair? Should it be (deemed) *lawful*?

Female vulnerability has been discursively appropriated by feminists in order to advocate for intersectionally-aware women rights, yet the trope is an ancient one and it featured in LoW drafting just as much as it filters through contemporary war reporting. The including-women-and-children narrative deepens an already profound male/female civilian divide, and frames violence and lawfulness in contemporary warfare in such a way as to systematically justify the massive extermination of men. Alienatingly enough, this is a direct consequence of the values that have shaped law-drafting in this field, and that feminists are failing to challenge and redefine, plausibly out of (what they believe is) genderised self-interest. LoW build on archaistic, atavistic tropes of the natural man as the warrior, the savior, the national hero, the capable, the strong, the leader in times of emergency, and so forth, in a sort of 'state-wide' reedition of the man as the traditional family's breadwinner. 'In the 'protector' narrative, the man's role is seen as the ultimate sacrifice, as he is the one who serves the dependent ones and makes sacrifices to provide them with security'.[37] In this sense, the man is the one who can (and shall!) resist, who will make it or heroically perish, and who is responsible for the collective fate of the family – and by conceptual extension, of

[34] See further M. Lidén, 'Child Soldier or Soldier? Estimating Age in Cases of Core International Crimes: Challenges and Opportunities', in X.A. Aranburu et al eds, *Quality Control in Criminal Investigation* (Brussels: Torkel Opsahl, 2020).

[35] V. Bramwell, 'Protecting Children in Armed Conflict: A Preliminary Assessment of Social Constructivist and Critical Feminist Approaches', in D. Rogers ed, *Human Rights in War* (Berlin: Springer, 2022), 263 (capitalisation removed).

[36] UN Secretary-General: 'Responsibility to protect: Prioritizing children and young people', 26 May 2022, A/76/844-S/2022/428, emphasis added.

[37] K. Wojnicka, 'Men and masculinities in times of crisis: Between care and protection' 16(1) *NORMA: International Journal for Masculinity Studies*, 3 (2021).

the whole nation.[38] This is a collectivisation of the stereotype of the *homo faber*, who takes on his shoulders the burden of crafting the future, of creating new realities and possibilities 'beyond the given'. War catalyses change, and it has long been the only viable revolutionary tool – which is not available for the masses nowadays thanks to the ultimate custody of nuclear weaponry by the élites: along history, the *homo faber* trope has intertwined itself with wars, inextricably.

What is further interesting to notice, from a public-law perspective, is that these stereotypes reverberate well beyond war, and inform international and domestic lawmaking across a wide spectrum of policy areas. Therein, the woman is aprioristically identified as 'vulnerable', while the man is intrinsically the 'capable' one who is supposed to 'make it'; the underlying assumption is that there is no need to (legally) protect the man, because he can find a way to cater for himself and make his voice heard. Of course, the reference here is not to horizontal (or 'omnibus') treaties like the Council of Europe's Istanbul Convention that are, by their own nature, dedicated to addressing the mistreatment of women within reactionary societies.[39] Rather, the reference is to subject-specific treaties where women are automatically attached the vulnerability tag, in spite of centuries of feminist discourse built around interchangeability claims. On the workplace, claims are that equal worktime should be rewarded equally because no research would support differential productivity, and that maternity and paternity leaves should not pause women's career longer than men's; and yet, to exemplify, Art 7 of the 1990 International Labour Organisation's Night Work Convention (no 171) provides that

> '(m)easures shall be taken to ensure that an alternative to night work is available to women workers (… including) the provision of social security benefits or an extension of maternity leave'.

To be sure, this is commonsense, and it meets all medical recommendations; there are excellent reasons to uphold this norm and encourage its incorporation into domestic law. The point here rather relates to the divide between interchangeability claims and their selective rejection: women and men's work is interchangeable, unless women's vulnerability is to be protected. Precisely the same narrative is enforced in times of war: civilians (or 'noncombatants') are all alike and deserving of equal protection, but women are vulnerable and as such their civilian status will be upheld more rigidly; as a consequence, men's civilian status will gradually be

[38] More accurately, the man is deemed responsible for *the survival of* the nation, while wartime responsibilities in a broader sense are frequently perceived as shared, with women stereotypically taking care of the wounded, working in munition factories upon industrial conversion, and preparing their male children to fight as heroes. Read eg J.K. Hass, *Wartime Suffering and Survival: The Human Condition under Siege in the Blockade of Leningrad, 1941-1944* (Oxford: Oxford UP, 2021), 135-169.

[39] Read further S. De Vido and M. Frulli eds, *Preventing and Combating Violence Against Women and Domestic Violence: A Commentary on the Istanbul Convention* (Cheltenham: Elgar, 2023).

eroded in comparative terms, and their killing will become less blameworthy over time. In between the lines, what it is being suggested is that it is the man who has to do the heavy lifting overnight, just like it is the man who, after all, should resist oppression and will thus more likely feature among 'hybrid', 'borderline' noncombatants. The curious paradox is that, once again, it might well be that those who drafted the Night Work Convention were predominantly men, with women being only cursorily 'consulted' as a matter of due process. Women are not being faulted for designing these frameworks, but for *selectively* resisting and questioning them in such a way that they factually turn against men, as if a more equal future for all was about discriminating men as opposed to freeing all humans from overarching, systemic chains and constraints.

The same mechanism extends to and permeates most policy-legal domains (think eg of retirement age despite shorter life expectancy, pension schemes, parenting rights, health policies and suicide prevention, education welfare, incarceration and sentencing, heavy labour, law enforcement, consumer protection, psychological counseling, human resources), especially on the international plane. Under IHRL, one may just reflect on the degree of attention which has been tributed to the right to food from an exclusively genderised female standpoint.[40] International family law is also notoriously discriminative of men, and more specifically fathers, including in transnational family reunification disputes. As for international criminal law (ICL), the tendency is to incarcerate, trial, and convict more (and more severely) men than women, not necessarily for sound reasons. It is true that across those developing countries that are most often targeted by the International Criminal Court (ICC) and cognate mechanisms,[41] state leadership (and thus criminal liability for mass crimes) is mostly male. And indeed, it is precisely in exercising this jurisdictional selection bias, ie in overfocusing on the so-called Global South (GS), that the ICC ends up discriminating against male leaders: if they were targeting Global North (GN) jurisdictions, they would indict not only alleged war criminals such as Tony Blair,[42] George W Bush, Barack

[40] Refer eg to J.B. Martignoni, 'A feminist methodology for implementing the right to food in agrarian communities: Reflections from Cambodia and Ghana' 48(7) *The Journal of Peasant Studies*, 1459 (2021); A.C. Bellows et al eds, *Gender, Nutrition, and the Human Right to Adequate Food: Toward an Inclusive Framework* (Abingdon-on-Thames: Routledge, 2016); P. Van Esterik, 'Right to food, right to feed, right to be fed: The intersection of women's rights and the right to food' 16 *Agriculture and Human Values*, 225 (1999); L.G. Domingo-Cabarrubias, 'The right to food and substantive equality as complementary frameworks in addressing women's food insecurity' 19(3) *International Journal of Law in Context*, 367 (2023).

[41] See eg O. Dovgalyuk and R. Vecellio Segate, 'From Russia and beyond: The ICC global standing, while countries' resignation is getting serious' *FiloDiritto* (2017), available at https://tinyurl.com/yw98vy2b (last visited 30 September 2024).

[42] The lifelong hypocrisy of his wife, a supposedly 'leading' 'human rights' barrister, is worth noticing too; she kept blaming and litigating against several 'terrorist' regimes, while her husband unlawfully invaded Iraq, and her American allies turned Guantanamo into a ferocious prison camp for decades – to mention but two instances!

Obama,[43] Henry Kissinger, Benjamin Netanyahu, or Anthony Albanese,[44] but also warmongering women such as Hillary Clinton,[45] Nancy Pelosi, Condoleezza Rice, or Ursula von der Layen.[46] And even across jurisdictions in Sub-Saharan Africa, South(-East) Asia, the Middle East, or Latin America, women's pivotal role in encouraging and supporting (technically, aiding and abetting) international crimes is often downplayed,[47] starting from all crimes allegedly sanctioned by Asma al-Assad or the Nobel-prized Aung San Suu Kyi. This might well be owing to patriarchal tropes, but in fact it represents discrimination against men under ICL – a legal framework which heavily sources doctrines and principles from IHL (and vice versa),[48] which means that men's disadvantage across these domains is subtly

[43] See eg C. Parsons and W.J. Hennigan, 'President Obama, who hoped to sow peace, instead led the nation in war' *Los Angeles Times* (2017), available at https://tinyurl.com/yytfsrhv (last visited 30 September 2024).

[44] See D. Rothwell, 'Why have Anthony Albanese and other politicians been referred to the ICC over the Gaza war?' *The Conversation* (2024), available at https://tinyurl.com/3x7psktu (last visited 30 September 2024).

[45] Refer eg to S. Zunes, 'Hillary the Hawk' *The Cairo Review* (2016), available at https://tinyurl.com/5b7v44n2 (last visited 30 September 2024); Middle East Monitor 'Hillary Clinton "war criminal" faces public backlash in Berlin' (2024), available at https://tinyurl.com/53kstew8 (last visited 30 September 2024); M. Landler, 'How Hillary Clinton Became a Hawk' *The New York Times Magazine* (2016), available at https://tinyurl.com/3ejs44cn (last visited 30 September 2024); D. Bandow, 'Hillary Clinton Never Met A War She Didn't Want Other Americans To Fight' *Forbes* (2016), available at https://tinyurl.com/2s3phpb2 (last visited 30 September 2024); M. Kranish, 'Hillary Clinton regrets her Iraq vote. But opting for intervention was a pattern' *The Washington Post* (2016), available at https://tinyurl.com/454k2was (last visited 30 September 2024).

[46] Her statements have arguably proven instrumental for Israel to feel as if the EU granted them a *carte blanche* with regards to response options to the October 7's massacre; she is thus an indirect enabler and systematic justifier of all war crimes that ensued from her irresponsible remarks and gut-reacting press releases. Refer also to J. Dempsey, 'Has the War in Gaza Irreversibly Damaged Europe's Credibility?' *Carnegie Europe* (2024), available at https://tinyurl.com/5dmht3fj (last visited 30 September 2024); V. Malingre, 'Von der Leyen fuels EU discontent after closely-watched Israel visit' *Le Monde* (2023), available at https://tinyurl.com/59yn68cn (last visited 30 September 2024); U. Mullally, 'Von der Leyen has damaged EU's reputation in Ireland, particularly among younger people' *Irish Times* (2023), available at https://tinyurl.com/mv39t6km (last visited 30 September 2024); P. Shankar, 'EU staffers criticise von der Leyen's "uncontrolled" support of Israel' *al-Jazeera* (2023), available at https://tinyurl.com/4nztkr2j (last visited 30 September 2024); C. Doyle, 'Europe's Gaza stance damaging its reputation' *Arab News* (2024), available at https://tinyurl.com/3udxuahx (last visited 30 September 2024); Middle East Monitor, '842 EU staff members express fury over von der Leyen stance on Israel-Hamas conflict' (2023), available at https://tinyurl.com/4vaxky4v (last visited 30 September 2024).

[47]Refer eg to J.T. Darden and I. Steflja, 'When Women Commit War Crimes' *War on the Rocks* (2020), https://tinyurl.com/2vsu6ye4 (last visited 30 September 2024); C. Wheeler, 'Women and war crimes: Why so few are prosecuted, and what happens when they are' *The Conversation* (2023), available at https://tinyurl.com/mw6eu7pn (last visited 30 September 2024); J.T. Darden and I. Steflja, 'Why it's important to see women as capable … of terrible atrocities' *The Conversation* (2020), available at https://tinyurl.com/5fwskdee (last visited 30 September 2024). More extensively, *see* J.T. Darden and I. Steflja, *Women as War Criminals: Gender, Agency, and Justice* (Stanford: Stanford UP, 2020).

[48]*Refer generally to* M. Faix and O. Svaček eds, *ICC Jurisprudence and the Development of International Humanitarian Law* (Berlin: Springer, 2024).

interconnected, and left with smaller benefit-of-the-doubt margins. Dismayingly enough, ICL is contested or wholesale rejected by most women as 'anti-feminist', not even under the meritorious (albeit idealistic) feminist and abolitionist claim that alternatives to carceral societies should exist,[49] but on the contention that ICL would not be sensitive enough to the advancement of female entitlements and mainstreaming of their quests.[50] *Inter alia*, feminists stand at discontent with definitions of gender that draw on the two biological sexes as opposed to more 'culturally sensitive' and 'inclusive' approaches.[51]

Besides these matters, citizenship, too, is yet another terrain for men discrimination. Everything else being equal, male 'habitual'/'permanent' residents are less likely than females to gain citizenship,[52] with implications abounding under PIL in terms of investments, mobility, and entitlements of various sorts. While these are mere statistics that do not, per se, prove active discrimination (ie a discriminatory intent), the same could be observed for most statistics that feminists deploy at face value to justify affirmative action, whenever the female fraction of interest falls below the 50 per cent threshold; from both sides, what statistics are indirectly indicative of is a context of overall disadvantage.

Exemplifications could run for hundreds of pages, yet I will select just another one, on a more 'legally systemic' level. In a considerable number of proceedings on the most disparate matters, when a woman receives a negative outcome, she can still appeal under the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); for instance, a female asylum applicant whose application is rejected may decide to lodge a nondiscrimination appeal (technically, a complaint) under the CEDAW.[53] In practice, this establishes a two-fold protection mechanism for women that debunks yet again the genderised double-standardism permeating most PIL domains. In this case, this seems even more striking as most asylum applicants are men, just like most of those who are

[49] See A.Y. Davis et al, *Abolition. Feminism. Now* (Chicago: Haymarket, 2022).

[50] See M.M. de Guzman and R. López, 'Is International Criminal Law Feminist?' *Oxford Handbook on Women and International Law* (Oxford: Oxford UP, 2024).

[51] See for instance J. Santos de Carvalho, 'The powers of silence: Making sense of the non-definition of gender in international criminal law' 35(4) *Leiden Journal of International Law*, 963 (2022).

[52] Check eg S. Dhawan, 'Want to get EU citizenship? Check out the hardest, easiest European country to become citizen' *Financial Express* (2024), available at https://tinyurl.com/3wuz28n4 (last visited 30 September 2024). On the interfaces between (predominantly male) persecution, statelessness, and algorithmic discrimination, refer generally to R. Vecellio Segate, 'Biometric Technology at the Borders of Citizenship: Identifying Technical Standards for Introducer-Based Remote Onboarding in Global Contexts of Statelessness, Nomadism, Displacement, and Refuge' 1(2) *International Journal of Digital Law and Governance*, 1 (2024[a]).

[53] Refer to M. Gleeson, 'Unlocking CEDAW's Transformative Potential: Asylum Cases Before the Committee on the Elimination of Discrimination Against Women' 118(1) *American Journal of International Law*, 41 (2024). See also A. Vogl, *Judging Refugees: Narrative and Oral Testimony in Refugee Status Determination* (2024), 70; T.E. Lagrand and S. Nicolosi, 'A Further Step to Gender-Sensitive EU Asylum Law: The Case of "Westernised Women" ' *EU Law Analysis* (2024).

politically persecuted under illiberal regimes, and especially like most of those who endanger their lives on the riskiest migratory routes by land and by sea, including the Mediterranean. It is probably worth specifying that what is being contested here is not the availability of these revisionary options due to multilayered HR protection framework. In fact, those options are desirable and should not be removed. Rather, it is to further evidence that, contrary to widespread narratives, PIL tends to privilege women across a fairly wide range of subjects and procedures, plausibly under the assumption that men are *strong enough to find a way by themselves*. One must also ground policy in quantitative evidence: if the overwhelming majority of distressed (and often imprisoned) asylum seekers are men, it is probably unwise to allocate administrative resources from already overburdened and understaffed offices to the few female applications being rejected and worthy a CEDAW-based revision. In an ideal world, resources for potentially persecuted people would not need to be apportioned on priority, but our global village is far from ideal, and we need to deal with the limited resources it pledges for the poorest.

If the workplace is limitedly staffed, and nighttime work shall be accomplished, men will not face a true consent-based choice: they will need to take on the fraction of female work, too. In the battlefield, this often turns even worse: the man holds no choice at all, not even on paper, to refuse combat. Across most jurisdictions, even where women can voluntarily join military ranks, the mid-age, fit man cannot remain a civilian even if he so wished: he will be sent to the frontlines under patriarchal military conscription laws, and often killed in rudimentary, trenched warfare. The few who disagree and manage to escape will seek asylum abroad, and likely face the asylum-system discriminations described *supra*. If they desert the army, their bank accounts and driving licenses will be rendered invalid,[54] and the enemy will capture them as war prisoners.[55] If they fail at any of these 'options', they will have no choice but to 'serve' their country under a long-standing expectation of heroic patriotism, and honor;[56] if they still disobey, they will face jail[57] or be shot dead on spot.[58] Some will even be extradited back to their countries, like convicted criminals.[59] The duty to defend a nation and often die is on men

[54] Refer eg to G. Gambassi, 'L'Ucraina è stanca della caccia alle reclute: Il fronte fa sempre più paura' Avvenire (2024), available at https://tinyurl.com/52fdk73y (last visited 30 September 2024).

[55] Refer eg to P. Contangelo, 'Guerra in Ucraina: "Voglio vivere", così i soldati russi (in lacrime) telefonano ai "nemici" ' *TicinOnline* (2024), available at https://tinyurl.com/6mpf8d9s (last visited 30 September 2024).

[56] See also T. Mastrobuoni, 'Kiev a caccia di reclute fa appello agli ucraini fuggiti all'estero: "Tornate e andate al fronte" ' *La Repubblica* (2023), available at https://tinyurl.com/yzyaz26u (last visited 30 September 2024); F. Mao, 'Myanmar stops men from working abroad as war intensifies' *BBC* (2024), available at https://tinyurl.com/5dj23j9k (last visited 30 September 2024); S. Morgunov et al, 'Ukrainian men abroad voice anger over pressure to return home to fight' *The Washington Post* (2024), available at https://tinyurl.com/2f5chzzu (last visited 30 September 2024).

[57] Refer eg to O. Ziv, 'Israeli teen jailed for refusing draft: "I'm willing to pay a price for my principles" ', 972 (2024), available at https://tinyurl.com/4sv7bfmt (last visited 30 September 2024).

[58] Refer eg to Rudolphy (2023), n 30 above.

[59] Refer eg to The New Voice of Ukraine, 'Estonia ready to sign pact allowing extradition of

only; and those who point to these discriminations will be invariably addressed as 'cowards', 'traitors',[60] 'unpatriotic', 'weak', 'vile', and ultimately 'undeserving' (of being alive, and of being male) – or indeed as… 'feminine'. They will also be blamed for disrespecting women, and not acknowledging female vulnerability; they will be shamed by family, society, and the State. They will be ostracised from their communities, probably repudiated by their parents and relatives, hunted down by their own army wherever they hide, stripped of their identity documents, and often executed anyway. New research notes that '(i)n present-day security discourses, traditional masculinised obligations to die for the homeland and its women and children are challenged and renegotiated',[61] but this is still far from permeating state practice diffusively, and in legal terms, it is definitely far from turning into a custom. This discrimination endures despite feminists themselves having long noted that it

> 'ennobles war-making and reinforces the nation as a community that unites generations through biological lineage (… where) women's bodies are placed under masculine protection (… and) women who do not conform to this (motherhood) norm are considered unworthy of protection'.[62]

This is only partly true, otherwise the non-mothers (or non-potentially-mothers) would be sent to the frontlines alongside men; yet the conceptual landscape is roughly accurate.

In Ukraine, despite President Zelensky portraying himself as the antithesis of hypermasculine and machist President Putin, wartime policies are the same as Russia's: women can seek refuge, while young adult men shall sacrifice their lives or be prosecuted.[63] Ukrainian men had to hide for weeks in the forest to cross a border in order not to sacrifice their lives;[64] some of them are still

Ukrainian men eligible for conscription' (2023), available at https://tinyurl.com/4ybr3h2m (last visited 30 September 2024); I.M. Einmaa, 'Estonia prepared to repatriate mobilization-aged men to Ukraine' ERR (2023), available at https://tinyurl.com/yknyc3zy (last visited 30 September 2024); Corriere del Ticino, 'L'Estonia è pronta a estradare i rifugiati ucraini in età di leva' (2023), available at https://tinyurl.com/mr38pexr (last visited 30 September 2024); Il Post, 'Polonia e Lituania dicono di voler aiutare l'Ucraina a rimpatriare gli uomini ucraini arruolabili che vivono all'estero' (2024), available at https://tinyurl.com/2w6muevr (last visited 30 September 2024).

[60] Read also K. Wojnicka, 'His body, his choice? Patriarchy, discrimination against men and protective masculinity at war' 18(1) *NORMA: International Journal for Masculinity Studies*, 1 (2023).

[61] C. Åse and M. Wendt eds, *Gendering Military Sacrifice: A Feminist Comparative Analysis* (Abingdon-on-Thames: Routledge, 2019), excerpt from the book cover.

[62] C. Åse, 'Introduction: Gender, War, and Military Sacrifice', in Id and M. Wendt eds, *Gendering Military Sacrifice: A Feminist Comparative Analysis* (Abingdon-on-Thames: Routledge, 2019), 14.

[63] See K. Wojnicka et al, 'On war, hegemony and (political) masculinities' 17(2) *NORMA: International Journal for Masculinity Studies* (2022); L. Harding, ' "I love my country, but I can't kill": Ukrainian men evading conscription' *The Guardian* (2024), available at https://tinyurl.com/ycytrx7m (last visited 30 September 2024).

[64] See M. Serafini, 'Gruppi Telegram, fiumi a nuoto e foreste a piedi: Così in 20 mila hanno lasciato l'Ucraina per non combattere' *Corriere della Sera* (2023), available at

wandering in search for help, hunted down by Ukrainian secret services who are misleadingly ordered to interpret their gesture as tantamount to holding pro-Russian political views.[65] Compulsory male conscription is indeed enforced across developed and developing countries alike, no matter their religious and sociocultural underpinnings, and not rarely in times of peace as well. Even more so in view of potential conflicts, the phenomenon is fairly alarming for Euro-American young men, with current talks around reintroducing it in the United Kingdom (UK), the United States (US), and the European Union (EU) – especially in Germany, Poland, and Estonia – as a dissuading strategy against the Russian neo imperialist threats. Italy, whose Constitution enshrines the repudiation of war and the provision of public health services (at Arts 11 and 32 respectively), keeps boosting its military expenditures every year, while defunding schools and hospitals which are already obsolete, dysfunctional, and understaffed.[66] Eighty years from WWII, young European and American men might be called upon to sacrifice their lives yet again for the 'defense' profiteering of the usual suspects – though they have no intention to do so.[67] While this is essentially domestic law, no international framework endeavoured to ban this practice – which is in itself, like normative silence in general, quite telling. Serving an abstract, fictitious, unvoluntary entity such as a State up to the extreme sacrifice plausibly rests on fruitless nonsense[68] – especially when the State *coerces* men into such sacrifice.

III. The Terrorist as a Blurring Edge and… As a Man?

In fairness, compared to the two World Wars and the time the Geneva Conventions were drafted, warfare has become more complicated, especially when it comes to conducting hostilities *lawfully*. The edge between combatants and noncombatants was already blurred due to resistance, anti-apartheid,

https://tinyurl.com/yvvuj5kf (last visited 30 September 2024).

[65] See A. Soglio, 'L'altra faccia dell'Ucraina: "Non voglio morire in guerra"' *Panorama* (2023), available a thttps://tinyurl.com/mtu6baxs (last visited 30 September 2024).

[66] Refer eg to D. Mancin, 'Medicine vs armi: quante ambulanze si comprano con un sottomarino? Un proiettile costa come 90 tamponi' *Il Sole 24 Ore* (2020), available at https://tinyurl.com/4vccsfn2 (last visited 30 September 2024); La Repubblica, 'Il business delle armi, in Italia dal 2013 si è speso il 132% in più in armamenti' (2023), available a thttps://tinyurl.com/3wcnexwx (last visited 30 September 2024); P. Onotri, 'L'Italia spenderà 29 miliardi in armi: ne sarebbero bastati 5 per migliorare la nostra sanità' *Il Fatto Quotidiano* (2024), available at https://tinyurl.com/4mvnapjs (last visited 30 September 2024).

[67] See eg M. Gill, 'Plummeting morale, low pay, unjust wars: No wonder young people resist joining up' *The Guardian* (2024), available at https://tinyurl.com/463uwmr2 (last visited 30 September 2024); A. Phillips, 'Americans Don't Want to Fight For Their Country Anymore' *Newsweek* (2023), available at https://tinyurl.com/289nbj4j (last visited 30 September 2024); The Economist, 'Would you really die for your country?' (2024), available at https://tinyurl.com/3wjvh55v (last visited 30 September 2024).

[68] See *also* G. Kateb, as quoted *in* S. Keller, 'Making Nonsense of Loyalty to Country', in B.P. de Bruin and C.F. Zurn eds, *New Waves in Political Philosophy* (London: Palgrave, 2009), 88.

decolonial, insurgency/insurrection, and liberation wars being actively fought by civilians;[69] this fuzziness only turned more complex with 'terrorism' creeping into security discourses, state agendas, and public policy – most prominently after the 9/11, but the trend is way antecedent thereto. As soon as the Western narrative framed the so-called 'Global War on Terror' (GWoT) as the epitome of the 'just' (or even 'holy') war,[70] the terrorist started to be targeted as the site of the 'just' bodily annihilation. Under the ICC's Rome Statute and cognate instruments, systematically liquidating civilians is a war crime and, with some doctrinal overlap, a crime against humanity,[71] but civilians' equation with terrorists has long been employed by state leaders to frame their crimes as 'self-defence'. Representatives from those States, and those States themselves, are often met with impunity under both PIL and ICL, due *inter alia* to jurisdictional limitations as well as to the infamous obsolescence of the permanent membership (and related veto powers) at the UN Security Council.

Against this backdrop, the massacre of male noncombatants has long been normalised alongside this civilians-as-terrorists narrative. Adding to the tropes already mentioned above, the man is singled out as potentially more dangerous, cruel, and merciless than the woman, which makes him 'worth killing' and, in keeping the 'justice' metaphor, a 'right' target. The military-age man might be a civilian, but he can easily turn into a combatant, and for this reason he is worth preemptively eliminating;[72] he is, so to write, a *perpetual combatant in potential*. This narrative dismisses the woman as unthreatening and either incapable or unwilling of offending, and as such, as not worth killing. The assumption on which women are not to be killed because they are, in turn, unable to kill implicitly enforces male-exalting discourses of power and capability onto women. Most of these tropes are ancestrally rooted in pseudobiological tenets of motherhood and femininity, yet there are also questions of 'aesthetics of violence' that have come into prominence to illuminate contemporary political violence. Male bodies are prone to easily be borrowed into the slippery rhetoric of the 'human shield', whereby civilians who are recruited by organised terrorism into low-intensity (and yet lethal) urban warfare must be first and foremost agile, strong, performant, highly mobile (and thus promptly relocatable) masculine bodies. Moreover, certain cultural prisms understand the woman as immaculate, virgin, and innocent;[73]

[69] See N. Perugini, 'Decolonising the Civilian in Third World National Liberation Wars' *Millennium* (2024).

[70] See T. Asad, 'Thinking about terrorism and just war' 23(1) *Cambridge Review of International Affairs* (2010).

[71] See F. Mégret, 'Massive Violence Against Civilians in War: The Ever-blurring Line Between a Policy of War Crimes and Crimes Against Humanity' 21(3) *Journal of International Criminal Justice* (2023).

[72] See also K.G. Southwick, 'Srebrenica as Genocide? The *Krstić* Decision and the Language of the Unspeakable' 8(1) *Yale Human Rights & Development Law Journal*, 202-203 (2005).

[73] See also K. Hagemann, 'History and Memory of Female Military Service in the Age of World Wars', in Id et al eds, *The Oxford Handbook of Gender, War, and the Western World*

her body is too elegant and beautiful to be targeted as a terrorist body, *also because it is not assumed to perform terrorist acts in the first place*.[74] While the chain of command who targets terrorist bodies might be more educated and less sensitive to these dichotomies, on-the-ground troops use to enforce them spontaneously – especially in situations of poor supervision or tactical freedom. Yet, these cultural prisms correspond to factually unsupported beliefs. The assumption is that the stereotypical woman-as-mother is a spreader of pure *concinnitas* whose dignified, graceful, generous body cannot be disemboweled and disfigured, and would never decide to land itself for deformation if not for giving birth. Giving birth is the agonizing act, the extreme sacrifice, the obscure perpetuation of the structural violence that is human living;[75] but besides that, or once that is accomplished, the woman is purified and ready to restart the cycle. Through these lenses, the civilian woman is a mother by definition, while the man is a father residually: before that, he is anyway a collective savior and most plausibly a terrorist. The dichotomy definitely forges military practice, although what remains unclear is the extent to which the assumption is *theirs*, or *ours about them*. In fact, while this deemed-primitive patriarchal breeding is routinely and perhaps ethnocentrically associated with non-Western, and especially Islamic sensibilities, the terrain is vaguely Christian and Western-centric as well. Romantic legacies from European literary tropes are way too evident in this vision of feminine chastity and purity that is returned by those who cannot believe that women would dismember their bodies as, say, kamikazes. Romanticism in Euro-American literature has notoriously exalted the woman warrior,[76] but always as a revolutionary outlier, as a praiseworthy and male-resembling character, and never as a standard horrifying figure who can long for dying anonymously as a suicide bomber. And yet, women do decide to die also that way: *pregnant* women do that, too – instances are so many that one is legimitised to generalise: maternal care and destructive harm are only apparently dichotomous.[77] Western bourgeois has learnt with a mixture of shock and wonder that those they despise as inferior can witness women freeing themselves of this angelic caricature and exploding in the air – killing dozens. How dare they? Why are they free to martyrise themselves? Who allowed that – meaning, *what men* would ever let that happen?

It is Cavarero who fierce fully realigned the debate with reality: these women pursue horrorism in their own right, and it is not necessarily because of men.[78]

since 1600 (Oxford: Oxford UP, 2020), 489.

[74] See eg C. Weber, 'Encountering Violence: Terrorism and Horrorism in War and Citizenship' 8(3) *International Political Sociology*, 242 (2014).

[75] Read A. Cavarero, *Donne che allattano cuccioli di lupo: Icone dell'ipermaterno* (Roma: Castelvecchi, 2023).

[76] Refer generally to A. De Biasio, *Le implacabili: Violenze al femminile nella letteratura americana tra Otto e Novecento* (Roma: Donzelli, 2016).

[77] See Weber (2014), n 74 above, 243.

[78] Read A. Cavarero, *Orrorismo: Ovvero della violenza sull'inerme* (Milano: Feltrinelli, 2007).

The tension towards horror, and the morbid, fetishised complacency stemming therefrom, can be and is female too; it being taboo does not equate to it being false, or secondary – the instinct of violence is gender-neutral, terrorist acts are too. In sum, the terrorist is not necessarily male. Cavarero aside, feminist voices abscond themselves when it comes to acknowledging forms of female freedom that society tends to find repugnant – it seems more comforting to believe that crystal ceilings to be broken are only those of finance and leadership; that terrorism is male, and men are those who are worth targeting – or perhaps even *deserving* of being eliminated. In fact, terrorist action has always been performed by significant fractions of women, whose pursuance of emotionally sophisticated and bodily pervasive humiliation of the enemy has been praised and sought after as a necessary complement to masculine rougher brutality.[79] The female perpetrator nourishes herself of the defenceless horror, of the helpless victim's intimate carnage, of their ultimate vulnerability and exposure;[80] it is relational wounding that thrives on fear and domination, that degrades and degenerates the body just like the suppressive violence identified with male perpetrators. Cavarero is the paradigmatic feminist scholar who oscillates between considering human life as a man-crafted social texture of individualistic violence that negates feminine altruism,[81] and redeeming the man as not the only one horror should be ascribed to. Yet this is not necessarily a contradiction: while the high-level system engineers masculine wars, the woman debunks her innocence therein – which is else from saying that a man-free world would not be more peaceful. More on this *infra*.

In spite of some ambiguities, Cavarero's thinking is a luminary exception to feminist intellectual darkness and situational dishonesty. Reality is that feminist scholarship has done little to disrupt the man-terrorist association; and if the adult man is the legitimate civilian target in war, no wonder that the expansion of warfare boundaries into broadly defined 'counterterrorism' has coincided with a widening net for killing men. As the distinction between combatants and non-combatants blurs under the aegis of ubiquitous 'terrorism' parlance, justifications for killing unarmed and ununiformed men expands correspondingly. If the civilian is either a combatant or a terrorist (or even both at once), so that – to make a contemporary example, which will be elaborated below – no one is to be deemed innocent in Gaza,[82] then no man is to be spared. Technically, this applies without

[79] See C. Townshend, *Terrorism: A Very Short Introduction* (Oxford: Oxford UP, 3rd edition 2018), 17-21.

[80] See S. Forti, 'From Horrorism to the Gray Zone', in T.J. Huzar and C. Woodford eds, *Toward a Feminist Ethics of Nonviolence: Adriana Cavarero, with Judith Butler, Bonnie Honig, and Other Voices* (New York: Fordham UP, 2021); T.J. Huzar, 'Violence, Vulnerability, Ontology: Insurrectionary Humanism in Cavarero and Butler', in T.J. Huzar and C. Woodford eds, *Toward a Feminist Ethics of Nonviolence: Adriana Cavarero, with Judith Butler, Bonnie Honig, and Other Voices* (New York: Fordham UP, 2021).

[81] Read A. Cavarero, *Il femminile negato: La radice greca della violenza occidentale* (Rimini: Pazzini, 2007).

[82] Refer to International Court of Justice, Application of the Convention on the Prevention

distinction to any sex, but as killing women and children comes with additional moral blame from the international community (and the domestic public opinion), in practice it proves especially dangerous for men. And indeed, when

> French-Israeli lawyer Nili Kupfer-Naouri drew criticism after she claimed that there were no innocent civilians in Gaza, (… t)he presenter of the TV program interrupted her saying that her words were *'unacceptable' as there were children and women among those killed* in the besieged Gaza Strip.[83]

War historians as well, in decrying US foreign policy, often avail themselves of formulas such as that 'American soldiers burned the houses, despite the *women and children* inside',[84] as if civilian men also trapped inside would have made zero difference and their burning alive could have gone unnoticed.

Furthermore, in many cultural settings, as argued before, 'the terrorist' is by definition a man – again, the strong figure, the heroic character, the one who would have the courage (and duty!) to martyrise himself for the greater good of his community, thus representing the higher threat to the safety of that community's enemies. A well-known expert in genocide studies, mass atrocities, and transitional justice, responding to Sky News headlines with reference to Gaza, recently tweeted that

> We really need to stop using 'women and children' as a signifier of innocence. Men are also civilians. Men can also be victims of genocide, crimes against humanity, and war crimes. The idea that men cannot be non-combatants or victims of atrocity crimes is the logic of Srebrenica. I reject the oft-stated premise of the Israeli government that all Palestinian men are Hamas fighters. (… I read m)any touching responses affirming that men can be victims and that we are dehumanizing Palestinian men. We also need to remember that combatants also have legal protections (such as against unnecessary suffering, as (prisoners of war), or when they are sick or wounded). (… In fact, t)here are women who have been convicted of a host

and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa* v *Israel*), Application instituting proceedings and request for the indication of provisional measures (29 December 2023), 66; Law for Palestine, Joint Communication to the Office of the Prosecutor of the International Criminal Court Regarding the Perpetration of the Crime of Genocide by Members of the Israeli War Cabinet' (2024), available at https://tinyurl.com/3njwu7bd (last visited 30 September 2024), 68. This is, in fact, a consummated claim, tracing back to several years before the latest escalation and massacres; *see eg* T. Lazaroff, ' "There are no innocents in Gaza", says Israeli defense minister' *The Jerusalem Post* (2018), available at https://tinyurl.com/2eyeme74 (last visited 30 September 2024).

[83] S. Uzundere, ' 'No innocent civilians in Gaza': Israeli lawyer's claim draws criticism' *Anadolu Ajansı* (2023), available at https://tinyurl.com/5h54af49 (last visited 30 September 2024), emphasis added.

[84] W.E. Lee et al, *The Other Face of Battle: America's Forgotten Wars and the Experience of Combat* (Oxford: Oxford UP, 2021), 118 (emphasis added).

> of international crimes, and I have personally interviewed a number of women perpetrators of atrocities ranging from rape, to torture, to inciting genocide. (…) Israel has repeatedly spoken about casualties in a way that characterizes all Palestinian men in Gaza as Hamas. And no, women and children are not necessarily more vulnerable in war.[85]

In retweeting the posts, a PIL expert emphasised how equating men to terrorists via fostering a culture of suspicion surreptitiously renders the IHL principle of distinction unserviceable.[86] Historians of law will be (un)surprised to hear directly from Hendrik Witbooi, in an 1890 letter to and (Samuel) Maharero predating the full-scale colonial Namibian Genocide (1904-1907), that these genderised arguments around female sanctity were already circulating in a quasi-legal fashion:

> (…) what moved you to kill my women and to carry my children away as prisoners? (…) *Women and children are innocent of our conflict*. You have not defeated me yet, so do not take my children yet. Return them all forthwith (…) I will not touch women and children, however, until I receive an answer from you.[87]

One could further argue that the targeting of men is only going to worsen with artificial intelligence (AI) warfare, military drones, and targeted killings. This liquidity does read paradoxical if one conceives of drone warfare as symptomatic of a granular 'individualisation of war',[88] because men are a genderised *category*, while targeted killing is supposed to strike individuals as such. The issue, yet again, rests with the equation between men and terrorists, especially when the 'targeted' action is in fact somewhat 'situational', and algorithmically determined through machine learning from gender-biased data. The centrality of the body and its

[85] K. Anderson, available at https://tinyurl.com/j8pyx3mu (last visited 30 September 2024), and follow-up tweets. The responses, too, are extremely interesting and revealing. Most of them are sympathetic with male victims, yet they range from '(o)ur natural instinct is to protect women and children, so will the species survive', to 'Palestinian men are also victims and we have seen them, holding the battered bodies of their children, a world of pain etched on their faces' and 'In places like Palestine where man is the bread maker, (h)aving a family left without a father is a huge torture for them for the rest of their lives. People do not seem to count men as victims or civilians, but in fact this is nothing but downplaying the real picture'. At least a dozens among the several hundred replies are worth reading and reflecting upon – some even come from the field, or at least from insightful awareness of how the field looks like.

[86] Check N. Carrillo Santarelli, available at https://tinyurl.com/4whkkuea (last visited 30 September 2024).

[87] As quoted in M. Goldmann, 'The ambiguity of colonial international law: Three approaches to the Namibian Genocide' *Leiden Journal of International Law*, 24 (2024) (emphasis added).

[88] M. Tognocchi, 'The "individualization of war": Discussion and critique of a discourse' *Critical Studies on Security* (2024). See also R.R. Swan and M. Mutschler, 'China's "Liquid" Warfighting Shift and Its Implications for Possible Future Conflict', *Journal of Asian Security and International Affairs* (2024).

genderised annihilation is revealed yet again, along with the tension between 'individualised' (and thus supposedly more compassionate)[89] warfare and algorithmic group discrimination.[90] In July 2016, in Syria, two men were targeted by air as carrying unidentified objects: it turns out, those two 'objects' were their babies[91] – the underlying stereotype being that women probably carry babies, while men probably carry explosives.

Genderised performance, aesthetics, and even fashion (or fetishisation) play a decisive role in sorting who must be struck from who shall be spared. Indeed, it is not merely about bodies *as they are*, but also about *how they appear* – ie, how they are dressed up, exposed, and moving. When in 2010 a US Predator drone crew spotted three vehicles in the Uruzgan province of Afghanistan,

> positive identification was made of all the individuals in the convoy as 'MAM' (military age male). The visual-material performance of these individuals (…) were (…) identified (gendered) as male/combatant. (…) After the attack, in which 23 individuals died and several more were injured, the military investigating report (…) concluded that all individuals were 'civilians'. The 'engagement' (…) did not cease until the missile and rocket operators 'spotted bright clothing and suspected women were present' (… T)he missile and rocket operators realised they had (…) killed civilians only when the gender ascribed to the targets (all male/MAM) did not match with how the operators identified the individuals' performance of gender, based on their 'bright clothing' (nonuniform/female). (… D)o not 'women' act as warfighters in armed conflicts (and do not individuals of all kinds of genders/non-genders wear 'bright clothing', at least sometimes)? Surely, a feminist critique must have something more to offer than arguing that 'women' should not be killed because they are 'women' or appear to be so by way of their visual performance/clothes and bodily features? Yet, to abandon gendering distinctions in IHL where some deemed 'women' are protected because of their material bodily features and attire whereas others, lacking 'female-coded' features, remain unprotected would only, in practice, result in a total of less life protected.[92]

This long quote is of the utmost relevance. First, it provides yet another concrete exemplification of how men are deemed lawful targets (algorithmically

[89] See eg J.D. Ohlin, 'The Paradox of Discrimination', in J.D. Ohlin et al eds, *Between Crime and War: Hybrid Legal Frameworks for Asymmetric Conflict* (Oxford: Oxford UP, 2022).

[90] Read also B. Marijan, 'Autonomous Weapons: The False Promise of Civilian Protection' Centre for International Governance Innovation (2022), available at https://tinyurl.com/7cnz9yje (last visited 30 September 2024); B. Rosen, 'AI and the Future of Drone Warfare: Risks and Recommendations' *Just Security* (2023), available at https://tinyurl.com/4f5sr9c4 (last visited 30 September 2024).

[91] O.A. Hathaway and A. Khan, '"Mistakes" in War' 173(1) *University of Pennsylvania Law Review*, 43 (2024).

[92] Arvidsson (2018), n 10 above.

as well as by humans) while women are not, despite both of them likely being of civilian status. Second, it confirms that feminist scholars are aware of the issue but cynically prefer to leave it untouched in the hope to at least spare female lives, under the biased (and fairly naïve) assumption that killing more men is going to spare more women.

One last comment on the dialectic between masculinity and terrorism is due, from a more intergenerational perspective. Let me even leave the 'supporting system'-argument aside, which would shed light on how entrenched male 'terrorist' action is within family structures of connivence and survival, yet also ideal aspiration. Let me further sideline that in certain cultures, the more 'visible' a man is, the more wives (and/or lovers) he is likely to have – and endanger, if stroked. Most relevantly, striking a man is going to nurture resentment and terror for decades to come, in a vicious circle which is typical of political violence, even more so if carried out along genocidal lines. When the man is targeted as 'terrorist' but survives, he radicalises and further validates his terrorist beliefs and plans. When the man is targeted and perishes, the entire family is radicalized further, with the children (*male and female alike*) growing themselves into terrorists, and feeding an endless cycle of resentment and revenge. In other words: equating men with terrorists along genderised lines is just going to socialise terror from the family to the societal level. Killing a father but sparing a mother in the hope that their children will be less traumatised and radicalised is tantamount to delusional thinking, not least from a scientific standpoint. Scientists are still refining epigenetic theories of trauma inheritability, but it seems very likely that a mother can transfer her dismembered-family trauma onto her prole through epigenetic mechanisms. This is obviously not to suggest that mothers are to be killed too; it is merely to observe that targeting civilian men under counterterrorism purposes is delusional and counterproductive, because the trauma and anger will anyway filter through these act and shape generations to come.

IV. On Masculine Laws, Yet Feminists not Denouncing Them

LoW are the terrain where shortcomings in feminist scholarship match systemic normative obsolescence in addressing the implications of patriarchal values being embedded in laws and treaties. PIL, along with its various specialised regimes such as IHL and IHRL, are the root cause of men being massacred at war without much repulsion and blame from the international community – at least in comparative terms. They have legitimised first, and legalised later, the idea that an international legal regime is 'humanised' when fewer women and children are being lawfully killed, as if adult male lives were not even worth computing. The normalisation of this 'selective humanisation' has deepened wartime cruelty and casualisation about killing men, because this has remained the only killing that in comparative terms will receive no fanfare and only

distracted condemnation before international fora. Even when condemnation does follow up, it is usually quantitative only, without placing any characteristic shame in that *to some extent, in compliance with IHL principles,* killing men is the actual objective of any war. After all, if they are deemed not vulnerable, IHRL will not advance intersectionality claims about them, and domestic laws will likely not save them either. This unbalance between the 'especially protected' and the 'barely protected' – this selective humanisation of the LoW indeed – has penetrated so deeply in the conscience and cognition of lawmakers, armies, and even civil society that very few seem interested in challenging its foundational tenets nowadays. This is moving so fast, and so far, that even the most basic IHL principle of distinction is factually not applied to adult male lives. How did this dangerous narrative around the invulnerable men establish and reinforce itself? How did we get to this state of affairs, practically and discursively?

Whenever shortcomings are addressed systemically, recourse is often made to neoliberalism and its geopolitical and geoeconomic underpinnings. Some will see in that an overstretching of the argument, and yet it does make sense to frame a specific narrative (men's invulnerability, and thus nonprotection) against the paradigm that agitates (and funds) contemporary warfare. It is predatory neoliberalism, with its promises and structural hypocrisies, its delusions and imperial machineries, that has elaborated and sanctioned this selectively IHRL-interfaced I'H'L. Feminism, once a voice of resistance against the capitalist masculine excesses thereof, has been absorbed by neoliberalism and mainstreamed – at least in the West;[93] feminists have since been spending this increased political capital to abandon systemic resistance (as no longer convenient) and rather focus on cultivating their sectarian self-interests, as 'operationally' as possible. Having interfaced the LoW with human-rights regimes, and these having been digested and promoted by newly-mainstreamed feminists, neoliberals have started to tell themselves that brutal violence, local extemporary re-eruptions aside, is on the decline. Engaging and funding warfare to then emphasise that fewer 'women and children' are being killed is part of this imperialist narrative that perpetuates Western hard and soft power, uplifting its morality to a hagiography of feminist benevolence and respect for the rights and interests of the 'most vulnerable'. If the feminist project was loyal to its foundational spirit, it would debunk the idea that vulnerability at war is a genderisable category. At least GS feminism – if too little can be expected of Western feminism today – would step up and admit that violence is not on the decline, and that killing men is just as awful and morally reprehensible, because we all (both women and men) share the same status, responsibility, and destiny. Biologically, legally, and even

[93] Despite my best efforts towards genuine representation and fair criticism, I accept that this type of statements will always embody a degree of uncertainty and undue generalisation; after all, 'any general account of the aims of feminism is likely to be controversial' – A. Allen, 'Feminism and the Subject of Politics', in B.P. de Bruin and C.F. Zurn eds, *New Waves in Political Philosophy* (London: Palgrave, 2009), 3.

spiritually. They would undo the surreptitious insinuation that men deserve to be killed – or that their killing is more justifiable – merely because they are in charge of all that the enemy seeks to destroy. We all are in charge in equal way, enjoy equal dignity, and are all worth the same. If feminists truly welcomed these ideals, these elementary statements would be embedded in their mission, and voiced daily. Yet, feminist silence reigns unhindered on the battlefield and therearound – if not to further advance female vulnerability-phrased 'special' protection, of course.

The ascendance of 'new' military and economic 'great powers' such as China or some Gulf nations has not radically altered these Western paradigms. First, because the declining US keeps 'leading from behind' and still accounts for more than half of global military expenditure. Second, because these selective 'vulnerability' narratives seem to be entrenched in our human nature profoundly – being it for rescuing or subjugating women, which not rarely come to coincide under the same concealedly patriarchal logic. In mentioning the West, one is *not* accepting that any other superpower would act differently based on their 'cultural nature' – an oxymoron; it is simply pointing to the region where warfare is currently elaborated and 'intellectualised'. In fact, warfare is subject to the same mechanism of domination and subalternity that arguably regulates most collective human endeavours: any dominant side tries to consolidate its advantageous position and construe a discourse to justify its perpetuation as well as to socialise ideas around its supposed moral superiority. New dominants, emerging by differentiation, will them shift to the dominant side and they themselves act though the same *instrumenta regni* they once despised. Hence, in absolute terms, the misappropriation of vulnerability claims for propagandistic and domination discourses is about us as a species, and how we regrettably work through belligerent élites. It is about how any society structures itself around a power centre and periphery, as opposed to genuine 'clashes of civilisation' between geopolitical regions. It is more about the élites' need to wage war 'justifiably' through discursive misappropriation of vulnerability claims, than about a group of countries and population in the absolute[94] – and feminism has come to serve this misappropriation fairly efficiently.

Percolated onto this historical contingency, killing men rests on claims and actions carried out or morally sanctioned by Western powers and their leading intellectual movements – feminism *in primis*, as they shape military doctrines, rules of engagement, and media ecosystems in the West itself and beyond. LoW are a by-product of Western élites, which founded these legal regimes and keep extending their doctrinal influence over their interpretation and (missed) reelaboration. Yet, the tension lies beyond the West: it is Western *today*, but not inherently Western; it is a fundamentally anthropological one. It reverberates

[94] See for instance M. Mann, 'Wars, Rulers, Rationality' 64(1) *European Journal of Sociology*, 123 (2023).

from the West – and Western feminism – because power capital is still harbored there, but it speaks to a genderised dialectic that is as ancient as our species itself (and more) and transcends any localisation. Disconcertingly enough, the articulation of this dialectic is accepted as 'humanised' today, with few voices trying to question *whom it is humanised for*. The few times feminists are faced with selectivity criticisms, the matter is abstracted from context and reassembled with its anthropological tension: if it is men those who radicalise, those who wage war, and those who fight in it, why should women fight for them to be spared? They call for an 'anthropological revolution' that displaces war altogether, assuming that the human-rights agenda can meanwhile deployed to rescue women from a male-to-male affair as warfare is deemed to be.[95] They posit that violence at home is on a continuum with violence on the frontline, that violence against fellow human beings is all about men violating women[96] – or other men, and that men can and should be forcibly educated to peace via training on respecting women.[97] While this quest for anthropolitical revolutions goes in full circle, sight is lost on the actual referent of this debate: male *noncombatants*. Why is feminist thinking so detached from their destiny? Why does it not strive for symphatising with those men who do not wage wars, or would not wage them *had they been offered a choice*? Are not those men, first and foremost, violated – both physically as the targets, and discoursively as an 'acceptable' or 'inevitable' one? Would not this be a meaningful, value-based 'anthropological alliance'? Even assuming that the man in power, by his own nature, wages wars to kill, is it really futile to recognise in all other men, at any point in time, victimhood? Is it truly legitimate to 'remind' them, while they are being massacred, that if they were the ones in power they would probably do the same *because this is masculine nature*, and that their survival is therefore a lost cause, something unworthy campaigning for?

Feminist grievances regarding wartime violence and torture during war are often voiced, and (rightly) given space. They tend to be phrased in terms of genderised discrimination, pointing to women as the naturally subaltern, defenceless victims. For instance, it was submitted that

> violences experienced by men are coded as torture, recognised as public/political, and treated with gravity by the international community and under international law; while violences experienced by women are coded as sexual violence, considered private/apolitical, and excluded from

[95] Refer eg to A. Leiss, 'Uno, e più salti nella testa di noi uomini' *Il Manifesto* (2023), available at https://tinyurl.com/2dztdscd (last visited 30 September 2024).

[96] See eg C. Cockburn, 'The Continuum of Violence: A Gender Perspective on War and Peace', in W. Giles ed, *Sites of Violence: Gender and Conflict Zones* (Oxford: Oxford UP, 2004).

[97] See eg W.W. McInerney and D.T. Archer, 'Men's Violence Prevention and Peace Education: Drawing on Galtung to Explore the Plurality of Violence(s), Peace(s), and Masculinities' 26(1) *Men and Masculinities* (2023).

similar levels of recognition.[98]

Statements and generalisations of this sort are problematic in at least three ways. First, denying the sexual nature of those torture assaults against men is not necessarily good news.[99] In Nigeria,

> (t)he kidnapping of (…) students by the insurgent group Boko Haram garnered worldwide media attention. The media coverage of the kidnapping featured gendered accounts of the victims and perpetrators with a particular focus on the gendered risks that the victims faced if not released from their captors. (…) The students were portrayed as the targets of violence because they were girls. They were defined as a group by their vulnerability to sexual assault and need for protection, which is associated to the idea of femininity and infantilism. Boys were also kidnapped but referred to as boy soldiers and not victims of gender-based violence.[100]

Second, they aspire to further sharpening the divide between special protection afforded to 'helpless' women and the supposedly already protected (or capable of self-protection) men.[101] Third, and most crucially, they omit to outline that violence, atrocious as is, is performed against living bodies; most men cannot even be victimised that way, as they are killed straightaway. With reference to the Islamic State of Iraq and the Levant (ISIS) campaign to eradicate the Yazidi community, it was noted that

> (a)lmost all survivors, whether female or male, have had male relatives killed by ISIS. (…) Every encounter began in exactly the same way: with ISIS fighters ordering the separation of men and adolescent boys from women and children. The crimes that followed depended, primarily, on the gender of the victim.[102]

[98] H. Gray et al, 'Torture and sexual violence in war and conflict: The unmaking and remaking of subjects of violence' 46(2) *Review of International Studies*, 207-208 (2020).

[99] Refer also to V.K. Vojdik, 'Towards a Gender Analysis of Sexual Violence Against Men and Boys in Conflict: Incorporating Masculinities Theory into Feminist Theories of Sexual Violence Against Women', in S. Mouthaan and O. Jurasz eds, *Gender and War: International and Transitional Justice Perspectives* (Leiden: Intersentia, 2019); S. Nath, 'Examining Militarized Masculinity, Violence and Conflict: Male Survivors of Torture in International Politics' 59(1) *International Studies*, 43 (2022).

[100] R. Khan, 'Media (mis)representation of conflicted-related sexual violence' *LSE Blog* (2022), available at https://tinyurl.com/bdfhx89f (last visited 30 September 2024).

[101] On men being raped in wartime and their difficulties in sharing their story and being societally acknowledged as victims, see eg Z. Djelilović, 'Male Rape Victims Confront the Bosnian War's Last Taboo' *Balkan Transitional Justice* (2020), available at https://tinyurl.com/4stdrevn (last visited 30 September 2024).

[102] S. Ashraph, 'Acts of Annihilation: The role of gender in the commission of the crime of genocide' 103(4) *Confluences Méditerranée*, 15 (2017). *Read further* UN Human Rights Council, ' "They came to destroy": ISIS Crimes Against the Yazidis', A/HRC/32/CRP.2, 15 June 2016,

Most times – like in Rwanda, 'where women played key roles in planning the genocide and where gender strongly shaped decisions about who would be killed and how'[103] – men are castrated, violated, and killed right away,[104] as their bodies are worth being publicly humiliated (as symbolic performance of sexual dominance over the defeated competitors) and, immediately after, annihilated (and thus neutralised as a threat), but unworthy of prologued sexual abuse (hence, of being kept alive). In the rare event they survive, their genitals will have been beaten and kicked so hard, also via forced mutual mutilation between detainees,[105] that the pain and the trauma (eg, fear of genitals' exposure) prevent them from reproducing for life.[106] Yet, again, survival is the exception. Is not the massive killing of men the most supreme deprivation and political atrocity, to put it in the cited passage's own terms? Why are feminists selectively silent, or passive, vis-à-vis those unbalances? Was theirs not supposed to be a message of mutual support and uplifting, of equal emancipation, fairness, and justice *for all*? Is 'hierarchisising' suffering, and cornering men as somehow the privileged ones, a winning and fair strategy for wartime atrocity to end? The ICL definition of rape was dictated by feminists;[107] in international criminal proceedings,

> the adoption of the governance feminist approach leads to exclusionary mechanisms affecting among others men and boys. For abused men, (…) their statements are misrepresented or not reviewed in the context of sexual violence crimes as evidenced in the (International Criminal Tribunal for Rwanda (ICTR)) cases *Bagosora* and *Niyitegeka* (…); or are included only as corroborating evidence for other crimes such as in the (International Criminal Tribunal for the Former Yugoslavia (ICTY))'s *Simić* or the ICC's *Ongwen* cases (…).[108]

True, surviving violence is not necessarily preferable compared to dying out of it; but pitting victims against each other is not a solution to either. The narrative whereby one sex is privileged by nature while the other is helpless by

paras 2;36;108;174;202.

[103] N. Rafter, *The Crime of All Crimes: Toward a Criminology of Genocide* (New York: New York UP, 2016), 152.

[104] See C. Bradford di Caro, 'Call It What It Is: Genocide Through Male Rape and Sexual Violence in the Former Yugoslavia and Rwanda' 30(1) *Duke Journal of Comparative & International Law*, 89 (2019).

[105] See eg Women in the Law Project, 'No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia' 5(1) *Hastings Women's Law Journal*, 95 (1994).

[106] See eg Marino (2009), n 20 above, 219.

[107] See K. Engle, 'Feminism and Its (DIS)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' 99(4) *American Journal of International Law*, 778 (2005).

[108] A. Van Der Velde, 'Prosecuting Conflict-Related Sexual Violence against Men in International Criminal Tribunals and Courts: Discussing Legal Feminist Framing Practices of Sexual Violence and their Impact on Male Victims of Sexual Violence' Master's Thesis in Public International Law at the University of Helsinki, 68 (2020).

nature fails to address the overarching proposition that human nature was apparently built for élites to wage war on all others to retain supremacy, the law has served as an *instrumentum regni* to that end, and feminism has further justified the neglection of victimhood for whoever is perceived as potentially a part to the problem. 'The problem' rests with our species, not with male noncombatants who would deserve to be disposed of just because *war is an inter-male affair and if they were in power they would do the same*. In fact, in Rwanda, most women who were raped *and killed* were fated to this treatment upon exclusive supervision and execution by other women, not men.[109]

V. Killing the Man for Sparing the Rest?

The untenability of grounding the discrimination of men on natural culpability underscores the need, for feminists, to engage with more surgical argumentation based on apparent alternatives; for instance, that killing a noncombatant man would help spare his family – especially if he is the one who exposes himself in times of danger, or if he acts heroically (…appreciate the trope again) as a human shield for his family. Let me even sideline my skepticism about the virtue of approving of these behaviors as if they were due, what needs to be challenged more fundamentally are the factual assumptions underlying this type of reasoning.

First, leaving aside the Ukrainian conflict which is more 'regular' than most conflicts today, contemporary warfare is usually fought in densely populated areas, where civilians are trapped (like Gaza), or difficult to evacuate (like Damascus), or active members of one of the 'rebel' factions that would not likely – which does make them combatants. Where population density is so high, and especially across cultures and societies that value 'extended families' also in terms of spatial proximity and space sharing, normalising the killing of noncombatant men equates to sentencing to death all family members living with them, when bombs are dropped. When combat is terrestrial and not aerial, those family members might be spared but left severely wounded anyway, with limbs to be amputated and other permanent injuries and disabilities. Other times, like with Israel's dystopian 'Where's Daddy' program, 'terrorists' are not killed outdoor, but *deliberately* followed home, so that their entire family (and proximate neighborhood) can be exterminated or at least injured.[110]

[109] See B. Van Schaak, 'Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson' 17(2) *Journal of Gender, Social Policy & the Law*, fns 5, 137 (2009). *See also* S.E. Brown, 'Female Perpetrators of the Rwandan Genocide' 16(3) *International Feminist Journal of Politics* (2014); M.A. Drumbl, 'She Makes Me Ashamed to Be a Woman: The Genocide Conviction of Pauline Nyiramasuhuko, 2011' 34(3) *Michigan Journal of International Law*, 563 (2013).

[110] Refer to Y. Abraham [יובלאברהם], ' "Lavender": The AI machine directing Israel's bombing spree in Gaza' *+972* (2024), available at https://tinyurl.com/46a7v2se (last visited 30 September 2024); S. Goodfriend, 'Why human agency is still central to Israel's AI-powered warfare' *+972*

Second, violence calls for violence, and diminished restraint in one domain inevitably calls for lesser degrees of self-control and accountability in cognate domains and joint operations. The fact that despite all discourses around the intersectionality of rights (or precisely due to the misappropriation of such discourses), vulnerability is still so rigidly sourced from one-size-fits-all categories from the XX century and earlier (when the woman might indeed have been structurally more 'vulnerable'), results in the intensification of ferocity deriving from inter-masculine competition and promises of justifiability or even acceptance. Once ferocity is unleashed, calls for restraint routinely fall unheard, because human cognition is not as adaptable and plastic to immediately escape from the summatory of innate pulsion and biases. Resultantly, more women and children than would have been the case are going to be exterminated or left disabled. Even without considering the epigenetic markers mentioned *supra*, these children are going to be left stunted, or lose reproductive capacity; the *genos* will be impacted, the population witness a contraction, and genocidal intents be accomplished. Mothers will be too injured and distressed to provide for their children, which will further complicate an already severe situation upon removal of the main breadwinner. Orphans will multiply, and the welfare and health systems – if any –collapse.

By any means, then, exclusive emphasis on the 'women and children' fraction of massacred noncombatants will not help reduce casualties and spare female lives – and again, even if it did, that would not necessarily be 'fair', especially so long as the feminist ritornello chants that we all enjoy equal rights and entitlements (and thus, equal duties and dignity) and no woman shall be placed under a man's protection. In practice, men's sacrifice is not going to spare their families; this is yet another vaguely patriarchal non-evidential belief, which has been promptly misappropriated by feminists and turned to their *apparent* advantage in times of war. Plausibly, this is also due to feminists' surreptitious rejection of motherhood; if we are to take mothers' pain seriously, we cannot deny that their loss will hunt them for life – survival is not necessarily a precious relief, and family loss is a form of victimhood.[111] It is not by chance that in the wake of, eg, the Chechnyan and other Post-Soviet Russian military campaigns, it was the (prospected) soldiers' mothers to organise anti-war activism and anti-draft resistance.[112]

The reader will allow me to walk controversy one step further. There have

(2024), available at https://tinyurl.com/kdexw58a (last visited 30 September 2024).

[111] On eg the so-called 'Mothers of Srebrenica', *read* J. Gavrankapetanović-Redžić, 'In the Shadow of Genocide: Mothers of Srebrenica and New Social Power', in D.Ü. Arıboğan and H. Khelghat-Doost eds, *Constructing Motherhood Identity Against Political Violence* (Berlin: Springer, 2023); J.S. Hoogstraten, 'Gender, Genocide and the UN: Gendered Approaches to Srebrenica 1995-2017' MA Thesis in International Relations in Historical Perspective at Utrecht University (2020), 17-38.

[112] Refer to M. Eichler, *Militarizing Men: Gender, Conscription, and War in Post-Soviet Russia* (Stanford: Stanford UP, 2011).

been theories circulating lately about 'being single driv(ing) young men to commit political violence', and although it remains unclear whether the nexus is solid enough to claim causality, that the men who engage in terrorism and asymmetrical warfare are mostly single is a fact.[113] This observation has led to innumerable speculations as to whether sexual appetite, frustrated desires, mating instincts, and gendered transformations of social norms have been contributing their share towards this phenomenon. Speculative ideas will not be addressed in detail here, but insofar as war itself is understood by feminism as a byproduct of men's ancestral nature, it is fair to at least consider similar 'evolutionary' approaches to the wartime treatment of women in the absence (that is, extermination) of 'their' men. Is it a possibility that lonely men kill other men in and outside the battlefield *precisely because* their male victims have a family and 'their' women to enjoy? Is it the effect of an obscure, tribal interest in securing that the other men are not more successful maters than those who have the power to kill? These are questions for psychologists and anthropologists, but so long as we deem them at least *credible* possibilities, we can draw therefrom yet another confirmation that killing men is not going to spare 'their' women. Their death would not be an end in itself, but a means towards the end of replacing those "happier" men with the frustrated killers. If the primary function of wartime rape of women is to reduce their social function to that of 'political pawns in the conflict between men, by which the rapist could threaten the ownership rights of his enemy',[114] then my conclusion is that sanctioning or ignoring the normalisation of killing male civilians is not doing women a favour, and feminists would better focus on this matter *making it their own*. It is not, as most feminists tend to argue, about 'critici[sing] raped women for having been "alone" (without a male guardian)';[115] rather, it is about making sure they appreciate the regrettable *externalities onto women* that ferocious intermale competition in contexts of war (and thus impunity) may trigger. Those can be reduced *inter alia* by protecting male noncombatants instead of accepting them to be transformed into disposable biological waste in times of warfare.[116]

Let me stretch the controversy even further. Subconsciously, it could even be that women are spared because male killers secretly hope to sexually replace their

[113] T. Kustra, 'Make Love, Not War: Do Single Young Men Cause Political Violence?' 63(4) *International Studies Quarterly*, 890 (2019).

[114] R.M. Schott, 'War rape and political evil', in A. Veltman and K.J. Norlock eds, *Evil, Political Violence, and Forgiveness: Essays in Honor of Claudia Card* (Lanham: Lexington, 2009), 81.

[115] C.F. Card, *Confronting Evils: Terrorism, Torture, Genocide* (Cambridge: Cambridge UP, 2010), 71.

[116] On the disposability of men at war, not just in biopolitical terms but even characterising them as public assets from a macroeconomic standpoint, *see most recently* R. Jamilov, 'Disposable Men' (forthcoming 2025). Male disposability beyond the context of warfare has long been a contentious are of scholarly and literary exploration; the most popular examples are: W. Farrell, *The Myth of Male Power: Why Men are the Disposable Sex* (New York: Berkley, 2nd edition 2000); M. Konner, *The Tangled Wing* (New York: Holt, 2nd ed, 2003); E. Vilar, *The Manipulated Man* (London: Pinter & Martin, 1971); H. Goldberg, *The Hazards of Being Male: Surviving the Myth of Masculine Privilege* (New York: Signet, 1977).

current men. After all, women have been sexually enslaved at war along the entire history of our species,[117] up until today. This is well documented and uncontroversial, so that the actual controversy rests with the link between the reason why men are killed, and the reason why women are spared. The consequences of this link may bring us to fairly radical and extreme conclusions, that will be explored *infra*. As for this section, suffice it to mention that (civilian) women at war have always been killed only insofar as they could not be raped and sexually subjugated; under this logic, their men must be removed because they would represent either an obstacle to mentioned subjugation, or the expression of sexual satisfaction that the lonely armed men cannot satisfy without resorting to violence. After all, from an anthrobiological and behavioral neuroendocrinological perspective, '(s)ame-sex homicides in which killer and victim are unrelated can be interpreted as an assay of competitive conflict' for the sexual dominion over the limited pool of available (and desirable) females, especially at young adulthood.[118] Mammal 'males commit adulticide to increase breeding opportunities and to compete with other males for mating',[119] and however mediated by culture, this applies to our species as well. All the more so as rules of engagement and military codes and training are agnostic on the matter: while some references to sexual violence tend to be included, they are not incapsulated within deep discussions around instinct, sexuality, tribality, and evolutionary competition. While these are not the only reasons why men tend to kill each other whenever they feel freed from the constraining reach of law enforcement (or excused by it),[120] they stand among the most powerful explanations thereof under the evolution-grounded homicide adaptation theory.[121] No 'reductionist' or 'essentialist' explanation, considered in isolation, should be taken at face value,[122] because evidence that 'it makes evolutionary sense does not make it true',[123] yet this remains arguably the most persuasive insight that scientific literature has on offer for the time being.

From Elena of Troy onwards, and plausibly before Elena as well, that wars were not only fought by men to kill the other men they would find among the

[117] Refer eg to S.S. Vieira de Andrade Mousinho and A. Rolim Peixoto, 'Women's Vulnerability at Armed Conflicts and the Biopower: A Study on Korean Sex Slaves of the Pacific War', in P.K. Grzebyk ed, *International Crimes in National Regulations of Selected States* (Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2022).

[118] M. Daly and M. Wilson, 'Killing the competition' 1 *Human Nature*, 81 (1990).

[119] J.M. Gómez et al, 'Killing conspecific adults in mammals' 288 *Proceedings of the Royal Society B*, 1 (2021).

[120] See also J.M. Gómez et al, 'The phylogenetic roots of human lethal violence' 538 *Nature* (2016).

[121] See further A.M. Holub and N. Barbaro, 'Homicide Adaptation Theory', in *Encyclopedia of Evolutionary Psychological Science* (Berlin: Springer, 2018).

[122] Read also M. Zalazar, '*The Word for World is Forest* – A multidisciplinary approach to teaching about genocide' Master Thesis in Literature at Stockholm University's Department of English (2022), 34.

[123] R.G. Bribiescas, 'Evolutionary and Life History Insights into Masculinity and Warfare: Opportunities and Limitations' 62 *Current Anthropology*, 50 (2021).

enemy, but to kill precisely those men that in times of peace represented an obstacle to a sexual desire, has been a well-articulated *topos* in war literature across virtually all literary cultures.[124] To conclude this section, it is worth noting that genderised identity has seldom improved on-the-ground conditions for women at war; in fact, gender conflicts themselves are a frequent cause of civil riots, rebellions, and full-scale violence that endangers women's safety and wellbeing: 'for mainstreaming gender into peacebuilding and conflict prevention', there is still a long (and bumped) way to go.[125] By disposing of men under selective misappropriations of vulnerability entitlements, and by causing or steering geopolitical conflict in the first place, feminism has plausibly harmed women at war more than it contributed to their enhanced, holistic, sustainable, and context-sensitive protection.

VI. A 'Chaosland'[126] Issue, After All…

The present work does not claim that the disposability of wartime men in feminist thinking is prompted by one single nonevidential belief; to the opposite, the argument is multidimensional and situated at the confluence of several co-causes, all of which contributes their share of inaccuracy to returning this overall (perceived-as-)self-serving posture whereby the male combatant is stripped of dignity and care to the apparent benefit of "women and children".

Indeed, yet another contributory cause might be a residual sense of distance and detachment as felt by West-based feminist thinkers *vis-à-vis* conflicts which mostly devastate far-away lands. Neocolonial tropes about the colonised man might well coalesce elements of inculpable negligence ('those men are else from ours, why should we bother') with elements of territorial extraneity or inferiority ('those are the men from the uncivilised lands'). Perhaps the uncivilised man is not deserving to die, but he is not worth actively sparing, either – it is a debate *of no concern to us, they will deal with this*. It could even be a fair position, were the bombs and bullets not being sold by the centre of the Empire, and/or the norms not being drafted and enforced by the 'orderly' civilisation that survives on the chaos it produces everywhere else. Imperialism thrives on its alterity from the chaos, and depends on it, but does not concern itself with its plagues; it rests

[124] See eg, in the Middle Ages: S. Harwood, *Medieval Women and War: Female Roles in the Old French Tradition* (London: Bloomsbury, 2022), 23-38.

[125] E. Prügl, 'Gender as a cause of violent conflict' 99(5) *International Affairs*, 1885 (2023).

[126] In Italian, 'caoslandia' is a (rather dichotomous) neologism infamously coined by the geopolitics magazine *Limes* to describe current world politics, settling for a dividing line between an area of chaos and an area of order: L. Canali, 'Caoslandia versus Ordolandia' (2020), https://tinyurl.com/36k9kdzj (last visited 30 September 2024). The former Italian minister for the Interior Mr Marco Minniti has recently employed this unfortunate expression to describe a meeting between the heads of Hamas, the Islamic Jihad, and Hezbollah; watch https://tinyurl.com/2durv5vr (last visited 30 September 2024).

on its alterity claim.[127] *When our men die at war, we will honour them and call their names; the uncivilised men cannot even be counted, because that is how chaos works*. Self-evidently, this is speculative: no reasonable feminist, let alone feminist scholar, would dare expressing herself this way; and yet these are tropes that never circulate in isolation, and that populate the Empire's subconsciousness as they are hard to let go. Human lives are never weighed as perfectly equal as per their worth and standing, there always is a priority list on policymakers and legislators' tables: an informal list that informs the shape of export-control laws, international negotiations, and self-constrained 'comity' in international affairs.

Whenever feminism is injected into legal anthropology, law and emotion scholarship, and cognate theoretical streams of legal inquiry, ethnocentric grievances on genderised roles are a common misguided intrusion.[128] Yet feminism being a global movement, why are not at least GS feminists revolting against GN feminist shortsightedness, and inject accountability therein? Why are they not challenging the colonial legacy of a feminism that, at least in this domain, is deeply embedded within a legacy of colonial normative domination? If IHL emerged out of a post-WWII global village concerned with destruction but still essentially colonial, how can GS feminists expect that *this* IHL will attend to the protection of men from the (neo)colonies? If 'intersectional and decolonial feminists (… wish to) focus on the lived experiences of oppression and resistance to interlocking systems of domination',[129] why do they fail to appreciate 'their' men's own struggle against that very same domination matrix?

There are indigenous feminist discourses across all cultures. The reason why GS feminism is not overturning these ethnocentric feminist paradigms is that the plight of men in contemporary warfare has never topped their agenda, either. That is perhaps because female oppression has to be fought across so many domains that not all battles can be pursued at once; yet it could also be that in this specific matter, the status quo is not understood as problematic by GS feminists, either. Even throughout the GS, where feminism can become a resort for survival more than across Western societies, feminists tend to selectively uphold the stances that can make female life easier, as opposed to harder. To that end, equal professional opportunities will be pursued, so long as mandatory conscription is not extended to women; and equal standing and dignity will be campaigned for, so long as female vulnerability can still be appealed to, and special protection relied upon. These contradictions cannot but reinforce the idea

[127] See also T. Barkawi, 'Empire and Order in International Relations and Security', in *Oxford Research Encyclopedias* (Oxford: Oxford UP, 2010), https://tinyurl.com/2fnt8vzj (last visited 30 September 2024).

[128] See R. Vecellio Segate, 'Navigating Lawyering in the Age of Neuroscience: Why Lawyers Can No Longer Do Without Emotions (Nor Could They Ever)' 40(1) *Nordic Journal of Human Rights*, 275 (2022[a]).

[129] A. Chessé and M. Sondarjee, 'A Feminist Critique of International Practices' 68(2) *International Studies Quarterly*, 5 (2024).

of double-standardism, and confirm the usual tropes around female weakness, fragility, and self-pity – these will hardly support the feminist cause in the long run. Unsurprisingly, resentment and contestation against feminist double-dealing are already widespread in the West and beyond, exacerbating profound societal fractures and electoral polarisation along genderised lines, that intertwine with other disparities on the intergenerational and inter-class planes. In fairness, it must be acknowledged that extreme situations exist, and there, one may well see why the killing of men is not ranking first on feminist agendas. To exemplify, if one thinks about eg Afghanistan, it is only fair that the UN HR Council strives for the inclusion of gender apartheid as a crime against humanity under Art 2(1) of the Draft Articles on the Prevention and Punishment of Crimes Against Humanity currently being considered by the UN General Assembly's Sixth Committee;[130] those feminists can be sympathised with for not placing men massacres to the core of their agendas – and yet, even there, the trope of the man who can be killed while the woman should not, is not going to free women from oppression in the long run. Claims of 'enhanced' or 'special' treatment never prove sound vectors towards emancipation. They are also misappropriated by autocrats for virtue signalling, accrual of political capital, and formalistic, symbolic compliance with international norms.[131]

Brutal regimes are still essentially male-dominated; dictators and autocrats are mostly male, too – not necessarily because women would be more virtuous, but because they were granted fewer chances to exhibit their vice. In Afghanistan, just like almost everywhere, violent power is exercised—and impunity sanctioned – by male political leaders. Leaving intellectual integrity aside, can be even expected of feminists to strive for men not being killed, if the foundational problem might well rest with masculinity altogether? Perhaps not, but the argument I defend here is that racialised subalternity and gender apartheid are two expressions of the same neocolonial mindset, so that neither can be effectively challenged in isolation.[132] In fact, what is striking is the monodirectional engagement by GS feminists with gender segregation, to the effect that men being disposable occurs out of racialised doctrines, but is not worth challenging, while female oppression – which is mostly a GS issue, too – is worth discussing. Meanwhile, feminists keep claiming they are after a global village of equal prerogatives and obligations for all. To exemplify, can Palestinian women really advance their gender-equality

[130] See UN Document A/HRC/WG.11/40/1, 15 February 2024: 'Draft articles on prevention and punishment of crimes against humanity: Recommendations from the Working Group on discrimination against women and girls'.

[131] See, most recently, A.M. Tripp, 'Gender, Women's Rights, and Authoritarian Regimes', in A. Wolf ed, *The Oxford Handbook of Authoritarian Politics* (Oxford: Oxford UP, 2024).

[132] See also J. Sides and K. Gross, 'Stereotypes of Muslims and Support for the War on Terror' 75(3) *The Journal of Politics*, 583 (2013); I.S. Shaw, 'Stereotypical representations of Muslims and Islam following the 7/7 London terror attacks: Implications for intercultural communication and terrorism prevention' 74(6) *International Communication Gazette* (2012); C.M. Corbin, 'Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda' 86(2) *Fordham Law Review* (2017).

claims while accepting that sympathy for civilians does not extend to Muslim men?[133] Who are they going to build a fairer society with, if not precisely those Muslim men who are being dismissed as quasi-civilians along racialised lines of suspicion, alterity, and abnegation? The genderised conflation of male noncombatants with disposable waste happens along racialised lines, that GS feminists, too, have the interest to subvert.

Coming back to terrorism, the reader will not be surprised to appreciate that two of the imperatives for killing male noncombatants – identification with terrorists, and racialised dismissal – can be inextricably conflated. '(A) c truly decolonial approach towards the study of terrorism needs to […] acknowledge the irredeemability of 'terrorism' as a legitimate category of political violence. 'Terrorism' needs to be acknowledged as a construct that carries racial, gendered, and colonial implications', and must be abolished.[134] The 'uncivilised', the 'others', the 'terrorists', have never been of concern to public international lawyers – or at least, to the drafters of international conventions, including on the LoW. 'Despite further developments in the law of armed conflict, it is worth asking how much more effective legal protections have become',[135] and *whom for*; the normative humanisation of warfare has definitely ignored male noncombatants. Their gender and racial endowment stands transparent before those who could protect them: just like there is room to deem 'colonial war as having been ignored by nineteenth-century movements to humanise armed conflict',[136] men at the periphery of the Empire go unprotected today – despite humanisation having creeped into IHL for decades, yet exclusively for 'women and children'.

VII. Aspiring to a Masculinity-free World?

For the longest time, minor exceptions aside, war has been an inherently male game, where men have been massacred by other men, and 'their' women raped. But does humanity keep playing the game in the first place? Why can it not simply dispose of armed conflicts? Scholars have long explored the feasibility of identifying war as an inherent aberration, that is, as a form of deviance that

[133] See eg A. Irfan, ' "Women and children": Why doesn't sympathy for civilians extend to Muslim men?' *Unbias the News!* (2023), https://tinyurl.com/yuw59prk (last visited 30 September 2024).

[134] R.M. Khan, 'A case for the abolition of "terrorism" and its industry' *Critical Studies on Terrorism*, 1 (2024). *Read further* Z.I. Búzás and A.A. Meier, 'Racism by Designation: Making Sense of Western States' Nondesignation of White Supremacists as Terrorists' 32(4) *Security Studies* (2023); N. Green-Riley and A. Leber, 'Whose War is it Anyway? Explaining the Black-White Gap in Support for the Use of Force Abroad' 32(4) *Security Studies* (2023); S.E. Goddard and P.K. MacDonald, 'From "Butcher and Bolt" to "Blugsplat": Race, Counterinsurgency, and International Politics' 32(4) *Security Studies* (2023).

[135] C. Szabla, 'Civilising Violence: International Law and Colonial War in the British Empire, 1850–1900' 25(1) *Journal of the History of International Law*, 98 (2023).

[136] ibid

somehow keeps replicating itself but is not 'encoded' into what is 'natural' to our biology or 'systemic' to our sociology.[137] Responses were of little relief.

Geopolitically and geoeconomically, the root of human belligerence is straightforward: wars sustain empires and put their supremacy on display for any candidate challengers to appreciate and fear.[138] Up to these months, Westerners have been thinking they were living in peace and would have lived in peace as a lasting condition, yet even prior to the most recent escalations that have undermined this optimistic prospect, most of the rest of the world was at war; to put it more accurately, most of the rest was at war *precisely because* most of the West stood in peace. The price to pay for sustaining peace in one region is to fund and pursue disorder everywhere else, so to exploit it faster and cheaper and appease at least that region's population, postponing revolt – which have otherwise proven to be a constant in human societies. Today's emperors are multinational corporations and the captured regulatory landscape legalising their transnational privilege;[139] the ephemeral (but effective!) centre of this neoliberal Empire works by the old *divide et impera* adagio – not by chance, an expression conceived by the Empire *par excellence*: Ancient Rome. Let me address, by way of exemplification, Europe. If not *in Europe*, at least *among Europeans* war seems unthinkable today not merely due to supposed learnt history lessons, and even less because Europeans have mysteriously and suddenly become less belligerent after having massacred each other for dozen thousands of years. More probably, peace among Europeans results from war being unnecessary for them to feed their prosperity: so long as chaos can be exported and war fought elsewhere by proxy (commercially first, more muscularly when applicable), Europeans are safe. The EU united and pacified internally by projecting its belligerence against common enemies externally, as it is always the case across all regions and times. One may deem it a cynical take, but that would not make it any less true – or at least plausible. War is not fought within Europe because Europeans fight it elsewhere, permanently, indirectly, hypocritically, through exploitative investment deals, land grabbing, commodity extractivism, waste-management outsourcing, and poor export control regulation.[140] Counterintuitively, it might be the lasting chaos and

[137] See eg C. Andrä, 'Problematising war: Towards a reconstructive critique of war as a problem of deviance' 48(4) *Review of International Studies* (2022).

[138] See also N.C. Fleming, 'Conquest, Empire, and the Struggle for Supremacy' 23(2) *War in History* (2016).

[139] Read further R. Vecellio Segate, 'The Distributive Surveillant Contract: Reforming "surveillance capitalism through taxation" into a legal teleology of global economic justice' Talent Program PhD Thesis in International Law at the Department of Global Legal Studies (Faculty of Law) of the University of Macau (2022[b]), https://tinyurl.com/53tajpev (last visited 30 September 2024), 2-30;608-670;692-741.

[140] See also R. Vecellio Segate, 'Persecution and Labor Migrations Due to Corporate "Environmental" Exploitation: Waiting for the UNHRC's Binding Treaty on Transnational Business Activities?' 18(1) *Loyola University Chicago International Law Review* (2022); N. Tzouvala, 'Aggression, Capitalism, and International Law: Missed Opportunities or Structural Constraints?' *Current Legal Problems* (2024); R. Vecellio Segate, 'The first binding treaty on business and

degradation at its borders that secures order and abundance within – however precarious.

'Terrorists' have understood this logic well, and debunked its hypocrisy. If their attacks are perceived as sinful and blameworthy is not because they are premised on deluded, nonevidential beliefs, but rather because they fail to systemically alter any balance, nor do they propose an alternative vision – even less do they drive it. Humanity only finds rest in the constant reshuffle of privilege, that redistributes temporary hope and projection to each faction and tribe. Terrorism does not incorporate this vision, which is why we tend to find its acts regrettable and meaningless, somewhat empty. It is *pars destruens* without (however temporary) *pars construens*. But their conceptual premises, their judgement of 'the system' and its distortions, are not per se far from fundamental truth;[141] in that sense, terrorists may properly be called *fundamentalists*. To be sure, Europeans enforce their privilege just like any other polity in the same circumstances and historical junctures would have done and would do. Europeans are neither intrinsically more virtuous nor structurally more vicious than anyone else – they just happen to be, for the time being, on the 'victorious' side of that unfathomable lottery which is History. Terrorists aim at injecting a seed of chaos into the order that nourishes itself from that very chaos that sustains it and is normally outsourced – in this sense, 'the closure of the phatic exigency is achieved in making what is distant near'.[142]

The preceding paragraphs explain warfare geopolitically, but most feminists propose an alternative – or somewhat complementary – answer: humanity still witnesses wars because it still hosts *the man*. Not the Empire per se, but an Empire *of men*, or at least, an Empire sustained and populated by men, too. *Masculine* men, to be more accurate; masculine men *in power*. One strand of feminism accepts that women, too, should be belligerent – for instance by serving in the army. Another strand postulates otherwise: women are not belligerent by definition; physical war is a masculine trait and an entirely inter-male affair. In their view, men keep pursuing a savior-mythology delusion according to which fighting wars would be welcomed as 'an activity in which masculinised, muscular 'protectors' necessarily make sacrifices for the feminised 'protected'.[143] Nevertheless, feminists fail to illustrate what humanity is supposed to do upon scenarios of fundamental value disagreement and interest divergence that cannot be resolved diplomatically. They were once pivotal in trusting the ideal that intellectualism and education could spare humanity from nihilist destruction, most famously during the 1919

human rights: A deconstruction of the EU's negotiating experience along the lines of institutional incoherence and legal theories' 26(1) *The International Journal of Human Rights*, 122 (2022[c]).

[141] Read also T. Terzani, *Lettere contro la guerra* (Milan: Longanesi, 2002).

[142] P.M. Szpunar, 'Communication and (Un)Inspired Terror: Toward a Theory of Phatic Violence' 30(3) *Communication Theory*, 321 (2020).

[143] V.M. Basham, 'Gender, race, militarism and remembrance: The everyday geopolitics of the poppy' 23(6) *Gender, Place & Culture: A Journal of Feminist Geography*, 883 (2016).

Zurich conference of the Women's International League for Peace and Freedom;[144] yet history proved them dramatically wrong: being it men's existence, or some other factors, probably a combination thereof, this has never sufficed and will arguably never suffice.[145]

Violence and war are not exclusively male; the reiteration of this trope rests on feminist political agendas:

> '(t)he reluctance to address women's violence (…) speaks to the concerns of feminist researchers who fear that such a focus could detract from the role of men's violence in women's oppression'.[146]

But even assuming that war owed to the persistence of masculine men in power, the latter are not going to disappear any time soon, which means that the only 'functional' feminism is the one that empowers the woman within a society where men and women need to coexist and shoulder responsible leadership. In other words, even assuming that war was an unfortunate product of men's existence, it is not going to dissolve. Under the plausible assumption that the war-headed attitude of men will not change, when feminists claim that war is about men, and then advocate for a war-free world, they also advocate for a men-free world, which is unattainable in the short run. Futuristic scenarios whereby aggressiveness and violence are moderated via chemically supplying moral/cognitive enhancement to soldiers and even humans more generally and thus, either way, men too – so to create more peaceful societies and psychophysiologically 'constrained' armies,[147] more ethically alert about the killing of noncombatants, do exist.[148] Nevertheless, doubts arise as to whether this option is consistent with the evolutionary patterns of our species, and in the negative, as to whether the dangers of deviating therefrom outweigh the claimed benefits. A *prima facie* case can be made against this form of artificial techno-solutionism, yet this paper will not explore neuroenhancement arguments.[149] And the Y chromosome seems to be disappearing 'naturally'

[144] *See* T. Irish, *Feeding the Mind: Humanitarianism and the Reconstruction of European Intellectual Life, 1919–1933* (Cambridge: Cambridge UP, 2023), 195.

[145] Read also V.M. Moghadam, 'Women, Peace, and Security: What Are the Connections? What Are the Limitations?', in H. Mahmoudi et al eds, *Fundamental Challenges to Global Peace and Security: The Future of Humanity* (London: Palgrave, 2022).

[146] R.E. Keyse, '"A Very Sensitive Rwandan Woman": Sexual Violence, History, and Gendered Narratives in the Trial of Pauline Nyiramasuhuko at the International Criminal Tribunal for Rwanda, 2001–2011' 32(7) *Women's History Review*, 1016 (2023).

[147] See e*g* F. Santoni de Sio et al, 'How cognitive enhancement can change our duties' 8 *Frontiers in Systems Neuroscience* (2014); Vecellio Segate (2022[a]), n 128 above, 280-281; F. Santoni de Sio et al, 'Who Should Enhance? Conceptual and Normative Dimensions of Cognitive Enhancement' 7(26) *HUMANA.MENTE: Journal of Philosophical Studies* (2014).

[148] Refer eg to M. Beard et al, 'Soldier Enhancement: Ethical Risks and Opportunities' 13(1) *Australian Army Journal*, 9-11 (2016).

[149] For further bioethical insights about neuroenhancement, *read eg* R Vecellio Segate, 'Neuroenhancement Patentability and the Boundaries Conundrum in Psychiatric Disorders: Comparative Regulatory Inquiries from China and the West' 11(1) *European Journal of*

nonetheless – it is going to take another million years, though.[150]

Furthermore, masculinity and femininity are not as straightforward in their relationship with organised violence. One could start examining the biological robustness of the claim that without men, wars would not be waged.[151] This claim is, in turn, dependent on long-standing disputes around 'whether political violence and war make men more violent or unleash a "natural" male violence'.[152] In this respect, it was hypothesised that 'making war is not an evolved aspect of masculinity but an acquired one';[153] yet, to 'undo' this anthrobiological acquisition, societies would arguably take thousands of years. We are thus back to the above: so long as men exist, there will also be men *in power, waging wars*. On their account, feminists saw this right: they started with rejecting "toxic" masculinity, contrasting it to a righteous one (that most often features in homosexuals, conscientious objectors, and so on), and ended up contesting masculinity *tout court*. If so long as we have men, we will also have them wage wars, this extension may make sense. However, is political violence and war confined to male aggressivity? I have already started to debunk this argument above, and much more could be said. Women frequently desired to join men at combat, and while numerous accounts of female soldiers have been published portraying and haling them as intelligence officials,[154] they engaged in field operations too. After all, from Cleopatra and Zenobia to the Amazons, history witnessed countless examples of sanguinary, 'savage', and ruthless female warriors; and similar characters have featured in female literature and visual arts for millennia.[155] There are even 'many feminists who do not promote an anti-violence stance, choosing to fight as part of their

Comparative Law and Governance, 52-72 (2024c).

[150] Refer to J. Wilson et al, 'Extinction of chromosomes due to specialization is a universal occurrence' 10 *Scientific Reports* (2020); M. Terao et al, 'Turnover of mammal sex chromosomes in the *Sry*-deficient Amami spiny rat is due to male-specific upregulation of *Sox*9' 119(49) *Proceedings of the National Academy of Sciences of the USA* (2022). For a more prosaic rendition of the underlying science, *check eg* D. Griffin and P. Ellis, 'The Y chromosome is disappearing – so what will happen to men?' *The Conversation* (2018), https://tinyurl.com/mr3bcd9x (last visited 30 September 2024). See also J. Graves, 'Modern human DNA contains bits from all over the Neanderthal genome – except the Y chromosome. What happened?' *The Conversation* (2024).

[151] See also A.J.C. Micheletti et al, 'Why war is a man's game' 285(1884) *Proceedings of the Royal Society B* (2018).

[152] G. Maringira, 'Soldiers, Masculinities, and Violence: War and Politics' 62(23) *Current Anthropology*, 1 (2021).

[153] R. Brian Ferguson, 'Masculinity and War' 62(23) *Current Anthropology*, 112 (2021).

[154] Refer eg to S.L. Miller, *The Women Behind the Few: The Women's Auxiliary Air Force and British Intelligence during the Second World War* (Hull: Biteback, 2024); A.M. Kingston, *Elegant Espionage: Women Spies Who Graced the Shadows of WW2 – and Conquered Them*, Kindle edition(2022); Michael Ashcroft, *In the Shadows: The extraordinary men and women of the Intelligence Corps* (Hull: Biteback, 2022).

[155] Refer eg to R. Gattuso, 'Martial Goddesses and Warrior Queens' *Curationist* (2022), https://tinyurl.com/fb8pm5vv (last visited 30 September 2024); E. Fammartino and B. Manetti, 'La violenza femminile nella letteratura degli anni settanta: Dacia Maraini e Angela Carter' 30 *Quaderni di Donne e Ricerca* (2013).

feminism'.[156] These considerations have prompted counter-feminist theories of political violence to emerge, with feminists then responding that women are remorselessly war-waging only when embedded in masculine environments that expect them to be that way and reward their masculine behavior. Even so, if they were so 'naturally' principled otherwise, why would they want to accept the prize? One reason is to secure their role as 'combative mothers'.[157] I do not buy the idea that women inhabit 'grey areas' only because they subject themselves to the systemic consequences of misogyny; genuine leadership also entails to refer one's responsibility to oneself as opposed to transfer it on. Even assuming – without conceding – that misogyny 'is often an element that complicates women's choices, presenting special possibilities and temptations',[158] this is no justification for turning a blind eye on men's own perils, thus perpetuating the evil of their mass extermination at war. Psychopathology studies have confirmed that 'in violent contexts, such as armed conflict, in which individuals perpetrate numerous aggressive acts against others, the likelihood for an experience of appetitive aggression increases – *regardless of whether the individuals are male or female*'.[159] Being it philosophy or neuroscience, brains and souls stand alike: it is first about circular exposure to violence, gender comes second-place – if it ever proves a true factor at all. Whatever one's standpoint, an excellent argument can be made for all civilians deserving equal levels of protection and care. Their extermination is heinous no matter their sex.

In sum, masculinity being or not the problem, it is no excuse to justify the normalisation of exterminating male noncombatants. None of them decided to be male at birth, or to be born altogether, so that regardless of war being or not an exclusively 'inter-men' issue,[160] men are still worth protection and respect for facing that universal tragicomic – and often oxymoronic – experience which is human living. Their death shall be mourned, and their perpetrators blamed and prosecuted, just like when to be targeted are female civilians. The overwhelming majority of helpless men (targeted noncombatants, conscripted soldiers who cannot bribe their way out of the country, and so forth) reject war and their active participation therein. And if males are still overrepresented among war-waging élites, that turns to those male élites massacring other men first and foremost, under the absurd (but profoundly encoded in our genes) assumption that this will grant them reproductive or at least sexual advantage over the men they liquidate. It is

[156] E. Jones, 'A Posthuman-Xenofeminist Analysis of the Discourse on Autonomous Weapons Systems and Other Killing Machines' 44(1) *Australian Feminist Law Journal*, 116 (2018).

[157] See eg S. Magadla, *Guerrillas and Combative Mothers: Women and the Armed Struggle in South Africa* (London: Routledge, 2024).

[158] C.F. Card, *The Atrocity Paradigm: A Theory of Evil* (Oxford: Oxford UP, 2002), 228.

[159] D. Meyer-Parlapanis et al, 'Appetitive Aggression in Women: Comparing Male and Female War Combatants' 6 *Frontiers in Psychology*, 1 (2016), emphasis added.

[160] Refer to F. Mégret, 'The laws of war and the structure of masculine power' 19(1) *Melbourne Journal of International Law* (2018).

not quite accurate to opine that 'the collective, historical power of men may be maintained by the dispensability of some men';[161] quantitatively (and qualitatively), the reverse is true: the 'masculine' power of *a very few* men (and women) belonging to globalised élites is enforced through the disposability of *the overwhelming majority of* all other men, at will. There even exists a pernicious generational aspect to it, aligned with the usual *divide et impera* that is not merely geopolitical, but also deployed by a few men over all others – usually younger; that is privilege capital being enforced, as expressive of the infamous tribal nature of our species, with its regard for the 'wise' elderly who chiefs the tribe and sends the young men to combat to 'prove themselves' and crystallise dominium. When those young men, generally in between adolescence and mid-age adulthood, are sent to combat, tribal mechanisms emerge and a subconscious duty is felt to defend the tribe's interests and attack the rest: 'targeted conspiratorial killing (...) contributed importantly to (...)promoting groupishness',[162] which adds to the sexually driven inter-male competition – also more vivid among young men. Insights from evolutionary social sciences truly debunk the wrongfulness of dismissing men as wilful perpetrators, or shady civilians. In their youth, they pay the price for being born into systems that deploy them to the battlefield – no alternative admitted – or routinely liquidate them around and outside the 'proper' battlefield.

One of the first sections of the present work argued that most international legal regimes favour women directly or indirectly, so that IHRL-interfaced and selectively humanised IHL is no exception. In fact, this is not true for *all* textures of normative structuring. The infrastructure of economic wealth, for instance, and its legal codification, are definitely male-privileging. Women do endeavour to pursue economic advantage – also unlawfully, often criminally – as shamelessly and recklessly as men,[163] but wealth amassing does not prove as immediate for them as it works for their male counterparts.[164] A male-championed global economic and financial system built around violence (suffice it to mention the 'defence' industry and its long supply chain), exploitation, money laundering, narcomafias, and tax avoidance, sustains warfare and its mass targeting of male noncombatants; in this relatively indirect sense (only), it indeed is an 'inter-men' struggle. Women have learnt to take advantage of it, and feminism is part of this picture. Nonetheless, there would be sound reasons to rather extend solidarity and compassion at men – especially the young ones who are either sent to the

[161] J.R Hearn, 'Men/masculinities: war/militarism – searching (for) the obvious connections?', in A. Kronsell and E. Svedberg, eds, *Making gender, making war: Violence, military and peacekeeping practices* (Abingdon-on-Thames: Routledge, 2011), 38 (emphasis removed).

[162] R.W. Wrangham, 'Targeted conspiratorial killing, human self-domestication and the evolution of groupishness' 3 *Evolutionary Human Sciences*, 1 (2021).

[163] Refer to Vecellio Segate (2022[b]), n 139 above, fns 1761;1899.

[164] See eg T. Deen, 'The World's Richest Men Leave Women Far Behind—Amid Rising Economic Inequalities' *Inter Press Service* (2024), https://tinyurl.com/3ay7ph7j (last visited 30 September 2024); I. Venzke, 'The law of the global economy and the spectre of inequality' 9(1) *London Review of International Law*, 130 (2021).

frontline or massacred at home. They are the first victims of their own sex, and its nature – having chosen neither of them.

VIII. The Slaughter of Men as Normalised and Relatively Unblameworthy

Feminism has admittedly been a major contributor to the humanisation of LoW – however selective. And yet, if intersectional vulnerability succeeded as a newly paradigmatic interpretation of IHL through IHRL lenses, that is because it has rapidly socialised in the storytelling by mass media, and propagated through social media accounts. This narrative, however, failed to capture the characters of a changing world that would have made it less and less justifiable to afford male civilians fewer protections than their female counterparts. It rested on outdated tropes, and unfortunately helped reinforcing them – serving precisely those societies that the Western bourgeois deems most 'reactionary'. First, we have seen above how the civilian man suffers the increasing blurring of the combatant/noncombatant distinction, which is both factually grounded (asymmetric, hybrid, and by-proxy warfare in densely populated areas) and rhetorically taken advantage of to exterminate more humans. This distinction fading, the historically deeply-rooted cognitive habit of linking men to armies becomes fairly dangerous for men. Of interest here is that this habit is also less and less substantiated by numbers – paradoxically enough, that is happening precisely due to the feminist equality wave. To begin with, women are increasingly recruited into armies' active combat posts. Second, they are no longer to automatically protect as mothers and thus custodians of life, because this role is being increasingly rejected and abdicated by women themselves – especially across Europe and East Asia, though this is slightly less true throughout the GS. If women no longer wish to be mothers, or to take on the majority of parenthood's burdens and privileges, which is obviously a legitimate choice, then it is only fair that they lose the additional layers of legal and organisational protection associated with their supposed status as the main child-carers. Third, as recalled above, more and more men reject compulsory military conscription and the genderised strings attached thereto; they place their lives before their country and families, in alignment with the self-serving and socially atomising attitude that feminists have long longed and campaigned for. Some will blame a decrease in 'virility' or 'courage' for this, but there are also deeper systemic transformations related with widespread awareness that war is cyclic cataclysm that has never brought about any radical, lasting overhaul of human nature as such – in short, war is no longer adopted and cherished as a trustworthy instrument of change. Today's resistance armies will become tomorrow's aggressive élites, and the game will restart with reversed roles. All studies point to cynicism and disenchantment being distinguished traits of the new generations, especially on the male side; it is a post-ideology society that polarisedly (and even violently) campaigns on the surface, but (perhaps

wisely) refrains from believing that institutions are an answer or that there exists a deep, final horizon of 'change' upon which most systemic distortions will be overcome. This self-fulfilling prophecy is powerfully coming true.

As it has turned customary throughout this paper, allow me to introduce some controversy at this juncture. Women joins marches for peace, reject warfare as a masculine seed, hail diplomacy and dialogue as the only way forward, and yet *voluntarily* join armies across any jurisdiction where the law permits it. Are they entering the army to 'finally' kill enemy *men* and express their own long-repressed violence, subconsciously excited at the prospect of reversing what they are indoctrinated to believe having been millennia-long military hierarchies? Is this voluntary participation a sort of class action along genderised redemption lines, which implies deploying revenge violence to radicalised emancipatory conquests? These are speculative questions that are worth steering reflection. For sure, women in the army are not enhancing the latter's commitment and loyalty to values and ethics, nor are they humanising armies' rules of engagement for all. In fact, in Iraq, female American jailors and torturers unleashed unspeakably cruel violence onto defenceless bodies;[165] those were invariably male and female, but

> when the news of Abu Ghraib had to be released to the American public, the emphasis was placed almost exclusively on the abuses against male Iraqi prisoners, which might evoke less lasting outrage than the abuses against female Iraqi prisoners would have done.[166]

Again, the proposition is always the same: it is acceptable for men to be assaulted, violated, tortured, killed – or at least, it is comparatively *more* normal, relatively less shocking, and subtly more justifiable. Men are ordinarily disposed of at war, there is nothing strange with it. And when they are the perpetrators, they are not seen as victims as well: victimhood is always female alone, perpetration is male.[167] The additional news with Abu Ghraib rests with the link between *female* torturers and *female* tortured; phrased differently, it rests with women also torturing other women as opposed to unleashing their wartime violence onto men alone. Routinely enough, these women have justified their war crimes with being surrounded by men, and even by having fallen in love with male members of the US Army that would have, reportedly, expected of them sufficient degrees of masculine violence.[168] Whatever the facts, and whoever the perpetrator, fault

[165] Refer to T. McKelvey ed, *One of the Guys: Women as Aggressors and Torturers* (Seattle: Seal, 2007).

[166] H. Beachy and B. Savage, 'Where Are the Women? The Representation of Gendered Wartime Violence at Abu Ghraib in U.S. Newspapers' (2021), https://tinyurl.com/5n8wrmj7 (last visited 30 September 2024).

[167] See also D. Zarkov, 'Conceptualizing Sexual Violence in Post–Cold War Global Conflicts', in K. Hagemann et al eds, *The Oxford Handbook of Gender, War, and the Western World since 1600* (Oxford: Oxford UP, 2020), 734-735.

[168] Read eg A.C. Estes, 'Eight Years After Abu Ghraib, Lynndie England's Not Doing So

is always transferred onto men – also in feminist scholarship;[169] and women will receive laughably light sentences by military tribunals.

Just-mentioned narratives, already misleading on their own, are further amplified and simplified through social-media engagement, up to becoming accepted standard of conduct for the populace at large, and the normalcy expectation before international criminal tribunals,[170] as well as from the public at large. What started as the denunciation of – and remedy against – wartime violence against women, turned to wartime violence by women so to justify it under a framing of war as an essentially masculine product. This is the specular aberration to the narrative that leads men to be unaccountably killed, no matter their civilian status: it is men's fault, *therefore it is only fair and normal that they die out of it*. The (im)moral postulation is so aberrant that it fails to appreciate its sourcing reasonings from that despicable narrative that accepts sexual violence against women if they dare dressing too provocatively or succinctly. *So long as women dress that way, perhaps rape is still wrong, but no surprise it occurs* – some men argue; *if men wage wars and have framed societies in masculine combative terms, perhaps their killing is unfortunate, but no wonder they get massacred* – feminists' underlying thinking arguably is. Women's linguistic sophistication sublimate the argument, but the construction of the reasoning is specular to that of the roughest of men vis-à-vis nighttime rape. It would be advisable to overcome genderised prisms of 'unsurprise' to rather seek a solidaristic appreciation of experiences of victimhood as *essentially human*.

When (rarely) prompted to face evidence that women in power are just as embedded in structural violence, and voluntarily joined armies as soon as they were allowed to (but without 'humanising' them), feminist intellectuals respond that this is because those women have accepted to subordinate their femininity to the unspoken expectations of a men-dominated political-geostrategic ecosystem. This argument could be recused from many angles, as done *supra*, but let me even take it at face value for a moment. What it means is that for a peaceful global society to emerge, men should either not exist or silence themselves, or be silenced into full disempowerment, so that women could finally feel free to exercise their femininity free from masculine invisible constraints, and spare humanity the tragedy of physical confrontation. Self-evidently, none of these scenarios are going to materialise any time soon, which limits their practical utility even under the (naïve) concession they stood credible.

Frustratingly enough, these genderised blame-shifting tactics only pave the way for further *divide et impera* warfare and market (the two are alike) logics.

Well' *The Atlantic* (2012), https://tinyurl.com/4faea4rn (last visited 30 September 2024).

[169] Check eg M. Gronnvoll, 'Gender (In)Visibility at Abu Ghraib' 10(3) *Rhetoric and Public Affairs* (2007).

[170] Refer eg to R. Khan, 'Male Victims and Female Perpetrators of International Crimes' *LSE Blog* (2022), https://tinyurl.com/226x6fpy (last visited 30 September 2024).

They end up sponsoring the profits of the very few men who feminists (and men themselves) should actually dissociate themselves from. The arms (or 'defense', as it is euphemistically marketed) industry is particularly susceptible to moral blame from activism and civil society; the lesser the blame, the higher the revenue. Higher revenue is reflected not merely in higher sales, but more profitably into higher leverage over pricing strategy, in that lesser blame allows for more transparency, which abates the costs of rewarding loyal secrecy and covering scandals up. When the killing of male noncombatants is normalised, killing men becomes also advantageous from a business perspective, funding those very industries that feminists are supposed to chiefly despise. This outcome falls within the usual mechanism of having the poor—or here, the victims—quarrel against one another over the crumbs (of an argument, in this case), so that the privileged can continue enjoy their luxury meal unbothered. The merchants of weaponry and death represent a transnational élite whose only interest rests with its own self-perpetuation, not least through (technically unlawful) informed trading;[171] any normalised killing plays to their favour, and perfects the engineering of their lucrative game on everyone else's skin.

The point here is that headlines around 'moral armies' minimising 'women and children' casualties are superficially praiseworthy, yet deeply unsettling as to the strategy they inadvertently serve. If an averagely educated person is told with concern that thousands of civilians are being killed in an armed conflict, 'including women and children', the underlying message is that the blameworthy part lies with the women and children, while if it was just about adult men, it would be fine – or anyway better. Journalists have a responsibility here, and feminist journalists are called upon to side their genderised concerns for the greater good – which includes women's own prosperity, safety, and peace. Headlines around 'women and children' not always convey *fake* news, but often *misleading* news nonetheless. Whether normalisation is steered by these headlines or headlines have 'absorbed' such normalisation, is impossible to define – that is the unhelpfulness of chicken-and-egg diatribes. What matters here is to raise awareness that 'women and children' headlines are an integral part of the problem, in that they reiterate, standardise, and disseminate misguided propaganda that on the face of farcical humanitarian values, in fact keeps massacring the men and brutalising 'their' women. On a curious tangential note, some even maintain that social-media posting would make propagandists 'combatants';172 this intriguing (and controversial) suggestion will not be addressed here, yet it just adds to the salience of how wars are framed, and information thereabout conveyed. Social media have become a terrain for war narration, contestation, and profiteering.

[171] See eg R.J. Jackson and J. Mitts, 'Trading on Terror?' (2024), preprint available on SSRN at https://tinyurl.com/ycu8hmtz (last visited 30 September 2024).

[172] Check M. Robin, 'Are propagandists combatants? Analysing the ethical status of propagandists in warfare', *Review of International Studies* (2024).

Feminism is called upon to appreciate the systemic impact of 'women and children' headlines, and their through-the-lines message of impunity and normalisation.

IX. The Genocidal Underpinnings of Normalising Men's Annihilation

By way of introduction to the Gaza case-study, and in furtherance of debates that have already been exposed in the preceding sections, a few more thoughts are due on the relationship between male extermination and genocidal intents.

Women are portrayed by feminists, and society generally, as the site of maternity and thus the quintessence of (ethnic) reproduction; this picture tells only half of the story, and not necessarily the half that genociders pay closer attention to. In fact, men are more mobile and tend to spread their genes more rapidly, widely, and arguably liberally, especially in highly mobile and dissolute times of war, so that a serious genocidal plan must prepare for their extermination. Coupled with evidence that men are morally and legally less problematic to exterminate, in that justifying their targeting will virtually always prove less burdensome than massacring women, this results in genocidal conflicts being – perhaps counterintuitively – the most perilous of all for male noncombatants.

Intergroup male violence, again for sexual domination and competition, is a proven causative or precipitating factor towards genocidal action.[173] Enemy men can opt for genocide for either replacing the victim men in their reproductive relationship with their women and thus 'contaminate' their inheritance, or for extirpating their genos altogether. In these scenarios, the *modi operandi* differ, but the most frequent outcome is that the men are killed, while 'their' women survive, but are raped:

> The rejection of the idea of the civilian in the so-called "new wars" of the 1990s is well known. […] The massacre of civilian men in Srebrenica was an obvious and terrible example of a rejection of wider ideas of civilian identity. Thousands of men were murdered simply because they were men and because such male massacre is a powerful symbol of conquest and superiority. Similarly, strategies of female rape in Bosnia and many parts of Africa similarly condemn women to atrocious suffering purely because of their sexual identity, and also act as an extremely violent way of sending messages of humiliation and pollution to enemy men.[174]

Scholars have profusely engaged with the tragedy of Srebrenica and the Bosnian wars as the most excellent contemporary example of androcide as gendercide,

[173] See A. Tratner and M. McDonald, 'Genocide and the male warrior psychology', in L.S. Newman ed, *Confronting humanity at its worst: Social psychological perspectives on genocide* (Oxford: Oxford UP, 2020).

[174] H.J. Robertson Slim, 'Why protect civilians? Innocence, immunity and enmity in war' 79(3) *International Affairs*, 492 (2003).

where gendercide and genocide converge along coherent political goals:[175] exterminating genetic mobility to prevent reproduction and extirpate the genos altogether. This convergence has been charged with new meanings after political philosophers' engagement with biopolitics, but the practice itself is as old as humanity.

Killing men to prevent reproduction and thus rapidly cause ethnic cleansing and the interruption of genealogy is 'best practice' in genocidal warfare; and alongside genetic interruption, the disgust for "sharing" local women from conquered areas with the native men—but no disgust whatsoever in raping them—has long been another trigger for removing as many men as possible from society, especially the young ones. Crossbreeding and hybridisation are first-ranked enemies for genociders, and shall be prevented, while the woman, mostly objectivised as a sexual desire and reproduction incubator, can be raped so long as "her" previous local men are neutralised. This was even more the case in past centuries, when male warriors could have (more or less formally) more women and spread their genes around the battlefield and outside of it, but it still holds true nowadays despite somewhat stricter rules of engagement on avoiding sexual contact with the conquered local populations. Men rape local women out of sexual and/or subjugation pleasure, but one side effect in the past, almost never willingly sought for, was the continuation of one's nobility lineage (and the defeat of the purity of the other party's) through sexual interaction with local women from warzone populations. Those were times when noble men actively engaged in the battlefield, and died on average younger, so that lineage and dynasty could have been a concern as well. Still so recently as during the early 1990s in the former Yugoslavia, Bosnian 'women were forced to deliver babies' upon being raped by the Serbians.[176] Nowadays, the non-perpetuation of the practice—at least as 'the norm'—draws on more subtle conceptions. Normative developments certainly owe a great deal to feminism and humanisation, but on the field, contemporary male genociders are more wary of hybridising with the female enemy, under the 'epiphany' that this, too, will perpetuate the genos of the defeated community – and today, women genes are acknowledged as just as contributory. Population geneticists and evolutionary biologists have long rejected the notion of human 'race',[177] but genociders' obsessions therewith have not changed.[178] In any case, this digression was to illustrate that targeting men within and outside the battlefield has often carried a genocidal intent that combines gendered and

[175] See also A. Jones, 'Gendercide and genocide'2(2) *Journal of Genocide Research* (2000); M. Drumbl, '*Prosecutor v Radislav Krstić*: ICTY Authenticates Genocide at Srebrenica and Convicts for Aiding and Abetting' 5(2) *Melbourne Journal of International Law*, 439 (2004).

[176] A. Begicević, 'Law, political economy and war reparation: The case of Bosnia and Herzegovina' 46(2) *Law & Policy*, 172 (2024).

[177] See G. Barbujani, *L'invenzione delle razze* (Milan: Bompiani, new edition 2018).

[178] Read further C. Lingaas, *The Concept of Race in International Criminal Law* (Abingdon-on-Thames: Routledge, 2020).

racialised views of the enemy genos, well beyond strategic necessity or even the neutral military annihilation of the enemy per se.

The almost totality of scholarly endeavours in the area of genocide and bodies inevitably focus on females. Yet, genociders' attention for the male body and his human reproductive functions within a system of social norms should not surprise. Genocide scholars have recently converged around the idea that by the 'dehumanisation' of genocide victims it is not meant their biological reduction to other species or neutrally wasteful biological material, but rather their suppression and humiliation while still accounting for them as humans. Their psychological suffering, physical pain, and removal from collectivity as socially functional beings, only makes sense insofar as their 'being human' is acknowledged while they are stripped of their moral status.[179] In many imperative ways, this is similar to Agamben's biopolitical account of the *Homo sacer* within a permanent state of exception,[180] whose body can be disposed of because he has been placed outside the legal regime (or the latter, for him, has been indefinitely 'suspended') – though this analogy (and its limitations) will not be further explored here. For the sake of our discussion, what matters instead is to realise that whenever the killing of men is normalised, those men are stripped of their moral status as symbolised by the protection of the law. They do not lose recognition of their biological status as humans, or even of their biological function within human societies, which is precisely why such a function is deemed irreconcilable with genocidal aims and eventually worth suppressing. Men are deemed dangerous and as such placed outside the protective scope of the law, with their moral status being denied; meanwhile, their bodies are acknowledged as human and functionally despised as perpetuators of the enemy genos, and thus worth suppressing. In this sense, 'dehumanisation' is a limitedly helpful term; in fact, men are massively killed *precisely because* they are human – just, humans who are worth humiliating and killing (for one side to the conflict) and not worthy of legal protection (for the other side).

There is an interesting paradox harboring here. The enemy man is killed and factually stripped of legal protection, but he is also the enemy interlocutor and term of reference – the metric to sort victory from defeat. Back to the tropes, to destroy – just like to defend – the nation, what matters for men is the man. He is the interface with the enemy nation, its very face and flag; and it is he that must be annihilated before declaring a military (and even more so genocidal) campaign a success. His humiliation must ensure that his fellows shy away for a very long time. Men are the variable that counts, the only accepted interlocutors. It is a sort of 'privilege curse', like the oil and mineral curse for resource-rich

[179] See A. de Ruiter, 'To be or not to be human: Resolving the paradox of dehumanisation' 22(1) *European Journal of Political Theory*, 82 (2023).

[180] See eg M. Fusaschi, 'Itinerari etnografici nelle conseguenze dell'agire genocidario', in Id ed, *Rwanda: Etnografie del post-genocidio* (Sesto San Giovanni: Meltemi, 2009), 26-35.

'rentier States' across the MENA region and Sub-Saharan Africa.[181] In fact,

> the consequences of discrimination, understood as the negative expression of inequality and injustice, can only be met with concrete solutions when a more paradoxical mode of thinking relying on polyvalent logic is applied. This mode leads to a more inclusive or holistic perception capable of addressing and transcending the perplexing paradoxes of our time.[182]

Lastly, wars' *mental* tall on civilians is of capital importance, and finally receiving the attention it deserves.[183] Family trauma is yet another reason why normalising the unleashing all the violence onto liquidating the men is not going to spare women from devastating levels of suffering and social retraction. This is appropriately framed in the Genocide Convention's definition of genocide, which includes mental harm. That performative violence in war plays an expressive "social reordering" function is well-known, with a view to justify the post-war order as the only possible option.[184] And I do join feminist scholars in emphasising that genocide brings this reordering function to the extreme: it is about foundational community disruption; what is despised about the enemy is its biology, *but also its vitality*[185] – its reproductive fitness *and cultural success*. The liberal regime will then try to reabsorb the eclipsed vitality through narratives of unfitness: the genociders—so will be indirectly accepted—merely rescued a deserving culture

[181] On this political-economy concept, *ex multis*: M.L. Ross, *The oil curse: How petroleum wealth shapes the development of nations* (Princeton: Princeton UP, 2012); J.D. Sachs and A.M. Warner Sachs, 'The curse of natural resources' 45(5) *European Economic Review* (2001); J. Colgan, *Petro-Aggression: When Oil Causes War* (Cambridge: Cambridge UP, 2013); A. Williams and P. Le Billon eds, *Corruption, Natural Resources and Development: From Resource Curse to Political Ecology* (Cheltenham: Elgar, 2017); M. Kamrava ed, *The "Resource Curse" in the Persian Gulf* (Abingdon-on-Thames: Routledge, 2020); F.A. Abumere, *Global Justice and Resource Curse: Combining Statism and Cosmopolitanism* (Abingdon-on-Thames: Routledge, 2022). East Asia, for instance, seems less affected by this phenomenon; *see most recently* J.V. Zhan, *China's Contained Resource Curse: How Minerals Shape State-Capital-Labor Relations* (Cambridge: Cambridge UP, 2022).

[182] R.J. Neuwirth, 'Equality in view of political correctness, cancel culture and other oxymora' 8(1) *International Journal of Legal Discourse*, 22 (2023).

[183] Refer eg to S. Solomon, 'The Psychological Impact of Military Operations on Civilians and the UN Human Rights Committee *Japalali* Decision: Exploring Mental Anguish under a *Vida Digna*, Right to Life Prism' 26(2) *Journal of Conflict and Security Law* (2021); S.M. Knuckey, 'The Proportionality Rule and Mental Harm in War', in C. Kreß and R. Lawless eds, *Necessity and Proportionality in International Peace and Security Law* (Oxford: Oxford UP, 2020); S. Solomon and Y.M. Bayer, 'Is All Mental Harm Equal? The Importance of Discussing Civilian War Trauma from a Socio-Economic Legal Framework's Perspective' 92(4) *Nordic Journal of International Law*, (2023); S. Solomon, 'Concretizing Mental Harm: Warfare's Psychological Impact on Civilians and the Return to Domestic Law for Establishing a Standards-Setting Paradigm' 31(1) *Transnational Law & Contemporary Problems*, (2021); N. Milaninia, 'Understanding Serious Bodily or Mental Harm as an Act of Genocide' 51(5) *Vanderbilt Journal of Transnational Law* (2018).

[184] Refer to K. Mulaj, 'Violence of war, ontopology, and the instrumental and performative constitution of the political community' 44(1) *Review of International Studies* (2018).

[185] See C.F. Card, 'Genocide and Social Death' 18(1) *Hypatia* (2003).

from the hands of deviant interlocutors of the dominant international order; the new interlocutors, the genociders, restored alignment and order.[186] (Male) élites are once again disrupting women lives by the very killing of 'their' men.

X. Gaza's Faceless Men, 2023-2024

So far, on the whole, this paper has been articulated around four overarching claims: 1) killing men does not serve to stop atrocities; 2) it actually fosters them, while 3) institutionalising hypocricy and reiterating male-centred stereotypes we should dispose of; 4) normalisation has become a cognitive habit, so that we have become insensitive to the actual meaning of headlines such as casualty counts 'of which 40% women and children', and if the 'residual' 60% was more acceptable or justifiable. It is now imperative to succinctly situate these claims in the 'real world', so to appreciate how military and sociopolitical practice substantiate them.

To this end, the contemporary Gazan conflict represents the perfect incarnation of blurring lines and more and more wars 'without civilians',[187] proudly livestreamed through paid social-media campaigns aimed at discrediting the existence of noncombatants.[188] Ever since December 2023, Israeli high military commanders kept reiterating 'that the "entire Gaza should resemble" the destroyed town of Beit Hanoun, liking it to a biblical tale in which *all the males were slaughtered* and the women and children taken'.[189] Francesca Albanese, the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories, has repeatedly warned against the genocidal seeds that underpin the dehumanisation of Palestinian civilians and camouflage it as careful IHL compliance.[190] From her latest official report,

> By early-December, Israel's security advisors claimed the killing of '7,000 terrorists" in a stage of the campaign when less than 5,000 adult males in total had been identified among the casualties, thus implying that all adult males killed were terrorists'. This is indicative of an intent to

[186] See J. Heiskanen, 'In the Shadow of Genocide: Ethnocide, Ethnic Cleansing, and International Order' 1(4) *Global Studies Quarterly* (2021).

[187] E. Semerdjian, 'A World Without Civilians' *Journal of Genocide Research* (2024).

[188] Refer eg to A. Accorsi, 'How Israel Mastered Information Warfare in Gaza' *Foreign Policy* (2024), https://tinyurl.com/2sur2atp (last visited 30 September 2024).

[189] N. Sultany, 'A Threshold Crossed: On Genocidal Intent and the Duty to Prevent Genocide in Palestine' *Journal of Genocide Research*, 2(2024), emphasis added.

[190] Check eg https://tinyurl.com/2szy88jp (last visited 30 September 2024). This is the first of a series of tweets I will be citing throughout the present case-study. Not only are they a precious source of lively debates among scholars and institutional representatives; they also return the sense of public morals in an immediate fashion, less mediated in comparison to more traditional references. In this regard, I believe they can properly complement the overwhelming majority of cited sources throughout this paper: more formal case notes, judgements, institutional reports, legal documents, policy briefs, newspaper articles, and scholarly works.

indiscriminately target members of the protected group, assimilating them to active fighter status by default.[191]

Many see in the judicial proceedings instructed against Israel an opportunity to develop the law of genocide after the partly disappointing *Bosnian Genocide* case before the ICJ.[192] The ongoing *Gambia vs Myanmar* ICJ case is also imbued with Western hypocrisy, *inter alia* for the call to protect those children as vulnerable, while not submitting cognate legal arguments for Gazan children and all other protected groups – which include civilians generally.[193] If *South Africa* v *Israel* is indeed an opportunity, lawyers might want to disrupt the selective humanisation that disfavours men.

The Palestinian Territories have long represented a testbed for genocidal acts and motives,[194] but the 2023-2024 Gaza War has stretched those already deeply rooted tendencies to the extreme. After Srebrenica, in Srebrenica survivors' own words, Gaza represents the paradigmatic genocidal laboratory for mass extermination,[195] and more specifically, for the systematic extermination of men, misguided as terrorists or anyway unworthy (or less worthy) of protection under the most absurd rhetorical lawyering artifices. To exemplify, Israel has created invisible 'kill zones' whose crossing results in immediate assassination, no matter the crossers' status of the under the LoW;[196] as always, this is phrased as counterterrorism, and most victims are male. The few times that men are not mass murdered, like in Gaza City months into the war (ie once the main battlefield had already moved to Khan Yunis and then Rafah), they are mass kidnapped, while women are sporadically arrested.[197]

This genocidal harbour found fertile terrain in the selective humanization of the LoWs as it percolated in the public opinion and featured in the media.[198] The narrative centred around sparing 'women and children', or condemning their targeting, has completely overtaken societal discourses and representatives at all

[191] UN Human Right Council, '"Anatomy of a Genocide": Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese', A/HRC/55/73, 25 March 2024, para 25.

[192] Refer eg to D.V. Velenczei, '*South Africa v Israel*: *Bosnia v Serbia* 2.0?' *International Law Blog* (2024), https://tinyurl.com/673ptnsf (last visited 30 September 2024).

[193] See L. Daniele, https://tinyurl.com/49k4fmpy (last visited 30 September 2024).

[194] See eg L. Yehuda, *Collective Equality: Human Rights and Democracy in Ethno-National Conflicts* (Cambridge: Cambridge UP, 2023), 6;79.

[195] Refer to A. Buljušmić-Kustura, '"It's not just Israel on trial": Bosnian war survivor's support for genocide case' *The Guardian* (2024), https://tinyurl.com/mwpfxmec (last visited 30 September 2024).See also Shmuel Lederman, 'Gaza as a Laboratory 2.0.' (2024) *Journal of Genocide Research*.

[196] Read Y. Kubovich, 'Israel Created "Kill Zones" in Gaza: Anyone Who Crosses Into Them Is Shot' *Haaretz* (2024), https://tinyurl.com/eass3a42 (last visited 30 September 2024).

[197] Check eg Y. Tirawi [يونس], https://tinyurl.com/3khm5ryh (last visited 30 September 2024).

[198] Refer also to R. Vecellio Segate, 'Channeled beneath international law: Mapping infrastructure and regulatory capture as Israeli-American hegemonic reinforcers in Palestine' 28(4) *Communication Law and Policy* (2024).

levels. From Palestine, it is deployed to solicit a global response – the killing of men would not have sparked the same outrage. Conversely, Israeli makes recourse to it in order to endorse the equation of Palestinian men with terrorists, and eventually lower the count of their mass extermination of civilians. Global media, aligned with one or the other narrative, joined the same phrasing; for instance, in Germany, TV screens on public transport reported the message.[199] As for institutions, they avail themselves of the same formula, for precisely the same reasons. In Italy, a singer shouted 'stop genocide!' during the Sanremo Festival, the most popular pop-music TV show. The CEO of Rai, Italy's public TV broadcaster, immediately issued an apologetic statement to appease the Israeli Embassy in Rome, and in deploring this statement, former President of the Italian Chamber of Deputies Laura Boldrini reiterated the 'women and children' narrative.[200] The same goes for the already mentioned Albanese.[201] In the US, the videomessage by senator Sanders, possibly the most vocal opposition to Biden's Israel-shielding policy, also deplored the 'women and children' victims,[202] as did the President of Colombia,[203] the UN Special Rapporteur on the Right to Housing,[204] an –self-evidently—the UN Entity for Gender Equality and the Empowerment of Women – not least on 'women and girls' being forcedly displaced in Rafah.[205] The US Department of Defense, too, released casualty counts that exclude all non-combatant men;[206] the count was later retracted, claiming they were merely citing Hamas's Ministry of Health, but what matters for the purposes of this paper is that the question (and answer) were phrased in a women-and-children fashion,[207] and so reposted across social media.[208] The disarticulation of civilian men from the public debate on war crimes in Gaza is so profound and normalised that the Palestinian representative at the UN General Assembly felt the urge to specify that men, too, are being massively exterminated, and this is no less outrageous.[209] Scholarly works, even those about the very rhetorical devices deployed for genocidal action, are not immune from this rhetoric, either. To exemplify, one of these laments 'the tally of civilian casualties, mostly children

[199] Check H. Hauenstein, https://tinyurl.com/3jjjvfcm (last visited 30 September 2024).

[200] L. Boldrini, https://tinyurl.com/5n9ax237 (last visited 30 September 2024).

[201] F. Albanese, https://tinyurl.com/ytparvts (last visited 30 September 2024).

[202] B. Sanders, https://tinyurl.com/5h9yjbzn (last visited 30 September 2024), at 0:15; B. Sanders, https://tinyurl.com/5p52dd5s (last visited 30 September 2024).

[203] See Middle East Monitor, 'Colombia: President proposes UN recognition for Palestine as full member state' (2023) https://tinyurl.com/2s3588b9 (last visited 30 September 2024).

[204] B. Rajagopal, https://tinyurl.com/58nrjrfb (last visited 30 September 2024).

[205] Check UN Women, https://tinyurl.com/yrc89ct9 (last visited 30 September 2024).

[206] Refer to al-Jazeera, 'More than 25,000 women and children killed in Gaza: US defence secretary' (2024) https://tinyurl.com/47npwc3e (last visited 30 September 2024).

[207] See US Department of Defense, 'Transcript: Pentagon Press Secretary Air Force Maj. Gen. Pat Ryder Holds a Press Briefing', 29 February 2024, https://tinyurl.com/4u93ewa3 (last visited 30 September 2024).

[208] Check eg @Kahlissee, https://tinyurl.com/bdffmpbv (last visited 30 September 2024).

[209] @Resist_05, https://tinyurl.com/3nyztmp8 (December 30, 2023), at 5.30-5.40.

and women'.[210]

Crediting due weight to the selectively accepted slaughter of men, for whom no intersectionality and special protection is generally pleaded, and to whom no LoW humanisation factually applies, has become of the outmost urgency. Men have been dehumanised to the extent that have slipped into normative and societal invisibility – despite their plight being real, and TV-screened on a daily basis. This type of invisibility also comes in a techno-fetishised mode, where AI is deployed to target men as likely terrorists: in Gaza, more than 37,000 men have been assessed as 'terrorists' by the drones-guiding algorithm,[211] making a parody of the core IHL principles of distinction, precaution, and proportionality. The original journalistic investigation speaks of 'women and children or *people who were not involved in the fighting*' (a euphemism for 'civilian men') being shot dead.[212] Crude records of these killings cannot be counted. The most infamous, from early February 2024 and reported by al-Jazeera,[213] are those of drones repeatedly striking a group of four civilian men who were simply wandering, slowly, among the ruins, in the middle of nowhere, carrying nothing except for their clothes. One man survived, and as he kept walking – even more slowly, as his leg had been wounded – they stroke him down again, until he collapsed into his blood puddle. This war-gaming dystopia, which is at once individual but group-targeted,[214] pursues no strategic objective other than massacring any male noncombatants indiscriminately. No one bothered to specify that these walking men were terrorists, or anyway representing a threat; and no one – so far as it can be known – bothered investigating the 'incident' (one of the many). The *modus operandi* is that of combat videogames, which themselves have been probed in feminist literature: why then, not challenging its manifestation against men, in actual reality? Why contesting this *modus* in theory as 'masculine', but not raising even lauder concerns when the mode's violence is unleashed against actual (male) human being on (or in this case, around) a real battlefield?

In Gaza, civilian men have been used as human shields – precisely what they are accused of doing.[215] Furthermore, they have been straight equated to

[210] D. Fassin, 'The Rhetoric of Denial: Contribution to an Archive of the Debate about Mass Violence in Gaza' *Journal of Genocide Research*, 1 (2024).

[211] See B. McKerna, '"The machine did it coldly": Israel used AI to identify 37,000 Hamas targets' *The Guardian* (2024), https://tinyurl.com/39nx2ue6.

[212] Y. Abraham, n 110 above.

[213] Check Al Jazeera English, https://tinyurl.com/696n66pk(March 22, 2024).

[214] On the interfaces between individual and group algorithmic targeting, with all shades in between, *see* R. Vecellio Segate, 'Shifting Privacy Rights from the Individual to the Group: A Re-adaptation of Algorithms Regulation to Address the Gestaltian Configuration of Groups' 8(1) *Loyola University Chicago Journal of Regulatory Compliance*, 69 (2022).

[215] Refer eg to Report of the United Nations Fact-Finding Mission on the Gaza Conflict established pursuant to Human Rights Council resolution S-9/1 of 12 January 2009, 25 September 2009, para 55, as also cited *in* International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa* v *Israel*), Application instituting proceedings and request for the indication of provisional measures

terrorists, and with them, their supporting system as well, most notably their "extended families". Indeed, this whole dehumanisation of men won't spare 'their' women and children. For instance, one could recall

> the reported execution in Gaza City of at least 11 male members of the Annan family and their relatives – boys and men, said to have been separated out by Israeli soldiers and shot in front of their family – before the women and children were then attacked.[216]

Commenting on other incidents, the UN have declared themselves 'shocked (… at) the deliberate targeting and extrajudicial killing of Palestinian women and children in places where they sought refuge, or while fleeing',[217] as if this was not daily reality for most civilian men in Gaza, *and their accompanying families*.

Along similar lines, killing men is not going to spare 'their' women from intergenerational genocide: thousands of pregnant Gazan women have experienced undernutrition, trauma, and poor medication,[218] with limited access to food and medical care also owing to the absence of their male partners. Those pregnancies will either be (naturally) aborted, or result in underdeveloped newborns who are plausibly going to perish soon after birth. In fact, that of stunting children has long been a genocidal demographic engineering method overtly pursued by the Israelis in Gaza.[219] And were those newborns to survive, they would anyway inherit the trauma epigenetically, and probably undergo severe distress as a result thereof.[220]

When feminists assume that justice is a female aspiration, they implicitly endow *this* feminism with the chrism of justice, thus condoning the annihilation of the man as someone undeserving of protection. In reacting to the ICJ's order in *South Africa vs Israel* (provisional measures), a female scholar expressed her (welcome) disappointment at the voting pattern of Judge Julia Sebutinde, framing her concerns as 'feminist hopes and disappointments in international law',[221] as if the dire state of PIL and the injustices it enables were a concern characterisable as 'feminist', and not shared by the overwhelming majority of those who belongs to the *invisible college of international lawyers*. Aspiring to justice and a

(29 December 2023), 19.

[216] ibid, para 46.

[217] UN Office of the High Commissioner for Human Rights, Press Release: 'Israel/oPt: UN experts appalled by reported human rights violations against Palestinian women and girls', 18 February 2024, https://tinyurl.com/3ahnde72.

[218] See further S. Elnakib et al, 'Pregnant women in Gaza require urgent protection' 403(10423) *The Lancet* (2024).

[219] See Vecellio Segate 2021, n 189-204 above.

[220] See eg M.A.S. Khoodoruth and W.N.C. Khoodoruth, 'From past famines to present crises: The epigenetic impact of maternal malnutrition on offspring health in Gaza' 95 *Asian Journal of Psychiatry* (2024). *Read generally* R. Vecellio Segate, 'Exposing, reversing, and inheriting crimes as traumas from the neurosciences to epigenetics: Why criminal law cannot yet afford a(nother) biology-induced overhaul' *Criminal Justice Ethics* (forthcoming 2024[b]).

[221] J. Santos de Carvalho, https://tinyurl.com/uyarvdd3 (February 16, 2024).

provisional finding of genocide is not 'feminist': just human. The other side of the argument, as already casted above, is that women, too, can be genocidal leaders – including Maj. Gen. Yifat Tomer-Yerushalmi, the IDF's Military Advocate-General who appeared to concede a 'climate' of war crime 'cases'[222] but kept adorning the IDF's operations with her lawyering glossa. Women can also be genocidal street-level executives, just like the thousands of IDF female soldiers who brutalise men, women, and children on a daily basis. Indeed, the Israeli army is one of the world's most 'gender-equal', evidencing yet again how depravity knows no genderised qualification, and confirming that female soldiers fail at sensibly uplifting an army's moral standing. It is rather disturbing that Albanese, on women's day, regrets what Israeli female soldiers in Gaza 'have become',[223] as if women were not structurally violent and savage, and were not supposed to normally commit atrocities and brutalities, but could only exceptionally 'become' so as a matter of tragedy. On the same women's day, the EU's High Representative for Foreign Affairs and Security Policy blamed it on a 'mainly men-made tragedy',[224] which is definitely true (at least in strictly military terms) but should not justify denying equal care, *pietas*, and dignity to the war's male victims.

Finally, there is also an aesthetics side to it. Gazan women are reportingly 'cutting their hair' due to scarcity of clean water, and other women join in solidarity from around the globe, posting it online.[225] While this relative triviality receives unprecedented deals of coverage, Gazan men face more pressing problems – for instance, being murdered. Their plight is only met with scant attention and compassion.

XI. Seven Tentative Policy Recommendations

Besides the specific situation in Gaza, the findings of this paper should prompt general policy action in at least seven directions:

i) Humanity should progressively eradicate human wars, and replace them with conflicts whereby smart robot armies destroy each other, shifting the focus from the loss of human life to the techno-economic annihilation of enemy resources – more or less like in a rules-based tournament.

ii) Media and institutions should refrain from reproposing the 'women and children' narrative, being it for exalting their morality, or for blaming a party for their recklessness.

iii) Each jurisdiction should outlaw forcible male military conscription as unconstitutional; international treaty law should follow, in order to harmonise

[222] Refer to E. Fabian, 'IDF's top lawyer warns commanders against "unacceptable cases of conduct" by troops in Gaza' *The Times of Israel* (2024), https://tinyurl.com/3jccp25h.

[223] F. Albanese, https://tinyurl.com/p3u3vjbv (March 8, 2024).

[224] J. Borrell Fontelles, https://tinyurl.com/msskkc28 (March 8, 2024).

[225] Check al-Jazeera English, https://tinyurl.com/v8cdr5sr (March 21, 2024).

all such constitutional-level provisions. Alternatives to compulsory military service should be offered; in the negative, such service should forcibly deploy individuals on the basis of their age and/or health status, not sex.

iv) Feminist scholars and policymakers should withdraw from selfish, cynical, and non-evidential assumptions around the status quo being the best compromise for women in times of war.

v) Male noncombatants should always be counted among the civilian victims, no matter their supposed 'terrorist' affiliation – unless they themselves overtly professed such affiliation and the willingness to "combat" (even on a private basis).

vi) The algorithms powering AI drones should be retrained to ignore gender distinctions and conservatively strike only military targets. Variables such as height, clothing, posture, and bodily mass should be proactively dismissed. Whenever this cannot be assured, algorithmic warfare against humans should be disposed of altogether.

vii) All domestic and international provisions, from HR treaties to local policies and rules of engagement, a priori granting non-pregnant adult women special protection or enhanced entitlements should be removed. Humanitarian protection and development cooperation funds by governmental and non-governmental actors should also be redistributed accordingly across sexes. Exceptions might be devised for mothers in certain territorial or sociocultural settings, depending on narrowly assessed circumstances to be ad hoc justified and periodically reaudited.

XII. Conclusions

Large fractions of men are reportedly at discomfort with contemporary feminism,[226] perhaps also owing to the latter's self-serving women-uplifting mission that is too often discounted from pursuing bipartisan forms of common, lasting good. Against this backdrop, the discrimination of men starts being acknowledged in literature but is not even nearly as addressed as that of women in practice.[227] The reverse is true: it has become normalised to such an extent that men themselves are often unaware of the discriminating system other élite-tied men have trapped them in. Feminists acknowledge that genderised research on the transition from peace to war (and back) is missing crucial pieces,[228] including on the micro-scale of everyday practices,[229] but when it comes to violence at war,

[226] See also I.M. Kahloon, 'What's the Matter with Men?' *The New Yorker* (2023), https://tinyurl.com/4rszub65.

[227] Read generally F. Manzi, 'Are the Processes Underlying Discrimination the Same for Women and Men? A Critical Review of Congruity Models of Gender Discrimination' 10 *Frontiers in Psychology* (2019); K. Zbrowska, 'Discrimination of men as a legal phenomenon' LLM Thesis in International Human Rights Law at Lund University (2016).

[228] See eg C. Cockburn, n 96 above.

[229] Refer eg to C. Rigual et al, 'Gender and the micro-dynamics of violent conflicts' 24(3) *International Feminist Journal of Politics* (2022).

the failure at taking the victimisation of both genders seriously becomes even graver. The man routinely falls victims of atavistic genderised stereotypes and expectations about him being dangerous, war-implicated, patriotic, a national hero, a suspect, a terrorist, a criminal, a family protector, and some of these qualifications endanger his safety and survival; yet, attention is scant when compared to the one reserved for women-endangering stereotypes and preconceptions. The interest with the differential protection of "women and children" rests with it being a paradigmatic example of cognitive habit generated by an international legal framework, and thus under a pretense of formal 'lawfulness', upon promotion by feminists and subsequent transposition into LoW interpretation by (mostly male) élites to the comparative disadvantage of all other men – in order to appear 'humane' and foster normative acceptance across societies. Under IHL, 'a woman is first of all a vulnerable being in need of protection, in a system of international law that is fundamentally state-based and masculine'.[230]

A comparatively diminished protection of the man just provides excuses to dehumanise the enemy males, brutalising and annihilating them alongside their families – that become 'collaterals'. It makes some civilian targets a bit more justifiable, a bit less unlawful. This arguably upscales the overall violence unleashed against civilian populations – including women themselves, who die with "their" men or go about unprotected and massively raped.

Contributory factors that can explain why men are massively targeted and killed regardless of their noncombatant status are innumerable, but only few of these factors are set in stone, with most rather depending on sociopolitical acquiescence to dismissive and discriminatory LoW interpretations that factually accept their sacrifice. In fact, there is no excuse for ignoring their plight or accepting its normalisation. Even accepting that men-exterminating warfare is ingrained into human cultural acquisitions that *possibly* built on some rudimentary natural predispositions to group violence,[231] as theorised by evolutionary social scientists, the law is always an exercise on the edge between *recording* what is 'natural' as 'lawful', and *transforming* it out of moral concerns and constantly evolving societal values and teleologies. Men might well fall victim of their own nature, but it is for society altogether – including women – to contribute to sustainable solutions that stand in 'degenderised' solidarity with the victimisation of most men as well. The life of male victims is just as worth preserving.

The 'women and children' rhetoric, so frequently deployed by the media as to emphasise the tragedy, or praise the humanisation, of armed conflict, shall be deemed unhelpful and a vector of normalised extermination. First, it represents source of insecurity from a strategic perspective, as it calls for higher engagement

[230] I. Delpla, 'Women and international (criminal) law' 39 *clio: Women, Gender, History*, 181 (2014). See also R. Provost and V. Wijenayak, 'Collateral kids: Weighing the lives of children in targeting' *Leiden Journal of International Law*, 6 (2024).

[231] Read eg R. Brian Ferguson, 'War Is *Not* Part of Human Nature' *Scientific American* (2018), available at https://tinyurl.com/mt3cya3h.

with the neither-women-nor-children components of society; second, it insists of those very same tropes that feminism was supposed to eradicate, including those around female fragility, unreliability, and strategic unserviceability. It also stands as a cardinal case of moral degradation by means of collective intellectual and cognitive desensitivisation: we have all become insensitive to the horror of male carnages, being they about young men who are sent to the frontlines, or male noncombatants who are liquidated operationally and disposed of rhetorically.

LoW are still essentially masculine, and by paradox, this is working against men themselves. Intersectional presumptions of vulnerability under an IHRL-interfaced IHL, that factually overprotect the woman and underprotect the young adult male, have sharpened a divide that is now difficult to bridge. Under these selectively humanised frameworks, the noncombatant man is 'worth killing', 'less blameworthy to kill' (compared to a noncombatant woman), or normalised as an 'ordinary target' to strike because, *inter alia*, a) terrorists are ordinarily identified as men; b) women are considered a vulnerable category just like children, the elderly, or the disabled; c) men are often forcibly conscripted, thus losing their noncombatant status against their will; d) genociders find it faster and less morally reprehensible to kill the man to extirpate the genos and pollute enemy women with their semen. While international reprehension for the killing of all noncombatants might have proven more effective vis-à-vis 'regular' international conflicts, which are becoming virtually inexistent, civil wars target the man as the 'reference point' and 'cardinal expression' of 'the other', under formalistic justifications articulated around counterterrorism lexicon and preventative doctrines aimed at undermining the principle of distinction. The current genocidal slaughter in Gaza has evidenced all of this powerfully, yet again.

Whatever the reason (or excuse), men are always massively executed, signaling a widely documented normalisation which seems neither desirable, nor trivial. It is not inevitable, either; feminists, for instance, could invest some political capital in equal protection safeguards for all – which as demonstrated here, would ultimately turn to their own advantage as well. For the time being, despite LoW being still essentially masculine, and thus potentially in contrast to feminists' demands, feminists have preferred to capitalise on their already acquired 'humanisation' developments, and abandon the field. This retraction is plausibly subsumed under a number of nonevidential beliefs, namely: that it would work against their interests, ie it would lead to more women being killed; that this is mostly a 'chaosland' dilemma for 'the rest' to deal with, as it is not of daily concern to most West-based liberal feminists; and that the most radical feminist response to this conundrum would call for an eradication of men from reality, or at least from any position of command, which does not read any feasible in the mid-run.

With this paper, mine was obviously not a call to legitimise the killing of women as well, or to kill proportionately more women and fewer men – these disclaimers should not feel necessary after such an extensive journey, but in

today's polarised political climate it is often worth specifying, so to prevent pernicious (and malicious) ill-readings and misunderstandings. Rather, this article sought to advance the fairly simple point that killing adult men is just as morally reprehensible as killing adult women or children – just, it has never received the same attention, due to a combination of causes rooted in male-centred yet feminised international law and security discourse. It has further contended that treating the annihilation of men more leniently than women's has ultimately served to justify more relentless, cruel, and deadly military practices than it would have been the case had the civilian man's survival been protected by public law and morals just like that of any other human being. Despite all post-WWII promises around equal rights for all, a few men have decided how IHL was to look like, and (many) feminists appended additional layers of protection for themselves only. IHL has done nothing to exceed its long-standing drawing on mere human nature, or to sublimate it; and feminists have been culpably silent, perhaps under the (simplistic) assumption that the selectively humanised IHL design could at least spare their lives under the guise of intersectional vulnerability. But this is not aligned with their overarching 'equality' stances, nor is it in harmony with the stated aspirations of and pledges to a genuinely 'humanised' IHL that works for all.

The present work wanted to be an urgent call for feminists to engage more constructively and less utilitarianly with issues of war and its political violence, and for international publicists to take the humanisation discourse more seriously, and translate it into IHL doctrines and practices that are fit for contemporary warfare. The wartime equation of the average adult man with a terrorist or with a life that is factually undeserving of protection must cease. Just like quantum physics, international affairs are a tale of interconnectedness and multicausality,[232] where most dichotomies are untenable and where selectively applied special protection risks undermining the standard protection of all others – as well as ultimately the very protection of the specially protected. Having 'their' men killed will not spare civilian women from being raped – the contrary is true, if anything; and will often not spare their lives, either. Not only is feminists' selective engagement cynical; it is also counterproductive and shaped by nonevidential beliefs.

If this paper claimed to harbour solutions to the half-a-million-year-long cycle of violence that inhabits our species – that would be absurd. Yet, I hope I have demonstrated that normalising the killing of men in law and practice, with contemporary Gaza as its latest testbed, is not going to advance any solutions, either – be they theoretical or operational. Indeed,

> neither victims nor perpetrators preexist violence, but they are instead constituted as such in the very act of the violence. Simply 'adding "female perpetrators" or "male victims" to our analysis does little to illuminate our understanding" of conflicts and violence, the people involved in them, the

[232] Read further L. Sjoberg, 'Quantum Ambivalence' 49(1) *Millennium* (2020).

> social histories of relevant power relations, or the very specific sociopolitical contexts within which they interact.[233]

So far, feminism has thus culpably abdicated its self-assigned role of equality seeker, structural violence disruptor, and fair *universal* humaniser. While feminist can pride themselves on a long and successful history of advocacy for doctrinal overhauls and integrations in IHL, ICL, and cognate frameworks (most notably on wartime sexual violence), they have willfully neglected the massacring of male noncombatants. Were legal feminists under a moral obligation to engage with alternative viewpoints on *all* relevant LoW dossiers, including the treatment of male noncombatants? This article extensively argued in the positive. Those who were previously excluded have now turned their advancement into equally extractive 'competition in scholarship',[234] which seemingly adds little to truly compassionate and universal justice.

With the present analysis, the hope is that all factual and theoretical premises are in place to urgently reverse course and stop finding the killing of young adult noncombatant males 'normal', 'inevitable', or more 'acceptable' than the killing of any other class of humans. Waiting for the Y chromosome to naturally implode,[235] and assuming we do not go extinct out of eg thermonuclear warfare or climate change, any solution will require more genuine and trustworthy an alliance between both sexes of *H. Sapiens Sapiens*. Women and men are to resist élitist (and life-inherent) oppression alongside one another; it is about 'fighting' together, not each other – this would add meaning to rights intersectionality as well.[236] That 'women and children' are spared is *only one* indicator of humanised warfare – and regrettably, a naïve one.

[233] K. Campbell, as cited *in* D. Zarkov, 'Conceptualizing Sexual Violence in Post–Cold War Global Conflicts', in K. Hagemann et al eds, *The Oxford Handbook of Gender, War, and the Western World since 1600* (Oxford: Oxford UP 2020), 737.

[234] J. Klabbers, 'On Epistemic Universalism and the Melancholy of International Law' 29(4) *European Journal of International Law*, 1069 (2019).

[235] This seems to align to a wider trend in the natural world; *refer to* T. Pievani and F. Taddia, *Il maschio è inutile: Un saggio quasi filosofico* (Milano: Rizzoli, 2nd edition 2014); K.D. Makova et al, 'The complete sequence and comparative analysis of ape sex chromosomes' 630 *Nature* (2024).

[236] See eg U. Mellström, 'Masculinity studies – more relevant than ever?' 18(3) *NORMA: International Journal for Masculinity Studies*, 157 (2023). *Read further* S. Salem, 'Intersectionality and its discontents: Intersectionality as traveling theory' 25(4) *European Journal of Women's Studies* (2016); J.C. Nash, 'Intersectionality and Its Discontents' 69(1) *American Quarterly* (2017).

Hard Cases

Indigenous Sovereignty in the Low-Carbon Transition: Reflections on the *Osage Wind* Judgement

Giuseppe Bellantuono*

Abstract

In *United States and Osage Minerals Council* v *Osage Wind et al*, the federal judges of the United States (US) ordered a wind developer to remove its turbines and pay damages to the Osage Nation. This dispute arose from the peculiar legal regime of the mineral estate established in federal Indian law. Its outcome has broader implications for the low-carbon transition. Indigenous opposition to renewable plants is widespread both in the US and elsewhere. This means that, in pluralistic legal orders, the management of the interplay between state and non-state law is a key factor for the success of climate policies. This comment describes the facts of the case and discusses the meanings of the Indian canon of interpretation, its implications for federal, tribal, and state sovereignty, as well as the global debate about the integration of Indigenous knowledge into climate policies.

I. Introduction: Managing Collisions Between Legal Pluralism and Decarbonization

News about a federal court ordering a wind farm in Oklahoma to dismantle its turbines and pay damages to the Osage Nation made headlines.[1] This judgement is the latest episode of a long legal battle that started in the early 2010s and is still far from its conclusion. The outcome of this dispute has broad implications beyond the parties directly involved. The interactions among the three distinct sovereignties of the United States' (hereinafter, US) legal system – the federal, the state and the tribal – are at work here. During the whole of US history, such interactions have been contentious, tragic, and brutal. In recent years, high-profile cases before the US Supreme Court and claims advanced by Indian grassroots movements signalled that the interactions among the three sovereignties had entered a new stage and were searching for a new balance. Echoes of this debate can be seen in the *Osage Wind* case.

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[1] *United States of America and Osage Minerals Council* v *Osage Wind et al*.2023 U.S. Dist. LEXIS 226386 (N.D. Okla. 20 December 2023). See eg N.H. Farah, 'Tribal Sovereignty Trumps Windin Oklahoma' (4 January 2024), available at https://tinyurl.com/2swkbvwh (last visited 30 September 2024); J.R. Porter, 'The Osage Nation of Killers of the Flower Moon Fame Had a Big Win in Federal Court This Week' (22 December 2023), available at https://tinyurl.com/y4akdxbt (last visited 30 September 2024).

This dispute also has broad implications for the energy sector: if Native Americans are allowed to oppose low-carbon technologies, should we conclude that strong versions of legal pluralism in any legal system are a barrier to the fast and effective decarbonisation of our societies? In light of the significant role played by a plurality of legal orders both within and outside the Western world, such a conclusion would be particularly worrisome. In my view, this question should be answered in the negative. Though, the answer is conditional on the implementation of legal strategies that support the low-carbon transition without interfering with the self-determination of Indigenous Peoples. Most legal systems, including in the US, are still struggling with pluralistic understandings of decarbonisation policies.

This comment is structured as follows. Section II describes the facts of the dispute, the property regime it arose from, and the judgment of the District Court. Section III discusses the unstable relationships among the three sovereignties and the role of the so-called Indian canon of interpretation. Section IV deals with the low-carbon transition on Indian lands. Section V turns to the global debate about Indigenous knowledge and climate change policies. Section VI summarizes the main arguments.

II. The dispute on the Osage Wind farm

The roots of the dispute on the Osage Wind farm can be traced back to the peculiar legal regime for land created by federal Indian policy since the nineteenth century. Before European colonization, the Osage tribes resided in the territory that is now included in the states of Oklahoma, Kansas, Arkansas, Missouri, and Illinois. In 1870, they were forced to move to a reservation in North-Central Oklahoma. The Osage were among the few Indian nations able to buy the land of the reservation, extending for about 1.470.000 acres (5900 km^2). Land ownership did not spare the Osage Nation from the federal government's allotment policy that, by the end of the nineteenth century, led to the division of reservations into parcels assigned to individual members of Indian nations. Though, land ownership did help the Osage Nation negotiate a different allotment regime. The Osage Allotment Act of 1906 only divided surface land. The subsurface mineral estate was held in trust by the federal government and Osage members enjoyed a share of the mineral royalties. The oil boom of the early twentieth century turned Osage members into millionaires. At the same time, this legal regime was at the origin of the many criminal plots against Osage members. Corrupted white guardians defrauded them of their rights. Many Osage members were murdered to steal their mineral rights.[2]

[2] One of these criminal plots was the subject of Martin Scorsese's *Killers of the Flower Moon*, Paramount Pictures, 2023. See D. Grann, *Killers of the Flower Moon: The Osage Murders and the Birth of the FBI* (New York, NY: Doubleday, 2017); M.L.M. Fletcher, 'Failed Protectors: The Indian Trust and *Killers of the Flower Moon*' 117 *Michigan Law Review*, 1253 (2019); E.D. Bernick, 'We the Killers: The Law of Settler Violence and Native Persistence Beyond 'Flower Moon'' *Northern Illinois University College of Law Legal Studies Research Paper*, 27 December 2023, available at https://tinyurl.com/y6wkhcch (last visited 30 September 2024).

Furthermore, the federal government failed to protect the interests of the Osage for many decades and didn't pay appropriate royalties.[3]

This situation of 'split estates' persists to this day. The Osage Nation is still able to benefit from the mineral estate, but over time it lost control of the surface land. By 2016, the latter was prevalently held by non-Indians within the Osage reservation.[4] When the territory of Oklahoma started to attract the attention of investors in renewable energy, the land ownership regime molded by the colonial past proved unsuitable to an ordered transition to low-carbon solutions. As of 2022, Oklahoma ranked third among US states for installed wind capacity and fourth for in-state wind generation.[5] Untapped potential for wind development is significant.[6] Not surprisingly, Enel Green Power North America, from 2014 owner of the Osage Windfarm, has a large fleet of 13 wind farms in Oklahoma worth $3 billion of investments. Note, however, that the oil and gas industry is no less relevant in Oklahoma: it represents more than one quarter of the state's gross domestic product (GDP). Only Alaska and Wyoming have higher shares.[7] Hence, without an adequate land planning and siting regime, the renewable industry and the fossil fuels industry are likely to clash.

Litigation about the Osage Wind farm already started before its construction. The Osage Minerals Council (OMC), created in 1906 to manage the mineral estate, argued that the wind farm, to be built on an area of about 8.400 acres leased from non-Indians, would interfere with the oil and gas leases for the mineral estate. The District Court disagreed, holding that the interference between the two activities was not supported by evidence and that the permanent injunction sought by the plaintiffs would deprive the surface owners of the payments they expected from the leases.[8]

A new suit was filed a few years later, this time to argue that the excavation works required to build the wind turbines had to be qualified as mining and called for a mining lease issued by the OMC and authorized by the US Secretary

[3] Only in 2011 did the Osage Nation receive partial compensation through a settlement with the federal government. See S.L. Carmack, 'Loyalties and Royalties: The Osage Nation's Energy Sovereignty Plan and Wind Farm Opposition' 40(1) *Public Land & Resources Law Review* 145, 151-154 (2019).

[4] The Osage Nation is striving to regain control of the reservation land as a way to establish an autonomous space for its lifestyle choices. See J. Dennison, *Vital Relations: How the Osage Nation Moves Indigenous Nationhood into the Future* (Chapel Hill: University of North Carolina Press, 2024). This search for autonomy clearly influences the opposition to the Osage Wind farm.

[5] United States Department of Energy, *Land-Based Wind Market Report: 2023 Edition*.

[6] See A. Milbrandt et al, Techno-Economic Renewable Energy Potential on Tribal Lands, NREL Technical Report, July 2018. More recent data are available at https://windexchange.energy.gov/.

[7] American Petroleum Institute, *Impacts of the Oil and Natural Gas Industry on the US Economy in 2021*, PricewaterhouseCoopers, April 2023.

[8] *Osage Nation ex rel. Osage Minerals Council* v *Wind Capital Group, LLC* U.S. Dist. LEXIS 146407 (N.D. Okla. Dec. 20, 2011). See S.L. Carmack, n 3 above, 158-160; W.R. Norman and Z.T. Stuart, 'United States v. Osage Wind: An Example of How an Indian Tribe's Unique Status Governs Appeal Rights and Statutory Construction' 90(9) *Oklahoma Bar Journal*, 28 (2019).

of Interior. The District Court gave a restrictive interpretation of mining activities, holding that only the commercialization of minerals required a lease.[9] The Circuit Judges reversed the lower court's interpretation.[10] Although the text of the Department of Interior's regulations did not provide guidance on the qualification of mining activities without commercial purposes, the Circuit Court held that a narrow interpretation would conflict with the Indian canon of interpretation. The latter requires that, in case of ambiguity, rules designed to favour the Indians are to be liberally construed in Indians' favour.[11] Clearly, this canon forces the three sovereignties to search for an agreement on the development of renewable energy. The Circuit Court's decision prompted mixed reactions. Fears of reduced investments on Indian lands were widely voiced. We shall come back to the impact of the Indian canon in the next section. In the meanwhile, the Supreme Court declined to hear the case, apparently unpersuaded by the wind developer's claim that the Indian canon could not be used to thwart its property rights.[12]

On remand from the 10th Circuit's decision, the District Court had to decide which remedies to grant the OMC. Here again, the Indian canon played a decisive role. There was no doubt that building the wind farm without the mining lease amounted to trespass and conversion, as defined by Oklahoma state law. The court held that damages had to be awarded, but remanded their quantification to a trial. The amount required by the OMC exceeds $25 million, while Osage Wind contended that only the much lower total value of the extracted minerals should be considered. Disgorgement of profits was excluded on procedural grounds. The OMC also claimed to be entitled to the equitable remedy of injunctive relief, in the form of ejection of the wind turbines from Indian land. Such a remedy could only be granted for continuous trespass. The wind developer argued against such a qualification, maintaining that no excavation works had taken place since the farm had been built. The District Court countered that the crushed rocks still provided support for the wind turbines. Hence, a broad reading in favour of the Indians was warranted.

Even though continuous trespass could justify equitable relief, three requirements had to be verified: an irreparable injury that could not be compensated with monetary damages, the balance of harms between the parties,

[9] *United States* v *Osage Wind, LLC* 2015 WL 5775378 (N.D. Okla. 2015).

[10] *United States* v *Osage Wind, LLC* 871 F.3d 1078 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 784 (2019). See S.L. Carmack, n 3 above, 162-164; W.R. Norman and Z.T. Stuart, n 8 above, 31-32; M. Potts, 'United States v. Osage Wind, LLC: Wind Energy Being Blown Away by New Rules?' 4 *Oil & Gas, Natural Resources &Energy Journal* 63, 72-77 (2018); C.J. Gnaedig, '"Mining" on Indian Lands: It's Not What You Think' 39 *Energy Law Journal*, 547 (2018); A.B. Christian, 'Digging Deeper to Protect Tribal Property Interests: United States v. Osage Wind, LLC' 43 *American Indian Law Review*, 411 (2019); W.M. Bowman, 'Dust in the Wind: Regulation as an Essential Component of a Sustainable and Robust Wind Program' 69 *Kansas Law Review* 45, 70-73 (2020).

[11] See secs 6 and 8 *Restatement of the Law of American Indians* (American Law Institute, 2022).

[12] S.L. Carmack, n 3 above, 167-170.

and the impact on the public interest.[13] The District Court fully endorsed the OMC's arguments about the need to protect Indian sovereignty and self-determination against unauthorized activities. More specifically, refusal by the wind developer to obtain a lease constituted an interference with the sovereignty of the Osage Nation that could not be compensated with monetary damages. In the same vein, the District Court concluded that the economic losses from ejection did not outweigh the interest in protecting Indian self-governance. Nor could such economic losses overshadow the public interest in preserving the Osage Nation's tribal sovereignty.

Both the prospect for a damages award and injunctive relief place the OMC in the best position to settle the dispute on favourable terms.[14] But the District Court's decision prompts two broader questions, to be discussed in the next two sections: first, does the application of the Indian canon of interpretation in this dispute conform to the most recent developments in the relationships among the three sovereignties? Second, is the approach adopted in this dispute able to support US climate policies?

III. The Indian canon of interpretation and tribal sovereignty

Both the Circuit Court in 2017 and the District Court in 2023 linked the application of the Indian canon of interpretation to the enhancement of Indian sovereignty. These judgments are in line with the broader trends of federal Indian policy that, at least from the seventies, allowed Native Americans to develop their own self-governance structures in a wide range of areas, including the management of natural resources.[15] Tribal constitutions adopted by many federally recognized Native Nations led to the introduction of civil and criminal codes, the establishment of judiciary and administrative branches, the implementation of federal schemes and agreements with local and state governments.[16]

[13] These requirements for permanent injunctions were established by federal case law to ensure uniform, nationwide solutions and avoid the inconsistencies that could stem from the application of state remedies. See *Davilla* v *Enable Midstream Partners, L.P.* 913 F.3d 959 (10th Cir. 2019).

[14] This is not to say that negotiation between the parties will be easy. In early 2024, Enel argued that removal of the wind turbines would cost $258 million and take 18 months. As an alternative option, Enel proposed to replace the rocks providing the foundation for each turbine with alternative backfill. Such a replacement would end the continuous trespass (A. Herrera, 'Wind Companies Float Options to Keep Turbines Operable' 27 February 2024, available at https://osagenews.org/). The OMC rejected the proposal and asked for a bond during delay in submitting a removal plant, as well as to shut down the wind farm immediately (E. Bryan, 'Legal Battle Over Wind Farm in Osage Nation Continues' 12 March 2024, available at https://www.newson6.com/). As of October 2024, the parties were unable to settle damages issues and a judicial award became possible: see L. Red Corn, *Enel Refuses to Settle or Negotiate Damages with Osage Minerals Council*, 24 October 2024, available at https://osagenews.org/.

[15] J.V. Royster et al, *Native American Natural Resources Law: Cases and Materials* (Durham, NC: Carolina Academic Press, 5th ed, 2023).

[16] For a broad overview of tribal law, to be understood as the body of rules enacted by the Indian self-governance structures and distinct from US federal Indian law, see M.L.M. Fletcher, *American Indian Tribal Law* (New York, NY: Aspen, 3rd ed, 2024). Also see M. Blackhawk, 'Legislative

Litigation about tribal sovereignty before federal and state courts tells another story. Judicial developments in the early twenty-first century suggest that the relationships among the three sovereignties are much less stable than the outcome of the *Osage Wind* dispute would suggest. Swinging majorities in the Supreme Court lead to inconsistent interpretations of those relationships. The Indian canon of interpretation itself is openly cast into doubt, or at least it does not provide reliable guidance in all cases. One major issue is how and by whom economic activities taking place on Indian lands should be regulated. Two high-profile cases, both related to Oklahoma, showed that more principled answers to the situations calling into question federal, state and tribal law are badly needed. Although both cases originated from criminal proceedings, they have broader implications for regulatory regimes related to land use.

In *McGirt* v *Oklahoma*, the Supreme Court held by a 5 to 4 decision, authored by Justice Gorsuch, that the Muscogee (Creek) Nation' reservation, as defined in its 1866 Treaty with the United States, still exists.[17] For decades, Oklahoma state authorities had denied the legal status of Indian lands.[18] Following *McGirt*, Oklahoma state courts recognized reservations for other four Indian nations (Cherokee, Choctaw, Seminole and Chickashaw) and five smaller reservations. These decisions radically changed the jurisdictional borders: now 43% of the state (19 million acres) is included in what US federal law defines as 'Indian Country'.[19] 1.8 million Oklahomans, about 90% of whom are non-Indians, live in reservations. The most direct legal implication is that, within Indian lands, tribal law, and in some cases federal law, exclude the application of state law. To be sure, the latter still applies in some cases. For example, non-Indians can own land within a reservation, and in Indian Country more generally. In this case, state courts maintain civil jurisdiction. Tribal law can only apply when there are agreements between a tribal government or members of a tribe and a non-Indian owner within Indian lands. Tribal law also applies when the activities of non-Indian owners interfere with the political integrity, economic security, health or welfare of the tribe.[20] This peculiar

Constitutionalism and Federal Indian Law' 132 *Yale Law Journal* 2205, 2242-2246 (2023) ('semi-sovereign enclaves within the territorial borders of the United States').

[17] *McGirt* v *Oklahoma* 140 S. Ct 2452 (2020). See R.J. Miller and R. Ethridge, *A Promise Kept: The Muscogee (Creek) Nation and McGirt v. Oklahoma* (Norman, OK: University of Oklahoma Press, 2023), 157-184.

[18] C.P. Cleary, 'The Rediscovery of Indian Country in Eastern Oklahoma' 94(5) *Oklahoma Bar Journal* 18 (2023).

[19] The definition of 'Indian Country' includes all land within Indian reservations, dependent Indian communities and Indian allotments. It was codified in 1948 at 18 USC sec. 1151(a) for criminal law, but it is held to apply to civil cases as well. See sec 3 *Restatement of the Law of American Indians* (American Law Institute, 2022).

[20] These exceptions stem from *Montana* v *United States* 450 S. Ct. 544 (1981). See Miller and Ethridge, n 17 above, 197-200. Over the years, the Supreme Court narrowed these exceptions to state jurisdiction on non-Indians. See B.R. Berger, 'McGirt v. Oklahoma and the Past, Present, and Future of Reservation Boundaries' 169 *University of Pennsylvania Law Review Online*, 250, 282-284 (2021); K. Florey, 'Tribal Land, Tribal Sovereignty' 56 *Georgia Law Review*, 967, 999-1014 (2022).

disconnection between tribal sovereignty and land ownership is the outcome of century-old developments in Indian federal policy and case law. Like other sovereigns, Indian Nations should be entrusted with regulatory powers over both public and private land within their territory. This is not so in Indian Country. The regulatory powers of tribal authorities could not only be excluded or limited on lands within Indian Country not owned by Indians, but also on Indian lands when the activities of non-Indians are involved.[21]

The *McGirt* decision could also have implications for the Osage Nation. In 2010, a circuit court held that the Osage reservation no longer existed after the adoption of the allotment policy.[22] This decision seriously downplays textual arguments rejecting the contention that the Osage reservation had been disestablished. After *McGirt*, the Osage Nation has been trying to use criminal cases to argue that the existence of the reservation should be reassessed. So far, federal courts have been unreceptive.[23] Without the recognition of the reservation status, the whole tribal governance arrangements of the Osage Nation could become inapplicable.

The interpretative criteria followed by the *McGirt* majority were originalist and textualist. The Indian canon of interpretation is a substantive one and was not explicitly relied upon.[24] Though, *McGirt* does explicitly acknowledge tribal sovereignty and restricts state sovereignty. From this point of view, the decision can be said to endorse the connection between tribal sovereignty and interpretation in favour of Native Americans. This view drove other important decisions of the Supreme Court, but has never been unanimously accepted. Both the Rehnquist Court and the Roberts Court disregarded tribal interests in many instances and did not support the federal Indian policies aimed at enhancing Indian self-determination. In the current Court, several Justices express doubts about the soundness of the Indian canon.[25] A striking signal of the Court's unwillingness to

[21] K. Florey, n 20 above, 1033-1037.

[22] *Osage Nation* v *Irby* 597 F.3d 1117 (10th Cir. 2010), *cert. denied* 564 U.S. 1046 (2011).

[23] P.H. Tinker, 'Is Oklahoma Still Indian Country – "Justifiable Expectations" and Reservation Disestablishment in *Murphy v. Sirmons* and *Osage Nation v. Irby*' 9(3) *Dartmouth Law Journal*, 121 (2011); B. Moschovidis, '*Osage Nation v. Irby*: The Tenth Circuit Disregards Legal Precedent and to Strip Osage County of its Reservation Status' 36 *American Indian Law Review*, 189 (2011); E.D. Bernick, n 2 above, 27-32. In *Mccauley* v *State of Oklahoma*, 2024 OK CR 8, Case No F-2022-208, 4 April 2024, the Oklahoma Court of Criminal Appeals held that only federal courts can reverse the *Irby* precedent.

[24] On the incompatibility between textualism and substantive canons see W.N. Eskridge et al, 'Textualism's Defining Moment' 123 *Columbia Law Review*, 1611, 1681-1687 (2023).

[25] D.R. Hedden-Nicely and S.L. Needs, 'A Familiar Crossroads: *McGirt v. Oklahoma* and the Future of Federal Indian Law Canon' 51 *New Mexico Law Review*,300 (2021); A.T. Skibine, 'Textualism and the Indian Canons of Statutory Construction' 55 *University of Michigan Journal of Law Reform*, 267 (2022); E.D. Bernick, 'Canon Against Conquest' forthcoming *Illinois Law Review* (2024), available at https://tinyurl.com/55jpj3mb (last visited 30 September 2024). Perhaps it is not by chance that, while some Justices voice their doubts about the Indian canon, the Biden administration requires federal agencies to follow it (Working Group of the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal

work out a mature and anti-colonial vision of the three sovereignties can be seen in the *Castro-Huerta* decision.[26] After Oklahoma mounted a media and litigation campaign to push the Supreme Court to overrule *McGirt*, certiorari was granted on another criminal case. This case gave a new majority, led by Justice Kavanaugh, the chance to reintroduce concurring state jurisdiction in Indian reservations when a non-Indian commits a crime against an Indian in Indian reservations. Aside from its impact on criminal law, *Castro-Huerta* was heavily criticized for broad, and unsupported, statements about extending state sovereignty to the detriment of tribal sovereignty. The Court did not officially overrule, but openly rejected the concept of tribal sovereignty affirmed since the early nineteenth century. According to that concept, states should be presumed not to exercise their powers in Indian Country.[27] Neither was the precedent of *McGirt* overruled. However, the principle of concurrent state jurisdiction on non-Indians in Indian Country can be expected to lead to heightened uncertainty in a variety of fields.

In the current landscape of US federalism, issues related to sovereignty are intertwined with issues related to property rights. To some extent, the *Osage Wind* dispute is a glaring example of the unsolved problems left by the era of settler colonialism. If the sovereignty of the Osage Nation had already been fully recognized within its reservation territory, the wind developer would have had no choice but to negotiate a lease with the OMC. More generally, tribal governance has been shown to represent an effective way to promote economic development for both Natives and non-Natives. A strong concept of tribal sovereignty can be expected to increase cooperation with state and local governments. Conversely, cooperation could decrease if, following the *Castro-Huerta* decision, states try to affirm their concurrent jurisdiction beyond criminal law.[28] Moreover, no alternative to tribal-state cooperation is feasible. The physical and legal separation of tribal and state territories would not only be politically unacceptable: it would also prove ineffective in managing problems common to those territories.[29]

Treaty and Reserved Rights, *Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making*, 30 November 2022, 17). An addendum to these best practices on Indian canons of interpretation was announced by White House, *2023 Progress Report for Tribal Nations*, 22.

[26] *Oklahoma* v *Castro-Huerta* 142 S. Ct. 2486 (2022).

[27] G. Ablavsky, 'Too Much History: *Castro-Huerta* and the Problem of Change in Indian Law' *Supreme Court Review*, 293 (2022); D.R. Hedden-Nicely, 'The Terms of their Deal: Revitalizing the Treaty Right to Limit State Jurisdiction in Indian Country' 27(2) *Lewis & Clark Law Review*, 457 (2023); W. Tanner Allread, 'The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law' 123(6) *Columbia Law Review*, 1533 (2023).

[28] K.M. Carlson, 'Dividing Authority Three Ways: Federal-Tribal-State Relations after *Oklahoma v. Castro-Huerta*' 53(3) *Publius*, 405 (2023).

[29] M.D.O. Rusco, '*Oklahoma v. Castro-Huerta*, Jurisdictional Overlap, Competitive Sovereign Erosion, and the Fundamental Freedom of Native Nations' 106 *Marquette Law Review*, 889 (2023). Separation would clearly be ineffective in a state like Oklahoma, with 38 federally recognized Native Nations. Only Alaska and California have a higher number of federally recognized Native Nations. See M.A. Schwartz, 'The 574 Federally Recognized Indian Tribes in the United States'

In the next section, we discuss how the interactions among the three sovereignties could play out in the energy sector.

IV. US climate policies in Indian Country

Does the opposition of the OMC to a wind farm mean that strong tribal sovereignty puts the low-carbon transition at risk? Actually, opposition to renewable plants is widespread in the USA and could prevent the achievement of the climate targets. No less contentious are other investments related to the low-carbon transition, from mining of critical raw materials (eg lithium) to long-distance electricity transmission networks. This is not a new phenomenon, but the growing number of utility-scale solar and wind plants led to the increase in the number of projects delayed or stopped by opponents.[30] 11 US states and about 15% of US counties adopted restrictions to renewable plants.[31] Opposition may depend on several factors, from land value to environmental concerns to health and safety concerns to lack of public participation. In most cases, more factors at the same time drive opposition. This is also true when opposition comes from tribal governments. Furthermore, it must be acknowledged that Native Americans are not just another group of stakeholders to be consulted. Energy choices directly involve tribal sovereignty.[32] Hence, traditional consultation is not enough. More specific solutions are needed to promote the development of renewable energy in Indian Country. Three different issues wait for satisfactory answers.

To begin with, benefits from renewable energy projects should be channelled toward Native Americans. Data on opposition to solar and wind plants shows that protests are more likely in areas with a larger number of White people and a higher income.[33] This means that the negative impacts of renewable plants are

Congressional Research Service (18 January 2024).

[30] See eg M. Eisenson, 'Opposition to Renewable Energy Facilities in the United States', Columbia Law School, Sabin Center for Climate Change Law, May 2023 (stating that 293 renewable energy projects encountering significant opposition in 45 states); R. Nilson et al, 'Survey of Utility-Scale Solar and Wind Developers Report', US Department of Energy, Lawrence Berkeley National Laboratory, January 2024 (stating that almost 50% of wind projects are delayed and about 30% are cancelled).

[31] A. Lopez et al, 'Impact of Siting Ordinances on Land Availability for Wind and Solar Development' 8 *Nature Energy*, 1034 (2023); E. Weise and S. Bhat, 'Across America, Clean Energy Plants are Being Banned Faster than they're being built' (4 February 2024), available athttps://tinyurl.com/2apb8ve9 (last visited 30 September 2024).

[32] L. Susskind et al, 'Sources of Opposition to Renewable Energy Projects in the United States' 165 *Energy Policy*, 112922 (2022); C. Grosse and B. Mark, 'Does Renewable Electricity Promote Indigenous Sovereignty? Reviewing Support, Barriers, and Recommendations for Solar and Wind Energy Development on Native Lands in the United States' 104 *Energy Research & Social Science*, 103243 (2023) (discussing renewable energy as a tool to achieve sovereignty).

[33] I. Ko et al, 'Wind Turbines as New Smokestacks: Preserving Ruralness and Restrictive Land-use Ordinances Across U.S. Counties' 18(12) *PloS One* e0294563, (2023); E. O'Shaughnessy et al, 'Drivers and Energy Justice Implications of Renewable Energy Project Siting in the United

often shifted to low-income areas. Given that Native Americans have a lower average income compared to other ethnic groups, they are more likely to experience those impacts. To be sure, renewable energy can generate economic benefits for local communities.[34] But such benefits are directly dependent on the possibility to control the renewable projects. If control is entirely left to non-Indians, benefits are much more uncertain. Federal legislation already started to support tribal governments' investments in renewable energy from the 1990s. Over the years, several schemes were introduced to promote tribal self-determination in energy matters. They mostly failed to prompt renewable investments on Indian lands. Tribal lands could potentially generate more than 7% of total US wind energy consumption, but actual generation is far below 1%.[35] The reasons for such a failure are manifolds: bureaucratic inefficiencies, complex authorization procedures, lack of infrastructures, and unavailability of federal subsidies.[36] The latter problem was particularly daunting. Tribes could not receive federal subsidies due to their status as non-taxable entities. Therefore, any renewable investments involving them were much more costly. Only with the Inflation Reduction Act of 2022 were tribes granted the right to receive direct payments equivalent to tax credits. Under the new regime, a variety of options have become available. Tribal governments do not have to lease land to non-Indian investors. They can partner with them through corporate entities. For example, the Tribal Energy Developed Organization (TEDO), introduced in 2018, includes at least one tribe that holds a majority interest and is regulated according to the laws of the tribe. Federal tax credits can now be split with non-Indian investors that join a TEDO.[37]

Secondly, renewable energy projects face a difficult trade-off between accelerating

States' 25(3) *Journal of Environmental Policy & Planning*, 258(2023); L.C. Stokes et al, 'Prevalence and Predictors of Wind Energy Opposition in North America' 120(40) *PNAS* e2302313120, (2023).

[34] D. Parker et al, 'Renewable Energy on American Indian Land', Working Paper September 2023, available at https://tinyurl.com/y2nmj3eb (last visited 30 September 2024) argue that earnings from leasing reservations land for renewable projects could be in the range of $7-19 billion by 2050.

[35] L.E. Evans et al, 'Do Windy Areas Have More Wind Turbines: An Empirical Analysis of Wind Installed Capacity in Native Tribal Nations' 17(2) *PloS One* e0261752, (2022).

[36] M. Maruca, 'From Exploitation to Equity: Building Native-Owned Renewable Energy Generation in Indian Country' 43 *William and Mary Environmental Law and Policy Review*, 391 (2019); E.A. Kronk Warner, 'Renewable Energy Depends on Tribal Sovereignty' 69 *Kansas Law Review*, 809 (2021); M.G. Zimmerman and T.G. Reames, 'Where the Wind Blows: Exploring Barriers and Opportunities to Renewable Energy Development on United States Tribal Lands' 72 *Energy Research & Social Science*, 101874 (2021); C. Grosse and B. Mark, n 32 above, 6-9 (describing social, material, and legal barriers).

[37] B. Reiter, 'Expanding Renewable Energy Tax Credits to Tribal Governments: How Current Legislative Proposals Will Benefit Tribes and Their Members in their Continued Efforts to Address Climate Change' 46(3) *William and Mary Environmental Law and Policy Review*, 687 (2022). The Biden administration provided dedicated tribal funding for clean energy investments never seen before: see White House, *Bipartisan Infrastructure Law Tribal Playbook* May 2022; White House, *Guidebook to the Inflation Reduction Act's Clean Energy and Climate Investments in Indian Country* April 2023; US Department of Energy, *Tribal Nations and Native Communities Resource Guide* February 2024.

the low-carbon transition and complying with principles of environmental, climate and energy justice. Native Americans could oppose renewable projects because of significant environmental impacts, as well as because they entail the destruction of sacred sites.[38] Justice issues are framed in different ways. For the land back movement, the goal is to restore the historical injustices of US settler colonialism.[39] For the rights of nature movement, the goal is to change the traditional Western approach to the exploitation of natural resources.[40] A broader theme common to these debates is the role that Indigenous knowledge systems should play in the low-carbon transition. If those alternative knowledge systems are taken seriously, the planning of green infrastructures should radically change.[41] The Biden administration made some steps in this direction by mandating the inclusion of Indigenous knowledge in federal decision-making. An attempt should be made to use Indigenous knowledge together with other knowledge systems. If conflicts arise, federal agencies should strive to consider multiple ways of knowing or lines of evidence. Indigenous knowledge should also influence federal rulemaking and be referred in order to explain why a rule is necessary, why an approach has been selected, or why alternative approaches have been rejected. Within regulatory impact analyses, Indigenous knowledge should be relied upon to assess the impact of a rule on different communities or on culturally and ecologically significant lands.[42]

[38] Native Americans also opposed several fossil fuels projects. According to Indigenous Environmental Network and Oil Change International, *Indigenous Resistance Against Carbon* August 2021, Indigenous campaigns could stop or delay projects emitting at least one-quarter of US and Canada annual greenhouse gases.

[39] W.Y. Chin, '"We Want Our Land Back": Returning Land to First Peoples in the Land Return Era Using the Native Land Claims Commission to Reverse Centuries of Dispossession' 24 *Scholar* 335 (2023); V. Racehorse and A. Hohag, 'Achieving Climate Justice through Land Back: An Overview of Tribal Dispossession, Land Return Efforts, and Practical Mechanisms for #LandBack' 34(2) *Colorado Environmental Law Journal* 175 (2023).

[40] E. Macpherson, 'The (Human) Rights of Nature: A Comparative Study of Emerging Legal Rights for Rivers and Lakes in the United States of America and Mexico' 31 *Duke Environmental Law & Policy Forum* 327 (2021); A. Huneeus, 'The Legal Struggle for Rights of Nature in the United States' 2022 *Wisconsin Law Review* 133; K. Bradshaw, 'Identifying Contemporary Rights of Nature in the United States' 95 *Southern California Law Review* 1437 (2022); H. Loury, '*Pachamama* over People and Profit: A Case for Indigenous Ecology and Environmental Personhood' 47 *American Indian Law Review*, 229 (2023).

[41] On the need to consider the vision of Indigenous Peoples for the transition to renewable energy see K. Whyte, 'Indigenous Environmental Justice, Renewable Energy Transition, and the Infrastructure of Sovereignty' in P.C. Rosier ed, *Environmental Justice in North America* (New York, NY and London: Routledge, 2024), 307-330.

[42] Office of Science and Technology Policy and Council on Environmental Quality, *Indigenous Traditional Ecological Knowledge and Federal Decision Making*, Memorandum for the Heads of Departments and Agencies, 15 November 2021; Id, *Guidance for Federal Departments and Agencies on Indigenous Knowledge*, Memorandum for the Heads of Departments and Agencies, 30 November 2022. The link between environmental justice and Indigenous knowledge was explicitly acknowledged in Executive Order 14096 of 21 April 2023. See also Institute for Tribal Environmental Professionals, *Status of Tribes and Climate Change Report* (Flagstaff, AZ: Northern Arizona University, 2021); H. Tanana, 'Protecting Tribal Health from Climate Change' 15(1) *Northeastern*

Whether these initiatives will help address all the trade-offs is unclear. In some cases, they are dealt with through voluntary transfers of land to tribal governments[43] or co-management solutions.[44] On a larger scale, the huge footprint of green infrastructures (eg, renewable plants, transmission lines, and critical materials mines) risks foreclosing Native Americans' access to areas tightly linked to their cultural and religious beliefs. In the *Osage Wind* dispute, religious concerns were related to the need for an unobstructed view of the horizon, a significant spiritual element for the Osage.[45] In many cases, sacred sites are located on federal public lands or federal sea waters. Consultation rights are usually available, but they can lead to two, equally undesirable, outcomes: the opposition by Native Americans stops a renewable project or the religious beliefs of Native Americans are devalued in order to complete the project.[46] Litigation about the protection of Native Americans' religious beliefs has not provided satisfactory solutions. The prevailing view is that religious claims cannot prevail on other parties' land.[47] The Biden administration tried to improve the protection

University Law Review 89, 154-158 (2023).

[43] Voluntary transfers took place between 2012 and 2022 through the Land Buy-Back Program for Tribal Nations. About three million equivalent acres were returned to Tribal trust ownership, but high levels of fractionated lands still exist and could further increase. See US Department of Interior, *Ten Years of Restoring Land and Building Trust2012-2022*, December 2023. With the fee-to-trust process, a program established in 1980, the Department of Interior was able to acquire over one million acres intro trust for the benefit of Tribes or individual Indians. See US Department of Interior – Bureau of Indian Affairs, *Land Acquisitions* 88 *Federal Register* 86222 (December 12, 2023).

[44] Several co-stewardship and co-management agreements for federal lands and waters were signed with tribal governments: see US Department of Interior and US Department of Agriculture, *Joint Secretarial Order No. 3403 on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters*, 15 November 2021; White House, n 25 above, 17-19; US Department of Agriculture, *Annual Report on Tribal Co-Stewardship*, December 2023;K.K. Washburn, 'Facilitating Tribal Co-Management of Federal Public Lands' *Wisconsin Law Review*,263 (2022); V. Racehorse and A. Hohag, n 39 above, 196-200.

[45] S.L. Carmack, n 3 above, 155; S.A. Husk, 'Scattered to the Winds?: Strengthening the National Historic Preservation Act's Tribal Consultation Mandate to Protect Native American Sacred Sites in the Renewable Energy Development Era' 34 *Tulane Environmental Law Journal* 273, 299-301 (2021). These religious concerns were not explicitly debated.

[46] A good example of such dynamics is represented by the two offshore projects of Cape Wind and Vineyard Wind. The first one was stopped in 2017 after many years of opposition by Indigenous communities. The second one was approved in 2021, although with some conditions related to the preservation of cultural resources. See A.M. Dussias, 'Room for a (Sacred) View? American Indian Tribes Confront Visual Desecration Caused by Wind Energy Projects' 38 *American Indian Law Review*,333 (2014); W.J. Furlong, 'The Other Non-Renewable Resource: Cultural Resource Protection in a Changing Energy Future' 42 *Public Land & Resources Law Review*, 1 (2020);S.A. Husk, n 45 above, 282-287; E. Bacchiocchi et al, 'Energy Justice and the Co-Opting of Indigenous Narratives in U.S. Offshore Wind Development' 41 *Renewable Energy Focus*, 133 (2022); Bureau of Ocean Energy Management, *Vineyard Wind Construction and Operation Plan Approval Letter*, July 15, 2021.

[47] See generally the high-profile case *Apache Stronghold* v *United States* U.S. App. LEXIS 5007 (9th Cir. 2024) (en banc), holding that the transfer of a site of great spiritual value to the Western Apache Indians from the federal government to a private company planning to start mining operations did not infringe the religious rights granted by the Free Exercise Clause of the

of and access to sacred sites on federal lands, though mainly through procedural measures.[48] Even with regard to mining activities, the most impactful for Native Americans, the federal government is required to mitigate adverse effects, not to refuse permission if tribal governments withhold consent.[49] A significant advancement would be the recognition of the direct applicability of the provisions that many tribal codes devote to the protection of sacred sites. So far, such a development is difficult to foresee.[50]

Thirdly, clashes between renewable investments and fossil fuels investments should be avoided. If the concept of tribal sovereignty is taken seriously, the phase out of fossil fuels cannot be imposed on Native Americans. For many tribes, coal and natural gas are the main sources of revenues. Divergent views about energy sovereignty can be expected within each tribe and across tribes.[51] However, with the low-carbon transition in full swing, coal plants on reservations closed and prompted the search for alternative energy sources. At the same time, Indian environmental organizations contributed to change prevailing worldviews that linked fossil fuels to development.[52] Following *McGirt*, oil and gas state law could be replaced by tribal law on Indian lands. This development could be exploited by tribal governments to enact a regulatory regime that reduces conflicts between the subsurface and surface energy investments. In both state common law and state legislation, attempts at identifying the rights of wind developers and the priorities among different land uses have left significant margins of uncertainty.[53] The goal should be to manage the phase out of fossil fuels

First Amendment to the US Constitution and by the Religious Freedom Restoration Act of 1993. See T.A. Rule, 'Preserving Sacred Sites and Property Law' forthcoming 2024 *Wisconsin Law Review*; A.R. Riley, 'Before *Mine!*: Indigenous Property Rights for Jagenagenon' 136 *Harvard Law Review* 2074, 2094-2096 (2023).

[48] 'Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites', November 2021; 'Best Practices Guide for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites', December 2023. On the use of Indigenous knowledge to avoid or minimize adverse effects to historic properties of religious and cultural significance to Indian Tribes and Native Hawaiian Organizations see the recommendations by the Advisory Council on Historic Preservation, 'Policy Statement on Indigenous Knowledge and Historic Preservation', 21 March 2024.

[49] *Biden-Harris Administration Fundamental Principles for Domestic Mining Reform*, February 2022; Interagency Working Group on Mining Laws, Regulations, and Permitting, *Recommendations to Improve Mining on Public Lands*, September 2023.

[50] A.R. Riley, 'The Ascension of Indigenous Cultural Property Law' 121 *Michigan Law Review* 75 (2022); Id, n 47 above.

[51] D. Raimi and A. Davicino, 'Securing Energy Sovereignty: A Review of Key Barriers and Opportunities for Energy-Producing Native Nations in the United States' 107 *Energy Research & Social Science* 103324 (2024).

[52] A. Curley, *Carbon Sovereignty: Coal, Development, and Energy Transition in the Navajo Nation* (Tucson: University of Arizona Press, 2023). Movement toward the incorporation of environmental principles into state oil and gas law is visible in many US states: see T.K. Righetti et al, 'The New Oil and Gas Governance' *The Yale Law Journal Forum*, 29 June 2020, 51.

[53] W. Swinford, 'Lessons Learned: Avoiding the Hardships of Tribal Mineral Leasing in the Development of Oklahoma Tribal Wind Energy' 40 *American Indian Law Review* 99 (2016);

with a proprietary and regulatory regime fully aligned with Indigenous knowledge. This outcome becomes viable only if the differences between Western and tribal value systems with regard to natural and cultural resources are duly acknowledged.[54]

Putting the *Osage Wind* dispute in the larger landscape of climate policies for Native Americans helps understand its deepest roots. Enel assumed that there was just one sovereign instead of three. No consultation with the Osage Nation was attempted. This strategy is in stark contrast with the sustainability principles by which Enel itself claims to abide.[55] An additional shortcoming of Enel's strategy was to plan for a wind farm that only considered standard economic and engineering factors. No attention was paid to alternative design options that could be deemed more compatible with the needs of the Osage Nation, its religious beliefs, or its environmental ethics.

If these issues are addressed, alternative ways to settle the dispute could emerge. The OMC argued that, to avoid removal of the turbines, Enel shall enter a mineral lease. The ongoing debate on the low-carbon transition suggests another option: Enel could enter into some form of co-management agreement with the Osage Nation. Clearly, the agreement would involve sharing of profits between the parties. At the same time, it could be a solution that allows them to discuss how future technological choices about the wind farm should take into account the needs and cultural views of the Osage Nation.[56]

V. Indigenous knowledge for the low-carbon transition

The *Osage Wind* dispute reflects the specific features of US legal pluralism. But many other Indigenous Peoples around the world are equally affected by the low-carbon transition. Like Native Americans, other Indigenous Peoples face a double risk: on one hand, they live in places where the impacts of climate change could be significant and adaptation strategies are more difficult to implement;[57]

T.A. Rule, *Renewable Energy: Law Policy and Practice* (St. Paul, MN: West Academic Publishing, 2nd ed, 2021), 177-196; M. Lockman, 'Fencing the Wind: Property Rights in Renewable Energy' 125 *West Virginia Law Review*, 27 (2022).

[54] On the search for shared understandings of resource management see S. Oh et al, 'Uncovering Implicit Western Science and Indigenous Values Embedded in Climate Change and Cultural Resource Adaptation Policy and Guidance' 15(1) *The Historic Environment: Policy & Practice*, 53 (2024).

[55] Enel, 'Human Rights Policy', first published in 2013 and amended in 2021, states at sec. 2.2.4 that 'In developing our projects, we commit to engage all relevant stakeholders, including indigenous and tribal communities as we believe active community engagement throughout the process is essential.' Stakeholders engagement is also referred to in Enel, 'Sustainability Report 2022',254.

[56] Several options are available to reduce the landscape impact of wind farms: see D. Harrison-Atlas et al, 'Dynamic Land Use Implications of Rapidly Expanding and Evolving Wind Power Development' 17 *Environmental Research Letters*, 044064 (2022).

[57] The vulnerability of Indigenous Peoples to climate change is heightened both by their dependence on land-based activities and the historical factors that led to structural conditions of inequality and poverty. See Intergovernmental Panel on Climate Change, *Climate Change 2022:*

on the other hand, they have to bear the burden of the activities required by the decarbonization process.[58] Mismanagement of these risks has led to countless conflicts between investors in clean technologies and Indigenous Peoples. Of course, Indigenous Peoples acknowledged the benefits of clean technologies in many cases. Most often than not, conflicts can be avoided if enough space is left for Indigenous sovereignty. How to carve out such a space cannot be stated too generally. Much depends on the kind of technology to be deployed and the peculiar features of legal pluralism in each country or region. Only two preliminary observations are possible here. They can represent the starting points for a broader analysis that considers all the relevant contextual elements.

The first observation relates to the meaning of Indigenous sovereignty. For both mitigation and adaptation strategies, it is not possible to interpret sovereignty as complete independence from other legal orders. The main issue is how to ensure that the interplay between these orders does not systematically endanger Indigenous needs. Perhaps the most significant requirement is the adoption of decision-making procedures that fully incorporate Indigenous knowledge and draw on it to design mitigation and adaptation strategies. Some progress in this direction can be seen in international fora. Until recently, Indigenous knowledge was perceived as a repository of information to be integrated into Western scientific approaches. This narrow perspective has largely been supplanted by approaches that rely on Indigenous knowledge to frame climate problems and search for solutions.[59] The main open issue is how to ensure that legal decision-making

Impacts, Adaptation and Vulnerability (Cambridge and New York, NY: Cambridge University Press, 2023), 1054-1058, 1191-1193; V. Reyes-García et al, 'Indigenous Peoples and Local Communities Report Ongoing and Widespread Climate Change Impacts on Local Socio-Ecological Systems' (2024) 5:29 *Communications Earth & Environment*; V. Reyes-García et al eds, *Routledge Handbook of Climate Change Impacts on Indigenous Peoples and Local Communities* (London and New York, NY: Routledge, 2024).

[58] See eg A.M. Levenda et al, 'Renewable Energy for Whom? A Global Systematic Review of the Environmental Justice Implications of Renewable Energy Technologies' 71 *Energy Research & Social Science*, 101837 (2021); T. Kramarz et al, 'Governing the Dark Side of Renewable Energy: A Typology of Global Displacements' 74 *Energy Research & Social Science* 101902 (2021); B.K. Sovacool, 'Who Are the Victims of Low-Carbon Transitions? Towards a Political Ecology of Climate Change Mitigation' 73 *Energy Research & Social Science*, 101916 (2021); A. Scheidel et al, 'Renewable Land Grabbing: Land and Resource Appropriations in the Global Energy Transition', in A. Neef et al eds, *Routledge Handbook of Global Land and Resource Grabbing* (London and New York, NY: Routledge, 2023),189-204; A. Scheidel et al, 'Global Impacts of Extractive and Industrial Development Projects on Indigenous Peoples' Lifeways, Lands, and Rights' 9 *Science Advances*, eade9557 (2023). Also see G. Bellantuono, 'The Case for Hydrogen in the Global South: Enhancing Legal Pluralism', in C.M. Cascione et al eds, *Public and Private in Contemporary Societies* (Rome: RomaTre Press, 2024), 521-544. for a discussion of Indigenous opposition to hydrogen infrastructures.

[59] This change of perspective is already visible in IPCC, *Climate Change 2022* n 57 above, 2713-2716. However, even the IPCC falls short of adopting truly transformative visions grounded on Indigenous knowledge. See E.S. Brondízio et al, 'Locally Based, Regionally Manifested, and Globally Relevant: Indigenous and Local Knowledge, Values, and Practices for Nature' 46 *Annual Review of Environment and Resources*, 481 (2021); M. Zurba and A. Papadopoulos,

adequately considers Indigenous knowledge. This is one of the aspects on which legal systems may significantly differ, depending on the concept of legal pluralism they endorse. As shown in sections III and IV, the US legal system has mainly relied on interventions by the executive power to make room for Indigenous knowledge, but its impact is often hampered by lack of support in the legislative and judicial branches. This is a version of 'asymmetric legal pluralism', in which recognition of Indigenous sovereignty is contingent on a combination of factors. Clearly, this approach does not ensure that legal pluralism can support the low-carbon transition.

Other legal systems face similar problems. United Nations (UN) reports suggest that national climate legislation rarely provides a broad recognition of the procedural rights of Indigenous Peoples.[60] In the European Polar region, the traditional lifestyles and agricultural activities of several Indigenous Peoples residing in Sweden, Finland and Norway are already heavily affected by climate change.[61] Conflicts about the footprint of renewable plants and mining activities abound, too.[62] So far, European Union (EU) law has done little to integrate Indigenous knowledge in its climate policies.[63] Even though consultation procedures are required for renewable plants, there is no assurance that Indigenous Peoples' point of view is granted priority. Promising changes can be expected from two new legislative interventions, however. Firstly, the Critical Raw Materials Act[64]

'Indigenous Participation and the Incorporation of Indigenous Knowledge and Perspectives in Global Environmental Forums: A Systematic Review' 72 *Environmental Management*, 84 (2023); B. Van Bavel et al, 'Indigenous Knowledge Systems' in K. De Pryck and M. Hulme eds, *A Critical Assessment of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2023), 116-125; R. Carmona et al, 'Analysing Engagement with Indigenous Peoples in the Intergovernmental Panel on Climate Change's Sixth Assessment Report' 2 *npj | Climate Action* 29 (2023); B. Orlove et al, 'Placing Diverse Knowledge Systems at the Core of Transformative Climate Research' 52 *Ambio* 1431 (2023).

[60] See eg Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples: Rights to Lands, Territories, and Resources* (Geneva: United Nations, 2021), V; United Nations, *Exploring Approaches to Enhance Climate Change Legislation, Supporting Climate Change Litigation and Advancing the Principle of Intergenerational Justice*, Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, A/78/255, 23 July 2023.

[61] IPCC, *Climate Change 2022*, n 57 above, 1867-1870.

[62] M. Tennberg et al eds, *Indigenous Peoples, Natural Resources and Governance: Agencies and Interactions* (London and New York, NY: Routledge, 2022); R. Kuokkanen, 'Are Reindeer the New Buffalo? Climate Change, the Green Shift, and Manifest Destiny in Sápmi' 22(1) *Meridiens*, 11 (2023); D. Cambou and O. Ravna eds, *The Significance of Sámi Rights: Law, Justice, and Sustainability for the Indigenous Sámi in the Nordic Countries* (London and New York, NY: Routledge, 2024); L. Mósesdóttir, 'Energy (In)justice in the Green Energy Transition. The Case of Fosen Wind Farms in Norway' Working paper 5 December 2023, available at https://tinyurl.com/3x3bhxya (last visited 30 September 2024).

[63] M. Hesselman, 'Human Rights and EU Climate Law' in E. Woerdman et al eds, *Essential EU Climate* Law (Cheltenham: Elgar Publishing, 2nd ed, 2022), 259-292.

[64] European Parliament and Council Regulation 2024/1252 of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials [2024] OJ L 2024/1252. For a critical assessment see S. Bogojević, 'The European Green Deal, the Rush for Critical Raw Materials, and Colonialism' *Transnational Legal Theory Online*, 16 September 2024.

requires promoters of strategic projects related to the extraction, processing, or recycling of critical raw materials, within the EU or in third countries, to submit a plan containing measures for the consultation of Indigenous Peoples, the prevention and minimization of adverse impacts and, where appropriate, fair compensation (Arts 6(c) and 7(e), Annex III). These requirements can also be fulfilled with certification schemes recognized by the Commission (Art 30 and Annex IV). Secondly, the Corporate Sustainability Due Diligence Directive requires compliance with human rights international instruments, including ones on the protection of Indigenous rights.[65] These provisions could change the way green infrastructures are planned. At the same time, these provisions could also fuel litigation whenever green infrastructures interfere with Indigenous rights.[66] Hence, despite the additional stability these legislative interventions could provide, the EU legal pluralism risks being no less 'asymmetric' than the US one.

The second observation goes beyond procedural rights and focuses on substantive rules: what kind of legal regimes do become feasible with the integration of Indigenous knowledge into climate policies? The integral replacement of state law with Indigenous law may sound appealing because it would entail a radically different approach to the management of natural resources. Integral replacement may also be a strategy to pursue the decolonization of legal systems. However, wholesale rejection of ideas, concepts and rules from the Western world leaves itself open to the criticism that Indigenous law is often an amalgam of ancient and modern approaches. Instead of searching for the 'purest' version of Indigenous law, it is more fruitful to assemble ideas and concepts from both Indigenous and state law in order to build the most suitable legal regime. The property regime for renewable plants is a case in point. An Indigenous perspective favours communitarian approaches, which ensures that technological choices are made according to Indigenous worldviews. At the same time, renewable plants shall be integrated into the regulatory framework of energy markets. Even though different types of energy markets may be preferred in the Global North and the Global South, both small and large renewable plants need to be embedded into the existing energy systems. This means that communitarian management

[65] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence. Indigenous rights shall also be taken into account in the risk assessments and due diligence obligations required by European Parliament and Council Directive 2023/1115 of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation [2023] OJ L150/206.

[66] On climate litigation trends related to Indigenous rights see F. Dehbi and O. Martin-Ortega, 'An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective' 17 *Regulation & Governance*, 927 (2023); E. Aba, 'A Fast and Fair Energy Transition: How Community Legal Action and New Legislation Are Shaping the Global Shift to Renewable Energy' 8 *Business and Human Rights Journal*, 252 (2023); A. Savaresi and M. Wewerinke-Singh, 'A Just Transition? Investigating the Role of Human Rights in the Transition towards Net Zero Societies' EUI Academy of European Law Working Paper 2024/09.

should be adapted to the financial requirements of a competitive environment.

The ultimate goal of a pluralistic approach to the low-carbon transition should be the development of a cooperative vision of the relationships among legal orders.[67] That most legal systems are still far from such a vision might turn out to be one of the most significant hurdles to a fast and fair transition.

VI. Conclusions

The *Osage Wind* dispute was triggered by the complexity of the property regime on Indian lands and the uncertain boundaries among the federal, state, and tribal sovereignties. More fundamentally, the dispute signals that the impact of legal pluralism on the low-carbon transition is largely overlooked. The large-scale transformations required by the transition cannot take place without considering the role of each legal order. Both the US experience and other disputes involving Indigenous Peoples around the world teach the same lesson: the adoption of clean technologies is directly dependent on their compatibility with institutional frameworks that give space to cultural diversity.

[67] See G. Swenson, *Contending Orders: Legal Pluralism and the Rule of Law* (Oxford: Oxford University Press, 2022), 62-63, for a definition of cooperative legal pluralism in which non-state actors retain significant autonomy but work together with state actors toward shared goals.

Hard Cases

The Right to Clean Air and Directive 2008/50/EC. Civil Liability, Resilient Approach, and Sustainability to Safeguard the Effectiveness of Environmental Protection

Loretta Moramarco*

Abstract

The essay explores the ruling of the Court of Justice in case C-573/19, which recognised Italy's 'systematic and continuous' infringement of the annual limit value set for nitrogen dioxide, upholding the complaint brought under Art 258 TFEU by the European Commission. Furthermore, the piece takes on a critical look on the weakness of the Court's argumentative process on Italy's defence: more specifically, this topic should be dealt with from a socioeconomic standpoint, with a focus on resilience and sustainability as well. The essay also discusses the possibility to recognize the subjective right to clean air, which is enforceable before the European Court of Justice, to guarantee the effectiveness of environmental protection.

I. The Judgment of the CJEU: The Umpteenth Infringement of European Parliament and Council Directive 2008/50/EC by the Italian Republic

On 12 May 2022, the Court of Justice of the European Union[1] found a 'systematic and continuous' infringement of the annual limit value set for nitrogen dioxide[2]

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[1] Case C-573/19 *European Commission* v *Italian Republic*, Judgment of 12 May 2022, available at www.eur-lex.europa.eu.

[2] Nitrogen Dioxide (NO_2) is a secondary pollutant formed by the oxidation of nitrogen monoxide in the atmosphere. NO_2plays a fundamental role in the formation of photochemical smog. Nitrogen Dioxide irritates the eyes, throat, and respiratory tract, and it affects lung function (bronchitis, chronic pneumonia, asthma, and pulmonary emphysema). Nitrogen Oxides contribute to the formation of acid rain. Its natural emissions include anaerobic organic decomposition reducing nitrates to nitrites, fires, volcanic emissions, and the action of lightning. Its anthropogenic emissions include high temperature combustion (motor engines); thermal installations; thermal power plants; and production of nitrogen fertilizers. S. Iavicoli, 'La qualità dell'aria in città: problematiche ambientali ed

by the Italian Republic, upholding the complaint brought under Art 258 TFUE by the European Commission.

This is the third case concerning the Italian Republic's infringement of the 21 May 2008 Directive 2008/50/EC. The first case[3] occurred in 2012, whereas the second[4] dates back to 2020; both cases concern exceeding limit values for concentrations of particulate matter PM10. In the second case, the violation of the relevant limit was described as *systematic and persistent*.

Also the Court recognised the Italian Republic's failure to fulfil its obligations under the provisions of Art 13, in conjunction with Annex XI of the Directive 2008/50/EC, by *systematically* and *persistently* exceeding the limit values for No_2 from 2008 and up to 2017. Moreover, by failing to adopt appropriate measures to ensure compliance with the limit values for NO_2 from 11 June 2010, the Italian Republic has failed to meet its obligations under Art 23 of the Directive 2008/50/EC, in conjunction with Section A of Annex XV, and in particular the obligations listed in the second subparagraph of Art 23, requiring that 'the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible'.

The proceedings of 2020 and the recent one are similar, if one looks at the defence arguments and the ruling of the Court. Furthermore, it was the second time that the Court could consider the exceeding limit values for concentrations of NO_2, just after the proceedings involving the French Republic.[5]

The Court has repeatedly pointed out that exceeding the limit values set for pollutants in ambient air is sufficient grounds for violation of the combined provisions of Art 13.1 and Annex XI of the Directive 2008/50/EC. For at least eight years in many areas, exceedance of the daily and annual limit values in Italy has remained systematic and persistent; in this case, the Court has found an infringement, without there being any need to examine in greater detail the content of the air quality plans drawn up by the Italian Republic. Adhering to the limit values for air pollutants is in fact a mandatory result; therefore, it would be difficult for any Member State to provide any justifications. According to the Court, the EU legislature set the limit values in order to protect human health and the environment, taking into consideration that air pollutants are produced by multiple sources

effetti sulla salute', in F. Alcaro et al eds, *Valori della persona e modelli di tutela contro i rischi ambientali e genotossici. Esperienze a confronto* (Firenze: Firenze University Press, 2008), 41.

[3] Case C-68/11 *European Commission* v *Italian* Republic, Judgment of 19 December 2012, available at www.eur-lex.europa.eu. See the comment by E. Maschietto, 'Un'altra condanna dell'Italia in materia ambientale: questa volta per inosservanza dei limiti relative alle concentrazioni di PM10 nell'aria: non è ancora finita' *Rivista giuridica dell'ambiente*, 381–386 (2013).

[4] Case C-644/18 *European Commission* v *Italian Republic*, Judgment of 10 November 2020 (Grand Chamber), available at eur-lex.europa.eu. See V. Tevere, 'La Corte di Giustizia ha accertato l'inadempimento dello Stato italiano per violazione della direttiva 2008/50/CE sulla qualità dell'aria' *Lo Stato civile italiano*, 76–77 (2020).

[5] Case C-636/18 *European Commission* v *French Republic*, Judgment of 24 October 2019, available at eur-lex.europa.eu.

and activities and that various policies, both at national and EU level, may affect ambient air quality. The Italian Republic argues that the deadlines which it has laid down are wholly appropriate: this, to the extent of the structural changes necessary to put an end to the exceedances of the limit values for No_2 in ambient air. This regards particular difficulties pertaining to the socio-economic and budgetary implications of the investments to be made, and local traditions. The Court recalls that that Member State must establish that the difficulties on which it relies in bringing the exceedances of limit values for No_2 to an end, are such as to rule out the possibility that shorter deadlines could have been set. Moreover, the Italian Republic has not used the two mechanisms stated in the directive, namely the request for extension or derogation.

To better understand the judgment of the Court,[6] it is necessary to provide a brief overview of the right to clean air in European and Italian law,[7] considering the fact that the legislation introduced in Italy is mostly a transposition of EU law acts.

The legal basis for the EU to act on air quality lies in Arts 191 and 192 of the Treaty on the Functioning of the European Union (TFEU). There are two framework directives. First, Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management requires Member States to establish certain monitoring and reporting procedures in respect of 13 substances. The second is Directive 2008/50/EC[8] of the European Parliament and of the Council, which

[6] This referral follows separate actions brought against France, Germany, and the United Kingdom in May 2018 for similar failures to respect limit values for NO_2, and for failing to take appropriate measures to keep exceedance periods as short as possible. For an analysis of the case law of the CJEU, see L. Calzolari, 'Il contributo della Corte di Giustizia alla protezione e al miglioramento della qualità dell'aria' *Rivista giuridica dell'ambiente*, 803–875 (2021). Out of 12 infringement cases, the Court found that 10 Member States failed to meet the ambient air quality standards. The nine most recent judgments even found a systematic and persistent infringement of the standards. Air quality standards have also been the subject of disputes before many national courts. C-479/10 *European Commission* v *Kingdom of Sweden*, Judgment of 10 May 2011, available at eur-lex.europa.eu; C-34/11 *Commission* v *Portugal*, Judgment of 15 November 2012, available at eur-lex.europa.eu; C-68/11, *Commission* v *Italy*, Judgment of 19 December 2012, available at eur-lex.europa.eu; C-488/15 *Commission* v *Bulgaria*, Judgment of 5 April 2017, available at eur-lex.europa.eu; C-336/16 *Commission* v *Poland*, Judgment of 22 February 2018, available at eur-lex.europa.eu; C-636/18 *Commission* v *France*, Judgment of 24 October 2019, available at eur-lex.europa.eu; C-638/18 *Commission* v *Romania*, Judgment of 30 April 2020, available at eur-lex.europa.eu; C-644/18 *Commission* v *Italy*, Judgment of 10 November 2020, available at eur-lex.europa.eu; C-637/18 *Commission* v *Hungary*, Judgment of 3 February 2021, available at eur-lex.europa.eu; C-664/18 *Commission* v *United Kingdom*, Judgment of 4 March 2021, available at eur-lex.europa.eu; C-635/18 *Commission* v *Germany*, Judgment of 3 June 2021, available at eur-lex.europa.eu; C-286/21 *Commission* v *France*, Judgment of 28 April 2022, available at eur-lex.europa.eu.

[7] Decreto del Presidente della Repubblica 24 May 1988 no 203 (implementation Council Directive 80/779/EEC of 15July 1980, 82/884/EEC of 3 December 1982, 84/360 e 85/203); decreto legislativo 4 August 1999 no 351; decreto legislativo 21 May 2004 no 171; decreto legislativo 18 February 2005 (attuazione Council Directive 96/61/EC); decreto legislativo 3 June 2006 no 152 (Environmental code)

[8] M. Gasparinetti, 'La direttiva 2008/50/CE sulla qualità dell'aria: applicazione e prospettive di revisione' *Le istituzioni del federalismo*, 105–124 (2015).

replaces five previous acts adopted from 1996 to 2000[9] for the sake of clarity, simplification, and administrative efficiency, although it has not introduced any radical reforms but implemented measures where appropriated. Council Directive 2004/107/EC sets target values for air pollutants to reduce their effects on human health and the environment. Hereafter, Council Directives 2008/50/EC and 2004/107/EC are referred to jointly as 'AAQ Directives' (currently known as Ambient Air Quality Directives).

On 26 October 2022, the European Commission adopted a proposal for revised Ambient Air Quality Directives. In light of its better regulation agenda (and REFIT programme), the Commission has proposed to merge Directive 2008/50/EC and Directive 2004/107/EC of the European Parliament and of the Council into one directive regulating all the relevant air pollutants.

The impact assessment also checked consistency with the European regulations on climate, in particular the European Climate Law[10] as measures to achieve clean air will lead to greenhouse gas emission reductions as well. It is also consistent

[9] Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide, and oxides of nitrogen, particulate matter and lead in ambient air, Directive 2000/69/EC of the European Parliament and of the Council of 16November 2000 relating to limit values for benzene and carbon monoxide in ambient air, Directive 2002/3/EC of the European Parliament and of the Council of 12 February 2002 relating to ozone in ambient air and Council Decision 97/101/EC of 27 January 1997 establishing a reciprocal exchange of information and data from networks and individual stations measuring ambient air pollution within the Member States.

[10] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law).

with the European Green Deal,[11] the Zero Pollution Action Plan,[12] the Fit for 55,[13] the Methane Strategy,[14] the Sustainable and Smart Mobility Strategy,[15] the related 2021 New Urban Mobility Framework,[16] the Biodiversity Strategy,[17] the Farm to Fork Initiative,[18] and the forthcoming Euro 7 proposal (cf PLAN/2020/6308).

In the Italian legal framework, the first definition of air pollution is provided in the decreto del Presidente della Repubblica 24 May 1988 no 203; Art 2 states that air pollution means

[11] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal* COM/2019/640 final. In that act, the European Commission committed to draw on the lessons learnt from the evaluation of the current air quality legislation; propose to strengthen provisions on monitoring and modelling air quality plans to help local authorities achieve cleaner air; and, notably, propose to revise air quality standards to align them more closely with the World Health Organization recommendations. M. Iannella, 'L'European Green Deal e la tutela costituzionale dell'ambiente' *federalismi.it*, 171–190 (2022); R. De Paolis, 'Constitutional Implications: The European Green Deal in the Light of Political Constitutionalism' *Rivista quadrimestrale di diritto dell'ambiente*, 112–122 (2021), highlights that 'the EGD has a limited legal relevance', as it is a soft-law tool, which embodies a political roadmap on climate change. Critically the author observes that the Green Deal 'does not refer to any of the classical environmental principles' and has not yet established a clear connection with them; however 'it is potentially capable of enriching the ongoing constitutional discourse on the EU policy, in particular in the perspective of "Political Constitutionalism", a prospective aimed at seeking to detect the historical-political rules, principles, practices, and maxims that establish, sustain, and regulate the activity of governing society'.

[12] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Pathway to a Healthy Planet for All EU Action Plan: Towards Zero Pollution for Air, Water and Soil*, COM/2021/400 final. Consider notably its 2030 target to reduce by more than 55% the health impacts (premature deaths) of air pollution and the 2050 vision of the Action Plan to reduce air, water, and soil pollution to levels no longer considered harmful to health.

[13]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Fit for 55: delivering the EU's 2030 Climate Target on the way to climate neutrality*, COM/2021/550 final.

[14] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU strategy to reduce methane emissions*, COM/2020/663 final.

[15] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Sustainable and Smart Mobility Strategy – putting European transport on track for the future*, COM/2020/789 final.

[16] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The New EU Urban Mobility Framework*, COM/2021/811 final.

[17] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU Biodiversity Strategy for 2030 Bringing nature back into our lives*, COM/2020/380 final. Forests are hugely important for biodiversity, climate, and water regulation, the provision of food, medicines and materials, carbon sequestration and storage, soil stabilisation, and the purification of air and water.

[18] Indeed, the use of chemical pesticides in agriculture contributes to soil, water, and air pollution, biodiversity loss and can harm nontarget plants, insects, birds, mammals, and amphibians. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system*, COM/2020/381 final.

> 'any change in the normal composition or physical state of the air, due to the presence in the same of one or more substances in quantities and with characteristics such as to alter the normal environmental conditions and the healthiness of the air; to constitute danger or direct or indirect injury to human health; to impair recreational activities and other legitimate uses of the environment; to alter biological resources and public and private ecosystems and material goods'.

The current definition is taken from Art 168, para 1, lett A of the Decreto Legislativo 3 April 2006, no 152 (hereinafter Environmental Code). It includes any change in atmospheric air, caused by the introduction into the same of one or more substances in quantities and with characteristics liable to harm or constitute a danger to human health or to the quality of the environment or liable to harm material property or to compromise the legitimate uses of the environment.

The recitals of European Parliament and Council Directive 2008/50/EC help to identify the objectives of the Act, which are the same as the Italian Environmental Code: 'the need to protect human health', paying particular attention to 'sensitive populations', better we say the vulnerable one, and 'the environment as a whole', to improve the monitoring and assessment of air quality including the deposition of pollutants and to provide information to the public. The Environmental Code explicitly considers also the harm of material property and the jeopardization of the legitimate uses of the environment.

Air pollution is the largest environmental health risk in Europe.[19] For instance, air pollution causes and aggravates respiratory and cardiovascular diseases. In 2020 in Europe 64,000 premature deaths were attributable to exposure to NO_2 concentrations, which went above the WHO guideline level of 10 $\mu g/m^3$.

In 2021, the World Health Organization (WHO) updated its air quality guidelines[20] for the first time since 2006. Air quality guidelines are a series of WHO publications that provide evidence-informed, nonbinding recommendations for protecting public health from the adverse effects of air pollutants by eliminating or reducing exposure to hazardous air pollutants and by guiding national and local authorities in their risk management decisions. Air pollution is recognised as the leading environmental risk factor globally, leading to health-related economic impacts; it is the single largest environmental threat to human health and well-being.[21]

It is worth noting the limited grounds of the judgment about some of the points of the defence arguments. In particular, the Court does not analyse the socio-

[19] *Health impacts of air pollution in Europe 2022* is part of the *Air quality in Europe 2022 report*, available at www.eea.europa.eu.

[20] World Health Organization, 'WHO global air quality guidelines: Particulate matter (PM2.5 and PM10), ozone, nitrogen dioxide, sulphur dioxide and carbon monoxide', available at www.who.int, 2021.

[21] ibid 11–12.

economic impact, and the responsibility of EU laws to exceeding the NO_2.

Another point that needs to be discussed concerns the possibility to recognize the subjective right to clean air, which is enforceable before the European Court of Justice.

II. Civil Liability as a Tool to Guarantee the Effectiveness of Environmental Protection in a *De Iure Condendo* Perspective

The European Parliament and Council Directive 2008/50/EC is an example of command-and-control environmental policy.[22] The lack of an air quality plan or the exceeding of the limits, even when a plan is actually adopted, is sufficient to establish an infringement procedure against a Member State before the Court of Justice.

Air quality standards in the form of binding limit values have been and probably continue to be a key driver for reducing air pollution concentrations. However, the number of infringements shows clearly that the effectiveness of environmental

[22] See U. Mattei, 'I modelli nella tutela dell'ambiente' *Rivista di diritto civile*, 389 (1985); N. Lugaresi, *Diritto dell'ambiente* (Padova: CEDAM, 2004), 113–140; M. Clarich, 'La tutela dell'ambiente attraverso il mercato' *Diritto pubblico*, 219–239 (2007), distinguishes noneconomic instruments (such as comand and control instruments) and pure economic instruments (environmental taxes, emission reduction subsidies); U. Salanitro, 'L'evoluzione dei modelli di tutela dell'ambiente alla luce dei principi europei: profili sistematici della responsabilità per danno ambientale' *Le nuove leggi civili commentate*, 795-822 (2013). R. Schmalensee and R. N. Stavins, 'Policy Evolution under the Clean Air Act' *Journal of Economic Perspectives*, 27-50 (2019), assess the evolution of air pollution control policy under the US Clean Air Act, passed in 1970, that established the architecture of the US air pollution control system and became a model for subsequent environmental laws in the United States and globally. The authors pay particular attention to the types of policy instruments used, focusing in particular on the increased use of market-based policy instruments, beginning in the 1970s and culminating in the 1990s. The Organization for security and co-operation in Europe, as already in 1989, released a paper named *Instruments économiques pour la protection de l'environment*, where the economic instruments of environmental protection are defined as 'all those measures that affect the choices between different technological or consumer alternatives, through the modification of the conveniences in terms of private costs and benefits'. The Green Paper on market instruments used for environment and related policy purposes, 28 March 2007, COM (2007) 140, stresses that the EU encourages Member States to use market instruments 'to combat pollution and protect resources'. The Green Paper identifies the types of market instruments that are prevalent in the EU: quantitative systems, such as tradable permit schemes, which provide more certainty as regards reaching specific policy objectives, eg emission limits (subject to effective monitoring and compliance) and purely price-based instruments, such as taxes. Price-based instruments, in turn, ensure security regarding the cost or the price of policy objective and tend to be easier to administer. See G. Caso, 'Tutela del clima e mercato delle emissioni inquinanti', in M. Pennasilico ed, *Manuale di diritto civile dell'ambiente* (Napoli: Edizioni Scientifiche Italiane, 2014), 167–174; A. Gratani, 'Inquinamento 'aria' e quote ETS. Gli obiettivi UE e gli ostacoli per raggiungerli', comment on Case 58/17 *INEOS Köln GmbH* v *Bundesrepublik Deutschland*, [2018] ECR; Case 572/16 *INEOS Köln GmbH* v *Bundesrepublik Deutschland*, [2018] ECR; Case 336/16 *European Commission* v *Republic of Poland* [2018], ECR; Case 577/16 *Trinseo Deutschland Anlagengesellschaft mbH* v *Bundesrepublik Deutschland* [2018] ECR; Case 229/17 *Federal Republic of Germany* v *European Commission* [2018] ECR; *Rivista giuridica dell'ambiente*, 325–335 (2018).

protection instruments is not yet guaranteed.

One way to enforce environmental protection measures is by imposing penalties with periodic regularity.[23]

According to some authors, this approach of the Court backs the idea that, in the EU legal order, individuals (especially NGOs) may be entitled to specific prerogatives which can be procedural but also substantive, related to a right to clean air.[24] This approach can complement the infringement procedures.

Regrettably, the subjective right to breathe clean air does not appear in any binding instrument at the international level,[25] unlike the right to clean water and sanitation.

The right to clean air became the subject of a trial, brought before the Court of Justice, against the State of Bavaria(German Republic). It was taken to court by a citizien, in the well-known *Janecek* case.[26]

The case concerned a reference for a preliminary ruling regarding the interpretation of Art 7, para 3 of the Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council on 29 September 2003. The reference came in the course of proceedings between Mr Janecek and the State of Bavaria concerning an application for an order requiring the state to draw up an air quality action plan in the district, where the

[23] The measure has been requested, in environmental matters, by the Commission in the case Court of European Justice, Grand Chamber, 17 April 2018, case C-441/17, *European Commission* v *Republic of Poland*. The Commission supplemented its application for interim measures by requesting that the Court additionally ordered the Republic of Poland to pay a periodic penalty should it fail to comply with the orders made in the proceedings.

[24] L. Calzolari, n 6 above, passim. See also, Client Earth, *Individual right to clean and healthy air in the EU*, available at www.clientEarth.org (2021).

[25] S. Jankovic, 'Conceptual Problems of the Right to Breathe Clean Air' *German Law Journal*, 168–183 (2021), analyses the general ambiguity and lack of precision of the right to breathe clean air: in the view of the author, it is a challenging goal to firmly indicate which foundations (legal or moral) or character (individual or collective) the right to breathe clean air should meet, as well as to determine which category (generations of human rights) it belongs to. Similarly, its temporal determination (present-day or Future) is uncertain, and it is easy to confuse or conflate the substantive right with procedural rights. Moreover, this right has a non autonomous character, and problems arise in connection to the meaning, the indeterminacy of the beneficiaries of the said right, and its absence at the international level. V.K. Aery, 'The Human Right to Clean Air: A Case Study of the Inter-American System' *Seattle Journal of Environmental Law*, 15-38 (2016), examines the procedural barriers to victims of air pollution pursuing legal remedies within the Inter-American human rights system and proposes legal mechanisms to enforce that right. The author notes that in 1986 the African Charter became the first international legal instrument to recognise and enforce environmental rights.

[26] C-237/07 *Dieter Janecek* v *Freistaat Bayern*, Judgment of 25 July 2008 *Rassegna dell'avvocatura dello Stato*, 117–121 (2008), with a critical comment by S. Palermo, 'Qualità dell'aria: diritto di un terzo vittima di danni alla salute alla predisposizione di un piano di azione'. E. Murtula, 'Prima applicazione in Italia della giurisprudenza comunitaria 'Janecek' sull'obbligo (regionale) di adottare i Piani per la qualità dell'aria' (critical comment on Tribunale amministrativo regionale Lombardia – Milano 4 September 2012 no 2220) *Rivista giuridica dell'ambiente*, 111–113 (2013).

applicant lived, including the measures to ensure abrupt compliance with the limit set by the community legislation regarding the particulate matter PM10.

According to the CJEU, Art 7, para 3 of Council Directive 96/62/EC implies that persons directly at risk when the limit values or alert thresholds are exceeded have the right to require competent national authorities to draw up an action plan, even though under national law, those persons may have other courses of action that they could take for requiring authorities to take measures to combat atmospheric pollution.

Regrettably, the Court[27] recently confirmed that the limit values for air quality, as imposed by the European Directives, are not intended to confer individual rights on individuals; nor do they confer on them a right to compensate against a Member State for any damage to health caused by exceeding the limit values. The Court affirmed that the obligations set in the Directive pursue a general objective of protecting human health and the environment as a whole. Thus,

> 'besides the fact that the provisions concerned of European Parliament and Council Directive 2008/50/EC and the directives which preceded it do not contain any express conferral of rights on individuals in that respect, it cannot be inferred from the obligations laid down in those provisions, with the general objective referred to above, that individuals or categories of individuals are, in the present case, implicitly granted, by reason of those obligations, rights the breach of which would be capable of giving rise to a Member State's liability for loss and damage caused to individuals' (§56).

Advocate General Kokott, on the contrary, suggested that the limit values and the obligation to improve ambient air quality under the directives

> 'are intended to confer rights on those who suffer damage to their health as a result of air pollution[28] [...] the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible is inherent in the system of the treaties on which the European Union is based'.

The entitlement to compensation for adverse effects to health resulting from an established exceedance of the limit values for PM10 or nitrogen dioxide in the

[27] Case C-61/21 *Ministre de la Transition écologique* and *Premier ministre*, Judgment of 22 December 2022, available at www.eur-lex.europa.See P. De Pasquale, ' "Francovich ambientale"? Sarà per un'altra volta. Considerazioni a margine della sentenza Ministre de la Transition écologique' *www.aisdue.eu*, 1-9 (2023).

[28] However, in 2019, Advocate General Kokott, in her opinion delivered on 28 February 2019, Case C-723/17, *Lies Craeynest and Others v. Brussels Hoofdstedelijk Gewest and Others*, observed that 'exceedance of the limit values leads to a large number of premature deaths. The rules on ambient air quality therefore put in concrete terms the Union's obligations to provide protection following from the fundamental right to life under Art 2(1) of the Charter and the high level of environmental protection required under Art 3(3) TEU, Art 37 of the Charter and Art 191(2) TFEU' (para 57).

ambient air 'requires that the injured party proves a direct link between that adverse effect and his or her stay at a place where the respective applicable limit values were exceeded', without there having been a satisfying and valid air quality improvement plan.

One of the reasons pointed out by the Advocate General is that, looking closer at all the infringement cases, at least ten Member States failed to meet ambient air quality standards, and this means that they failed to prevent or reduce harmful effects on human health. One can assume that the system of civil liability could make environmental policies on air quality more effective.[29] Corte di Cassazione[30] stated that

> 'in the current legal system, civil liability is not assigned only to the task of restoring the patrimonial sphere of the subject who has suffered the injury, since the function of deterrence and that of sanction are internal to the system'.

Punitive damages were considered incompatible with public policy in several

[29]European Parliament, 'Report on the application of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage', 11 October 2017, considers the possibility of extending the field of application of the directive also to air pollution. See C. Crea and L.E. Perriello, 'Salute, ambiente e iniziativa economica: tecniche di bilanciamento ed effettività dei rimedi' *Actualidad Jurídica Iberoamericana*, 748-793 (2021). Moving from the analysis of the symbolic Ilva case, the author contends that 'reflected' environmental damages should be granted compensation through a strict rule of liability. V. Corriero, 'La "responsabilità" del proprietario del sito inquinato' *Responsabilità civile e previdenza*, 2442 (2011), observes that the environment registers a different choice: 'a strange retreat of the rules of responsibility and a functionalization of the property in a restorative key', despite 'the proliferation of cases of tort'. On the usefulness of an interpretation of civil law instruments for environmental protection in line with 'polluter pays' principle see also, Id, 'Diritto di rivalsa e obbligazioni parziarie risarcitorie nel sistema italo-europeo di responsabilità ambientale' *Rassegna di diritto civile*, 342–369 (2021).

[30] Corte di Cassazione-Sezioni unite 5 July 2017 no 16601, *Responsabilità civile e previdenza*, 1198 (2017), whit critical comment of C. Scognamiglio, 'Le Sezioni Unite ed i danni punitivi: tra legge e giudizio' 1109-1122; A. Briguglio, 'Danni punitivi e delibazione di sentenza straniera: turning point «nell'interesse della legge»', 1597-1608; C. Consolo and S. Barone, 'Postilla minima di messa a giorno' *Giurisprudenza italiana*,1365 (2017); C. Consolo, 'Riconoscimento di sentenze straniere, specie USA e di giurie popolari, aggiudicanti risarcimenti punitivi o comunque sopracompensativi, se in regola con il nostro principio di legalità (che postula tipicità e financo prevedibilità e non coincide pertanto con il, di norma presente, due process of law)' *Corriere giuridico*, 1050-1057 (2017); M. La Torre, 'Un punto fermo sul problema dei "danni punitivi" ' *Danno e responsabilità*, 419-428 (2017); G. Corsi, 'Le sezioni unite: via libera al riconoscimento di sentenze comminatorie di punitive damages' *Danno e responsabilità*, 429-434 (2017); G. Ponzanelli, 'Polifunzionalità tra diritto internazionale privato e diritto privato' *Danno e responsabilità*, 435-436 (2017); P.G. Monateri, 'Le Sezioni Unite e le funzioni della responsabilità civile' *Danno e responsabilità*, 437-440 (2017). F. Bilotta, 'La discriminazione diffusa e i poteri sanzionatori del giudice' *Responsabilità civile e previdenza*, 77 (2018), notes that 'there has been no lack of reflection over time on the issue of punitive damages and the deterrent function of civil liability [...] Indeed, it can be said that the recent judgment of the United Sections is the fruit of the most recent regulatory innovations; much of the reflections of the doctrine'.

European countries.[31] The function of 'deterrence' of civil liability can be effective also in the case of inaction of public authorities, such as that challenged to the Italian State in the present case. This form of protection does not exclude but combines contrast techniques that are expressed outside the process.[32]

The interest in health - Advocate General Kokott observed - 'is highly personal and individual in nature, and thus, it forms the basis of the case-law outlined just above'.

In the Italian context, a recent but isolated ruling by the Corte di Cassazione considered that, in spite of the normative data, the notion of environmental damage should be extended to also include air pollution.[33] The Court affirmed that air

[31] A. Montanari, 'Del «risarcimento punitivo» ovvero dell'ossimoro' *Europa e diritto privato*, 448 (2019) observes that the punitive damages could create that overdeterrence of civil liability that even in common law is deprecated. Art 10:101 of the Principles of European Tort Law (PETL) affirms that 'damages are a money payment to *compensate* the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of *preventing harm'. The European Group on Tort Law* is a group of scholars in the area of tort law established in 1992. The group meets regularly to discuss fundamental issues of tort law liability. T. Kadner Graziano, 'The Purposes of Tort Law: Article 10:101 of the Principles of European Tort Law Reconsidered' *Journal of European Tort Law*, 23-41 (2023) argues that modern tort law pursues a much wider range of objectives. The author identifies a total of eleventh functions which interact and complement each other: attribution of damage; compensation of damage; pronouncing a moral value judgement of the wrongdoer's behaviour; internalising negative external effects and social costs; transferring the costs of damage to the party who can best avoid it; allocating the damage to those who can best pass it on to the community of beneficiaries of that activity; preventing (or deterring harmful behaviour); recognising that the victim's protected interests have been infringed; providing an entrance gate in private law for the protection of constitutional values; providing a forum for the recognition of newly protected rights and interest; shifting illicitly acquired gains from the tortfeasor to the victim; punishing the tortfeasor.

[32] G. Comporti, 'La responsabilità per danno ambientale' *Rivista quadrimestrale di diritto dell'ambiente*, 9 (2011) states that civil liability should not be 'overstated'. 'Civil liability is a necessary response [...] However, this response cannot be exclusive or exhaustive. The compensation for damages is not the most effective way to administer the widespread damage caused by mass disaster'. The author considers decreto legislativo 13 August 2010 no 155 on ambient air quality as an example of positive anti-pollution techniques. The relevant judgments, including the one in the commentary, show, however, that such tools - although appropriate - have not proved their efficacy.

[33] Corte di Cassazione 14 November 2018 no 51475, available at www.dejure.it. M.T. Meli, 'The Environment, Health, and Employment: Ilva's Never-Ending Story' *Italian Law Journal*, 498-499 (2020), found it an "unconvincing opinion [...] because it does not consider that the whole structure of the discipline is now modelled on the European one, which essentially revolves around the idea of restoring the environmental resources which have been attacked. From this point of view, not to indicate the air among the possible resources that are subjected to aggression appears as a very precise choice, as it is not possible to proceed with its restoration with any adequate repair measures'. On the other hand, the author recognises that 'the Supreme Court's ruling was intended to be as an anticipation of this evolutionary trend, by providing for the condemnation of those responsible to actually pay compensation for damages rather than to order restoration measures [...] This, however, gets to the heart of the problem reported by the Court: would such compensation be an adequate instrument of protection, regarding the violation of the rights mentioned by the Court? [...] In other words, in this case are we facing collective damage or an individual and private one?'.

pollution, whenever it is "significant and measurable", falls within the notion of environmental damage pursuant to Art 300 of Environmental Code. Therefore, the Ministry of the Environment can claim for damages.

As is well known, civil law and common law systems adopt different perspectives. It may, then, be useful for the interpreter to look at other regulations to verify the effectiveness of the means of protection provided therein. In the English legal system, for example, anyone affected by harmful emissions can apply for an injunctive relief by enforcing the law of nuisance or the judicial review procedure on administrative acts. The protection of the individual right to the health of the environment is indirectly pursued by the law of nuisance, but legal scholars[34] have stressed the limited impact even in the hypothesis of unhealthy air. The effectiveness of the judicial review[35] is also limited, since the judge's decision is often declaratory and does not have immediate effect restoring the health of the places. The remedies identified by English law recall the Italian legislation on '*immissioni*' that has demonstrated its inadequacy and has led to looking at civil liability as a more effective remedy.[36]

In the European context, the shifting point in this matter could be the approval of the proposal for the new directive on ambient air quality and cleaner air. It introduces a new chapter (VII), 'Access to Justice, Compensation, and Penalties', composed by two articles. Art 27 establishes detailed provisions to ensure access to justice for those who want to challenge the implementation of the directive, such as when an air quality plan has not been established despite exceedances of relevant

[34] R. Potenzano, 'La tutela della salubrità dell'aria e della persona in civil law e in common law', in S. Lanni ed, *Sostenibilità globale e culture giuridiche comparate. Atti del Convegno SIRD Milano, 22 aprile 2022* (Torino: Giappichelli Editore, 2022), 49-71. The author observes that polluting activities 'can only be the subject of a summary proceeding if they generate [...] 'dust, vapour or odour'; even if the person responsible for them may object to having complied with or attempted to comply with the legislation, even in violation of the latter; to contain these emissions'. She invites, however, to draw inspiration from the English model, valuing the tool of inhibitory protection. For an analysis of remedies in the US system, although with a focus on climate damage, see D. Hunter and J. Salzman, 'Negligence in the air: the duty of care in climate change litigation' *University of Pennsylvania Law Review*, 1741-1794 (2007).

[35] To activate such a remedy two conditions must be met: a real and immediate risk to the right to life – which is significant and substantial, present and continuing – that can be met where the affected individual is facing, by reason of the industrial activity, the development of a condition which would entail a reduced life expectancy; the state authority should know or ought to know of that risk.

[36] K.N. Hylton, 'When Should We Prefer Tort Law to Environmental Regulation?' *The Boston University School of Law Working Paper Series Index*, 16 (2001) affirms that 'nuisance law protects property rights while at the same time preventing certain intangible invasions of these rights. Its utilitarian structure provides a test for determining when such invasions go too far and when regulations go too far. If a government agency attempts to force a landowner to supply a public good, as opposed to the prevention of a public harm, the nuisance model requires public subsidization of this supply in the form of compensation. Conversely, if because of malfeasance in the legislative or enforcement process government enforcers fail to regulate appropriately, nuisance law provides a ready regulatory backup in the form of damages liability'. On the intersection of environmental law and the tort system, see M. Latham et al, 'The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart' *Fordham Law Review*, 737-773 (2011).

air quality standards. Art 28 aims to establish an effective right for people to be compensated by the competent authorities where damage to their health has occurred wholly or partially as a result of a violation of rules prescribed on limit values, air quality plans, short-term action plans or in relation to transboundary pollution. People affected have the right to claim and obtain compensation for those damages. This includes the possibility for collective actions.

The proposal also considers the practical difficulties to recognise a damage.

The principles of civil liability require a causal link between the act and the damage in order for environmental liability to come into play. In a claim of violation of the right to clean air, the causation analysis is not easy; pollutants in the atmosphere depend on multiple sources of emission, and some of them have nonlinear reactions when in contact with other substances.

European Parliament and Council Directive 2008/50/EC already considered this possibility in recital 15 and lays down the rules in Art 20.It's a burden of the Member States to relay to the Commission, for a given year, lists of zones and agglomerations where the exceeding of the limit values for a given pollutant is attributable to natural sources. The burden of proving that exceedances are attributable to natural sources shall be borne by the Member State.

A Member State, moreover, can demonstrate that a case of *force majeure* justifies noncompliance with the limit values. The State should prove that the unavoidable difficulties preventing it from complying with its obligations under European Union law are only temporary, and exceeding the limit values is limited only for the period necessary to resolve those difficulties.[37]

Another reason for excluding Member State liability could be the transboundary air pollution.[38]

These assumptions were adequately considered in the proposal.

Art 28, para 4, states that the

> 'violation and the occurrence of the damage shall be presumed' when the claim is 'supported by evidence showing that the violation is the most plausible explanation for the occurrence of the damage of that person'.

The respondent public authority shall be able to rebut this presumption.

The proposal requires the Member States to

[37] For example, see C-68/11 *Commission* v *Italy*, Judgment of 19 December 2012, § 64, 65, available at www.eur-lex.europa.eu.

[38] In fact, in 1979, 32 countries in the pan-European region decided to cooperate to reduce air pollution signing the UNECE Convention on Long-range Transboundary Air Pollution, creating the first international treaty to deal with air pollution on a broad regional basis. The convention entered into force in 1983. Over the years, the number of substances covered by the convention and its protocols has been gradually extended. The Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone was adopted in 1999. The Protocol sets national emission ceilings for 2010 up to 2020 for four pollutants: sulphur (SO2), nitrogen oxides (NOx), volatile organic compounds (VOCs) and ammonia (NH3).

> 'ensure that national rules and procedures relating to claims for compensation, including as concerns the burden of proof, are designed and applied in such a way that they do not render impossible or excessively difficult the exercise of the right to compensation for damage' (para 5).

Member States also need to ensure that the limitation periods for bringing actions are not less than five years, running after the violation has ceased and the person claiming the compensation knows, or can reasonably be expected to know, that he or she suffered damage from that violation.

Despite the judgement of the Court did not analyse them thoroughly, and the proposal did not mention them, the actual impact of the European policies should be adequately taken into account, in particular with respect to transport and agricultural policies.[39]

Since the incidents of NO_2 pollution in many European countries are mainly due to diesel engines, what kinds of taxation policies should be in place at the national level to discourage these violations?[40] Also, what is the role of European policies concerning usage of diesel? Also, the Fitness Check[41] refers to instances where EU funds are used to support projects that may have adverse effects on air quality. The example used relates to biomass investments under the cohesion policy's objective of supporting the shift to a low-carbon economy.

However the Court, imposing hastily the respect of the limit as a performance obligation for the Member States, takes into account that any Member State cannot, in any event, rely on an alleged lack of coordination between different Union policies as a justification for breaching an unambiguous obligation laid down in an existing directive, such as European Parliament and Council Directive 2008/50/EC, and

[39] About transport policy in particular, the Commission emphasises not only that the standards it has adopted or proposed from 2016 on vehicle type-approval tests do not set emission or toxic concentration limit values, but, above all, that those standards, when applied, produce another type of effects. The Commission recalls that the authorities of the Member States have not complied with the obligation to prohibit the use of illegal measuring instruments. The Commission also observed that the Italian Republic did not reply to that observation: since it is well known that the effects of the use of EURO vehicles on the reduction of pollutant emissions were limited, [it was even more obvious that the Italian authorities should take appropriate measures to bring the NO_2 concentration values down to the level authorised by Directive 2008/50. In regard to the agricultural policy and the production of emissions from the combustion of woody biomass for domestic heating, an alleged lack of coordination between unidentified initiatives, including some European funding, may not exclude the infringement of an obligation clearly laid down by the legislation in force. Therefore, the alleged lack of coordination between the different European policies cannot be invoked as an argument to exclude the existence of an infringement of an obligation contained in a directive in force at a given time. It follows that such a lack of coordination, if proven, cannot exempt Member States from that obligation.

[40] Thus, M. Gasparinetti, n 8 above, 118. The author observes that the fiscal policies have remained largely a prerogative for Member State governments.

[41] Directorate-General for Environment (European Commission) 'Study to support the impact assessment for a revision of the EU Ambient Air Quality Directives', available at www.op.europa.eu, 28 (2022).

therefore be exempted from that obligation.

III. The Need for a Different Interpretation of the Socio-Economic Factor Claimed by the Italian Government: The Principle of Sustainability and the Principle of Resilience Could Bring Together Environment, Social and Economic Issues

The Italian Republic put forward an argument already used in a previous case in 2020, stating that structural difficulties arising from socio-economic and budgetary implications of large-scale investments required for environmental protection justify delaying the implementation of the necessary measures. However, the Court found these difficulties to be not exceptional and thus did not justify the impossibility of setting shorter deadlines.

The motivation of the Court is rather narrow, but it should have been much broader and more complex, taking into consideration the concepts of sustainability and resilience.

Indeed, the Court could have stated (should have done so, actually) that it is incompatible with EU law to disregard the obligations arising from the principle of sustainable development:[42] in fact 'the Italo-European legal system guarantees

[42] On the concept of Sustainable Development, see M. Pennasilico, 'Sostenibilità ambientale e riconcettualizzazione delle categorie giuridiche', in Id ed, n 22 above, 34 - 42. The author notes that according to the consolidated definition, provided in the Report Brundtland, to which the Environmental code conforms (Art 3 *quater*), 'this principle consists in taking account of the development needs of current generations without compromising the quality of life and the possibilities of future generations (intergenerational solidarity). In a more incisive sense, the principle also seeks to address the needs of disadvantaged regions and classes (social cohesion) and less favoured countries on the planet (international solidarity)'. See also Id, 'La transizione verso il diritto dello sviluppo umano ed ecologico', in A. Buonfrate and A. Uricchio eds, *Trattato breve di diritto dello sviluppo sostenibile* (Padova: CEDAM, 2023), 37-224; Id, 'La "sostenibilità ambientale" nella dimensione civil-costituzionale: verso un diritto dello "sviluppo umano ed ecologico" ' *Rivista quadrimestrale di diritto dell'ambiente*, 4–61 (2020); Id, 'Economia circolare e diritto: ripensare la sostenibilità' *Persona e mercato*, 711–729 (2021); G. Perlingieri, '«Sostenibilità», ordinamento giuridico e «retorica dei diritti». A margine di un recente libro' *Foro napoletano* (2020), 101-117; M.A. Ciocia, *La sostenibilità ambientale in epoca pandemica* (Padova: CEDAM, 2020); E. Caterini, *Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale* (Napoli: Edizioni Scientifiche Italiane, 2018); G. Capalbo ed, *Iniziativa economica privata e mercato unico sostenibile* (Roma: Sapienza Università Editrice, 2023); M.A. Ciocia, 'La centralità della persona nella nuova sostenibilità economica. Spunti di riflessione' *www.giustiziacivile.com*, 5 (2022); D.A. Benitez and C. Fava eds, *Sostenibilità: sfida o presupposto?* (Padova: CEDAM, 2019). In the international scholarship, see M. Pieraccini and T. Novitz, eds, *Legal Perspectives on Sustainability* (Bristol: Bristol University Press, 2020); D. Abdulai, O. Knauf and L. O'Riordan, 'Achieving Sustainable Development Goals 2030 in Africa: A Critical Review of the Sustainability of Western Approaches' in S. O. Idowu, R. Schmidpeter and Liangrong Zu eds, *The Future of the UN Sustainable Development Goals* (Cham: Springer, 2020), 3-44; W. Kahl, *Nachhaltigkeitsverfassung* (Tübingen: Mohr Siebeck, 2018); H.C. Bugge and C. Voigt eds, *Sustainable Development in International and National Law* (Zutphen: Europa Law Publishing, 2008); J.W. Kuhlman and J. Farrington, 'What is sustainability?' *Sustainability*, 3436-3448 (2010). They proposed to stick to the original meaning, where sustainability is connected to the well-being of future generations and in particular to irreplaceable

contracts, debts, responsibilities, cohabitations, companies, ownerships, entities, institutions as long as they are sustainable'.[43]

The principle of sustainable development was defined for the first time in the Brundtland report,[44] then it was incorporated into the final declaration of the Rio Conference in 1992 and is, to date, protected by numerous legal provisions.[45]

The centrality of sustainable development marks, for some legal scholars,[46]

natural resources—as opposed to the gratification of present needs which we call well-being; L. Kotzé, 'Sustainable development and the rule of law for nature: A constitutional reading', in C. Voigt ed, *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (Cambridge: Cambridge University Press, 2013), 130-145; C. Voigt, 'The principle of sustainable development. Integration and ecological integrity', in Id ed., *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (Cambridge: Cambridge University Press, 2013), 146-157. In the economic science, the root can be found in the works of Antonio Genovesi, the first scholar in Europe to hold a Chair in Economics, professor of *Lezioni di economia civile* (Lectures on Civil Economy) in 1765. E. Screpanti and S. Zamagni, *An Outline of the History of Economic Thought* (Oxford: Oxford Academic, 2005), 59 observe that 'here we have more than just a simple outline of the present-day notion of social capital, an essential requisite for any socially acceptable development process'. F. Ferraro, 'L'evoluzione della politica ambientale dell'Unione: effetto Bruxelles, nuovi obiettivi e vecchi limiti' *Rivista giuridica dell'ambiente*, 783 (2021), observes that the Green Deal mentions 'sustainability as many as 96 times [...] but seems to be aware of the difficulty of defining a single concept of sustainability when it refers to four different dimensions', identified in the 2020 annual strategy for sustainable growth (COM/ 2019/650 final): 'environmental, productivity-related, equity-related and macroeconomic stability-related'. About the channel for interaction and integration between labour and environmental sustainability in European social policy and European environmental policy, see P. Tomassetti and A. Bugada, 'From a Siloed Regulation to a Holistic Approach? Labour and Environmental Sustainability under the EU Law' *Italian Law Journal*, 683–713 (2022).

[43] E. Caterini, 'Sustainability and Civil Law' 4 *The Italian Law Journal* 2, 293 (2018). According to M. Pennasilico, 'La transizione' n 42 above, 72, sustainability 'is a necessary condition of ecological and distributive justice, a moral duty, that comes before legal duties, and have to be met unconditionally'.

[44] The discussion can be traced back to the 1970s. In 1972 the Club of Rome published the report on *The Limits to Growth* (Dennis and Donella Meadows) and the Stockholm Conference gave rise to the United Nations Environment Programme (UNEP). M. Pennasilico, n 42 above, 40, warns that the concept of sustainability is mobile, multi-dimensional (even more so in the Sustainable Development Goals identified in the UN Agenda 2020 of 2015) and it is subject to a plurality of definitions. The term sustainability is, however, much more dated. The birth of the term is attributed to Hans Carl von Carlowitz (1645-1714) who with his work, *Sylvicultura Oeconomica oder Anweisung zur wilden Baum-Zucht*, introduces the concept of Náchhaltigkeit, warning of the consequences of excessive deforestation See K. Bartenstein, 'Les origines du concept de développement durable' *Revue Juridique de l'Environment*, 289-297 (2005).

[45] Lastly, United Nations General Assembly Resolution no 70/1 of 25th September 2015 *Transforming our world: the 2030 Agenda for Sustainable Development*. The declaration's introduction (1.6) state that 'these are universal goals and targets which involve the entire world, developed and developing countries alike. They are integrated and indivisible and balance the three dimensions of sustainable development'.

[46] B. Pozzo, 'La tutela dell'ambiente tra strumenti di diritto privato e strumenti di diritto pubblico: le grandi epoche del diritto dell'ambiente', in G.A. Benacchio and M. Graziadei eds, *Il declino della distinzione tra diritto pubblico e diritto privato. Atti del IV Congresso nazionale SIRD Trento, 24-26 settembre 2015* (Napoli: Editoriale Scientifica, 2016), 291-334, identifies three stages of environmental law: the age of discovery; the age of faith in administrative law instruments; the age of anxiety. The cultural framework of the third phase is based on several key pillars, including the concept of sustainable development. 'The idea contained in the principle of

the transition to the third era of the evolution of environmental law.

EU law expressly states the principle in art 11 TFEU, Art 3 para 3 and Art 21 TEU. Art 37 of the Charter of Fundamental Rights proclaimed in Nice in 2000 stated that: 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. Art 3 *quater* Environmental Code regulates and defines it; according to Art 3 *bis* it ranks among the general principles for environmental protection.

For at least twenty years scholars have discussed and measured competitiveness in sustainability,[47] affirming the compatibility between economic development and environmental protection. Such studies undermine the basis of the Italian State's defence. If we adopt the ecological vision of sustainable development and, moreover, if we consider the reflections elaborated in Latin America on the concept of *buen vivir*,[48] the reasoning of the Italian Government seems even weaker and

sustainable development - theoretically - seems simple: leaving to future generations at least as many opportunities as we have had. Instead, it is more difficult to determine - from a practical point of view - what are the regulatory measures and the right mix of legal instruments, public law and private law, to be adopted to achieve this magical balance between today's needs and those of tomorrow' ibid 310. Instead, V. Corriero, 'Sviluppo ecologico e strumenti negoziali di valorizzazione dei "beni culturali, paesaggistici e ambientali" ' *Rivista quadrimestrale di diritto dell'ambiente*, 111 (2020) finds that 'the Green New Deal represents the third frontier of environmental law, after the first characterized by the emergence of the needs of health and environmental protection in the economic development-and the second, often characterized in antinomic terms, of sustainable development'.

[47] See the Lisbon European Council, Conclusions of the Presidency, 23 March 2000; confirmed in 2003, 2005, 2009 and the Göteborg European Council Presidency conclusions, 15 and 16 June 2001. M. Prezioso, 'La Dimensione territoriale della Strategia di Lisbona e Goteborg: l'Approccio concettuale e metodologico' *Bollettino della Società Geografica Italiana*, 9 -34 (2006) analyse the results of the transnational research project promoted by the European Spatial Program Observatory Network (ESPON), which aimed at identifying common policies and criteria in order to develop, by 2010, and simultaneously, an economy based on competitive knowledge (Lisbon) and at the same time sustainable (Gothenburg) in all countries and regions of the European Union. M. Coronato and A. D'Orazio, 'Il principio di sostenibilità nelle pratiche di impresa: tipologie e diffusione delle misure di sostenibilità nel quadro italiano', in F. Massa ed, *Sostenibilità. Profili giuridici, economici e manageriali delle PMI italiane* (Torino: Giappichelli, 2020), 3, note that 'the European Union, in its political orientation, acknowledges the need for businesses to adapt as much as possible to the rules promoting sustainability in all its dimensions (environmental, social and economic) [...] but only with the Kok Report (2004), companies really had to confront themselves seriously and decisively with the theme of sustainability and with the competitiveness closely linked to it'. In the American context, see J. Elkington, 'Toward the Sustainable Corporation. Win-Win-Win Business Strategies for Sustainable Development' *California Management Review*, 90-100 (1994).

[48] See S. Baldin and M. Zago eds, *Le sfide della sostenibilità. Il buen vivir andino dalla prospettiva europea* (Bologna: Filodiritto, 2014). They analyse the Andean cosmovision called *buen vivir*, which is recognized in the constitutions of Ecuador (2008) and Bolivia (2009). It does not conceive the separation between human beings and nature typical of the Western societies. It is a systemic approach to the development and sustainability, based on the subjective aspect rather than the objective one, and which differs from the linear models of Western development. The concept of *buen vivir* is opposed to a conception of the dominant development model based on the goal of an indefinite progress of human activity in a world, however, characterized by the limited character of resources. It addresses issues of general relevance by

out of focus.[49] The seriousness of the damage to the environment is a warning that cannot be concealed by the mere reference to budgetary difficulties.

IV. Prospects of Overcoming Economic Difficulties in The Adoption and Implementation of Plans to Protect the Right of the Vulnerable to Breathe Clean Air

The weakness of the Italian Government's defence and the lack of an in-depth analysis in the Court of Justice's ruling are also clear in the light of the close connection of a society with a sustainable economy and a resilient society. The Court should have highlighted the cogency of the principle of sustainable development and the objective of a resilient society and economy.

Sustainability and resilience can be perceived either as separate concepts or as synonyms. For instance, resilience can be seen as a factor affecting sustainability measures, while sustainability can be considered as a way to promote resilience. Focusing on these two paths of research can be beneficial.

Sustainability could contribute to increase resilience against future crises, overcoming the limitations of traditional and short-term approaches.[50]

proposing a model of lifestyle based on the balance among man, community and nature and on the affirmation of the role of cultural diversity and biodiversity.

[49] K. Bosselman, *The Principle of Sustainability Transforming law and governance* (London: Routledge, 2017), observes that one can distinguish between the ecologist approach and the environmental approach to sustainable development. The ecologist approach is critical of growth and favours ecological sustainability (*strong sustainability*). The environmental approach assumes the validity of growth and poses equal importance on environmental sustainability, social justice and economic prosperity (*weak sustainability*). The difference between them is not just a matter of degrees, but a fundamental one as becomes clear when we follow the sustainability debate through to the 1980s and 1990s. R.E. Kim and K. Bosselmann, 'Operationalizing Sustainable Development: Ecological Integrity as a *Grundnorm* of International Law' *Review of European Community & International Environmental Law*, 207 (2015), argue that 'The key argument we put forward is that post-2015 SDGs must be organized around a single priority at the apex of the goal-system hierarchy. We define the priority goal as the protection of the bio-physical preconditions that are essential for long-term sustainable development. [...] We insist that all other interests, such as socio-economic development, albeit important, must be subordinated under this ultimate biophysical priority goal. [...] Integrity is a system property maintained by resilience or robustness of the system. [...] For an effective implementation of the SDGs, the priority goal needs to be legally binding. To that end, the goal should be recognized as a *grundnorm*, and instituted through global eco-constitutionalism. Where there is a regulatory gap, this *grundnorm* fills the void. Where there is already a treaty obligation, it reinforces and clarifies treaty obligations in light of the planetary boundaries framework. The *grundnorm* could be implemented through the upgraded UNEP as a trustee and a legal guardian for the global commons and common concerns of humankind. These institutional building blocks would constitute the core of the next generation of international environmental law, which could be called 'Earth system law'.

[50] According to N. Boeger, 'Sustainable Corporate Governance: Trimming or Sowing?', in M. Pieraccini and T. Novitz, eds, *Legal Perspectives on Sustainability* (Bristol: Bristol University Press, 2020) while express linkages between corporate governance and sustainability are a relatively recent phenomenon, a 'sustainable systems' perspective (opposite to a 'sustainable capitalism') shows that the scope and urgency of sustainability challenges today require more

Sustainability serves both as a means to enhance organizational resilience and a way to increase the resilience of the vulnerable. In fact, sustainability has three dimensions: environmental, economic and social sustainability.

Legal literature stressed the importance of the spatial-temporal categories of universality on the one hand and resilience and adaptive management on the other.[51] The concept of resilience most of the legal scholars refer to is, however, a 'constraint to the administration to improve and elevate the degree of *ecosystems resilience* involved'[52] (italics are by the author). The ecosystem resilience assessment would guide the administrative processes using scientific research, such as planetary boundaries,[53] to identify the tipping points for each ecosystem.

Resilience, however, it isn't only an eco-legal principle (ecological resilience),[54] but also a socio-legal one:[55] in fact concepts such as social ecological resilience,[56]

fundamental systemic revisions, including of the growth objective itself.

[51] A. Buonfrate, 'Ambiente, economia, società, governance: l'epoca delle grandi trasformazioni', in Id and A. Uricchio eds, *Trattato breve di diritto dello sviluppo sostenibile* (Padova: CEDAM, 2023), 31, states that 'In this renewed vision [the fourth era of environmental law] which sees sustainable development as the main instrument of integration and balancing of the environment system with the other two equally complex systems of economy and social inclusion, the spatial-territorial categories of universality (and in particular universal interdependence) on the one hand, and resilience and adaptive management on the other, take on an ultimate and decisive importance'.

[52] M. Monteduro, 'Le decisioni amministrative nell'era della recessione ecologica' *Rivista AIC*, 69 (2018).

[53] This theory was developed by the Stockholm Resilience Centre. J. Rockström et al, 'Planetary boundaries: exploring the safe operating space for humanity' *Ecology and Society*, 14: 32 (2009). In September 2023, a team of scientists quantified, for the first time, all nine processes that regulate the stability and resilience of the Earth system. See J. Richardson et al, 'Earth beyond six of nine Planetary Boundaries' *Science Advances*, 9: 37 (2023).

[54] See L.H. Monteiro De Lima, 'The Principle of Resilience' *Pace Environmental Law Review*, 695-810 (2013); N.A. Robinson, 'The Resilience Principle' *IUCN Academy of Environmental Law EJournal*, 20 (2014) states that 'just as courts have begun to recognize the Principle of Non-Regression, the welfare of both humans and nature requires recognition of Resilience'.

[55] A.E. Quinlan et al, 'Measuring And Assessing Resilience: Broadening Understanding through Multiple Disciplinary Perspectives' *Journal of Applied Ecology*, 677-687 (2016), analyse the multiple resilience definitions (engineering resilience, ecological resilience, social-ecological resilience, social resilience, development resilience, socioeconomic resilience, community resilience, psychological resilience) and the multiple approaches to measure and assess resilience that has emerged in a variety of social-ecological contexts.

[56] The social ecological resilience is the amount of disturbance a system can absorb and remain within a domain of attraction, the capacity for learning and adaptation and the degree to which the system is capable of self-organizing. See S. Carpenter et al, 'From metaphore to measurement: resilience of what to what?' Ecosystem, 765-781 (2001); A.S. Garmestani and C.R. Allen eds, *Social-Ecological Resilience and Law* (New York: Columbia University Press, 2014); A.S. Garmestani et al, 'Can Law Foster Social-Ecological Resilience?' *Ecology and Society*, 37-42 (2013); J. Ebbesson and E. Hey, 'Introduction: Where in Law Is Social-Ecological Resilience?' *Ecology and Society*, 25-28 (2013).

social resilience,[57] development resilience,[58] socioeconomic resilience,[59] and community resilience[60] can be discussed.

One of the limitations in the resilience principle lies in the lack of codification; moreover, the term is often used imprecisely, as it happens with another buzzword.[61] There are few legal documents in which the word 'resilience' is used.[62] On 17 June 2024, the Council adopts *Nature Restoration Law*, which mentions 'resilience' several times but fails to provide a specific definition. In this case, resilience is being considered as an effect of recovery, although these are

[57] Ability of groups or communities to cope with external stresses and disturbances because of social, political and environmental change. See W.N. Adger, 'Social and ecological resilience: are they related?' *Progress in Human Geography*, 347–364 (2010).

[58] Capacity of a person, household, or other aggregate unit to avoid poverty in the face of various stressors and in the wake of myriad shocks over time. This definition has an emphasis on vulnerability. See C. Barrett and M. Constas, 'Toward a theory of resilience for international development applications' *Proceedings of the National Academy of Sciences*, 14625–14630 (2014); K. Pasteur, *From Vulnerability to Resilience: A Framework for Analysis and Action to Build Community Resilience* (Warwickshire: Practical Action Publishing, 2011).

[59] Socioeconomic resilience refers to the policy induced ability of an economy to recover from or adjust to the negative impacts of adverse exogenous shocks and to benefit from positive shocks. See A. Mancini e tal, 'Conceptualizing and measuring the 'economy' dimension in the evaluation of socio-ecological resilience: a brief commentary' *International Journal of Latest Trends in Finance and Economic Sciences*, 190–196 (2012).

[60] A process linking a set of adaptive abilities to a positive trajectory of functioning and adaptation after a disturbance. See F.H. Norris et al, Community resilience as a metaphor, theory, set of capacities, and strategy for disaster readiness. American Journal of Community Psychology, 127-150 (2008).

[61] C. Inguglia, 'Resilienza' *Risk elaboration*, 37-52 (2020).

[62] The most relevant is Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters Extract from the final report of the World Conference on Disaster Reduction (A/CONF.206/6). The Conference provided a unique opportunity to promote a strategic and systematic approach to reducing vulnerabilities and risks to hazards. It underscored the need for, and identified ways of, building the resilience of nations and communities to disasters. The framework recalls the notion given in 2004 by the United Nation Interagency Secretariat of International Strategy for Disaster Reduction. Resilience is the capacity of a system, community, or society potentially exposed to hazards to adapt, by resisting or changing in order to reach and maintain an acceptable level of functioning and structure. This is determined by the degree to which the social system can organise itself to increase this capacity for learning from past disasters for better future protection and to improve risk reduction measures. The same notion is recalled in Communication from the Commission to the European Parliament and the Council, *The EU approach to resilience: Learning from food security crises*, COM(2012) 586, 3 October 2012. For a broader reflexion on resilience, see M. Ungar, *Multisystemic Resilience. Adaptation and Transformation in Contexts of Change* (Oxford: Oxford Academic, 2021); J. Rifkin, *L'età della resilienza. Ripensare l'esistenza su una terra che si rinaturalizza* (Milano: Mondadori, 2022). Resilience-based and adaptive solutions have been integrated into the Sustainable Development Goals 2030 Agenda, the Climate Goals of the 2015 Paris Agreement and, most recently, into the European policies of the Green Deal and the Next Generation EU. Resilience in European strategies to achieve the goal of competitive sustainability (Communication from the Commission to the European Parliament and the Council 2020 Strategic Foresight Report Strategic Foresight – Charting The Course Towards A More Resilient Europe, 2020, 493final), is defined as 'the ability not only to withstand and cope with challenges but also to transform in a sustainable, fair, and democratic manner'. See A. Buonfrate, n 51 above, 5-6.

two distinct concepts. Meanwhile, Art 3 defines 'restoration' as

> 'the process of actively or passively assisting the recovery of an ecosystem in order to improve its structure and functions, with the aim of conserving or enhancing biodiversity and ecosystem resilience, through improving an area of a habitat type to good condition, re-establishing favourable reference area, and improving a habitat of a species to sufficient quality and quantity'.

Resilience, however, is not simply a 'recovery'; instead, it involves adaptation and, to some extent, transformation.

It is worth considering, even though the Court does not mention it, the entire European environmental legislation, especially Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021, which establishes the Recovery and Resilience Facility. Recital 23 of this regulation states that 'the Facility should support activities that fully respect the climate and environmental standards and priorities of the Union and the principle of 'do no significant harm' (DNSH) within the meaning of Art 17 of Regulation (EU) 2020/852 of the European Parliament and of the Council'.[63] This rule also proves the link between resilience and sustainability. The DNSH principle is based on the provisions of the Taxonomy for Sustainable Finance, adopted to promote private sector investments in green and sustainable projects, and help achieve the goals of the Green Deal. The regulation identifies six criteria for assessing how each economic activity contributes in practice to protecting the ecosystem without compromising environmental objectives. The fifth criterion focuses on the prevention and reduction of air, water, and soil pollution.

Complying with the applicable EU and national environmental law is a separate obligation and does not waive the need for a DNSH assessment. However, it strongly indicates that the measure does not entail environmental harm. In fact, some objectives covered by Art 17[64] are not yet fully incorporated in the existing EU Environmental Legislation.

On 25 July 2024, the Directive on corporate sustainability due diligence (Directive 2024/1760) entered into force.[65] The directive aims to ensure that

[63] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088. To assist national authorities in the preparation of the Recovery and Resilience Plans under the Recovery and Resilience Facility Regulation, the European Commission has enacted the technical guidance on the application of 'do no significant harm' under the Recovery and Resilience Facility Regulation (2021/C58/01). C. De Vincenti, 'Il principio DNSH: due possibili declinazioni' *www.astrid-on-line* (2022); R. Rota, 'Riflessioni sul principio "do not significant harm" per le valutazioni di ecosostenibilità: prolegomeni per un nuovo diritto climatico-ambientale' *www.astrid-on-line*, (2021).

[64] Regulation (EU) 2020/852 of the European Parliament and of the Council of June 18, 2020, *On the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088*, *Taxonomy Regulation*.

[65] See V.G. Corvese, 'La proposta di direttiva sulla Corporate Sustainability Due Diligence

companies active in the internal market contribute to sustainable development and facilitate the transition towards more sustainable economies and societies. This goal can be achieved through the identification, prevention, mitigation, and minimisation of potential or actual adverse impacts on human rights and the environment caused by a company's own operations, subsidiaries, and value chains.

Sustainability and resilience are not just principles to be complied with in accordance with the European legislation. Organizations increasingly seize emerging opportunities arising from a supply chain management sustainable and resilient approach.[66] Supply chain resilience (SCRes) is a relatively recent phenomenon, popularised in 2003, that focuses on the adaptive capability to prepare, react to an unforeseen disruption, restore regular activities, or to move towards a different and more desiderable state.[67]

In the case at hand referred to the ECJ, the Italian Government considered socio-economic difficulties, but only with the aim of justifying the infringement, despite being a topic with two aspects take into account, even if we look at the necessary protection of the vulnerable.

As recognized by influential economists 'the basic idea of expanding "human capability" or of "human development" [...] involves the assertion of the unacceptability of [such] bias and discrimination'. The demand for sustainability is a reflection of the universality of rights. 'That universalism also requires that in our anxiety to protect the future generations, we must not overlook the pressing claims of the less privileged today'.[68] It is also useful to look to the studies that

e i suoi (presumibili) effetti sul diritto societario italiano' *www.orizzontideldirittocommerciale.it*, (2023); E. Barcellona, 'La sustainable corporate governance nelle proposte di riforma del diritto europeo: a proposito dei limiti strutturali del c.d. stakeholderism' *Rivista delle società*, 1–52 (2022); S. Bruno, 'Il ruolo della s.p.a. per un'economia giusta e sostenibile: la Proposta di Direttiva UE su "Corporate Sustainability Due Diligence". Nasce la stakeholder company?' *Rivista di diritti comparati*, 303–338 (2022)*;* V.G. Corvese, 'La sostenibilità ambientale e sociale delle società nella proposta di Corporate Sustainabilty Due Diligence Directive (dalla «insostenibile leggerezza» dello scopo sociale alla «obbligatoria sostenibilità» della due diligence' *Banca impresa società*, 391–432 (2022); G.D. Mosco and R. Felicetti, 'Prime riflessioni sulla proposta di direttiva UE in materia di Corporate Sustainability Due Diligence' *Analisi giuridica dell'economia*, 185–211 (2022); G. Racugno and A. D. Scano, 'Il dovere di diligenza delle imprese ai fini della sostenibilità: verso un Green Deal europeo' *Rivista delle società*, 726–744 (2022); U. Tombari, 'Riflessioni sullo "statuto organizzativo" dell'"impresa sostenibile" tra diritto italiano e diritto europeo' *Analisi giuridica dell'economia*, 135–144 (2022).

[66] M. Negrietal, 'Integrating sustainability and resilience in the supply chain: A systematic literature review and a research agenda' *Business Strategy and the Environment*, 2859 (2021).

[67] B. Fahimnia and A. Jabbarzadeh, 'Marrying supply chain sustainability and resilience: A match made in heaven' 91 *Logistics and Transportation Review,* 306-324 (2016), underline that the relationship between the two concepts, namely resilience and sustainability, is still ambiguous. M.V. Carissimi et al, 'Crossing the chasm: Investigating the relationship between sustainability and resilience in supply chain management' *Cleaner Logistics and Supply Chain*, 5 (2023), observe that resilience is either interpreted as the new state of equilibrium generated by the adoption of sustainable strategies, or described as a component of sustainability.

[68] S. Anand and A. Sen, 'Human Development and Economic Sustainability' *World development*, 2029-2030 (2000). They analyse the linkage between the claims of the present

explores alternative economic concepts that focus both on sustainability and distributive justice[69] to better understand the possible developments in the legal scholars's teories and case-law of the European Court. Sustainable development could be seen in terms of social-ecological resilience to overcome the nature-culture-dualism.[70]

In fact, in May 2022, Advocate General Kokott, in the *Commision* v *French Republic* case, addressed the false problem of a large number of claims for compensation due to infringements of air quality standards. Advocate General Kokott pointed out that the burden of exceeding these limit values falls on certain groups who live or work in particularly polluted areas, not affecting everyone equally. These groups often consist of people with low socio-economic status, who heavily rely on judicial protection. In other words, they are the vulnerable ones mostly affected by environmental issues.

The concept of 'vulnerability' has gained a significant importance in the legal field[71] and also within the jurisprudence of the CJEU.[72]

One of the interpretations of this notion can be traced back from disaster studies,[73] which introduced a 'different, systemic concept of vulnerability with

and those of the future generations, in term of the broad notion of sustainability, integrating the concerns of the present and the future.

[69] J. Peeters, *Sustainability and new economic approaches. An exploration for social work research. SPSW Working Paper No.CeSo/SPSW/2022-01* (Leuven: Centre for Sociological Research, 2022).

[70] J. Peeters, 'Sociaal-ecologische praktijk: een oriënterend kader', in Id ed, *Veerkracht en burgerschap. Sociaal werk in transitie* (Berchem: EPO 2015), 123-141.

[71] In legal literature, see T.H. Casadei, *Diritti umani e soggetti vulnerabili. Violazioni, trasformazioni, aporie* (Torino: Giappichelli, 2012); S. Zullo, 'Lo spazio sociale della vulnerabilità tra pretese di giustizia e pretese di diritti. Alcune considerazioni critiche' *Politica del diritto*, 475-507 (2016); F. Rossi, 'Forme della vulnerabilità e attuazione del programma costituzionale' *Rivista AIC*, 1–61 (2017); O. Giolo and B. Pastore eds, *Vulnerabilità. Analisi multidisciplinare di un concetto* (Roma: Carocci, 2018); A. Gentili, 'La vulnerabilità sociale. Un modello teorico per il trattamento legale' *Rivista critica di diritto privato*, 41-64 (2019); B. Pastore, *Semantica della vulnerabilità, soggetto, cultura giuridica* (Torino: Giappichelli, 2021); P. Corrias, 'Il mercato come risorsa della persona vulnerabile' *Rivista di diritto civile*, 968-990 (2022); E. Battelli, 'Vulnerabilità della persona e debolezza del contraente' *Rivista di diritto civile*, 941-967 (2022).

[72] A. De Giuli, 'Sul concetto di vulnerabilità secondo la Corte di Giustizia UE' *Diritto penale e uomo*, 1–19 (2020). Most of the judgments that use that notion deal with environmental law, especially Directive 91/676/CEE, concerning the protection of waters against pollution caused by nitrate from agricultural sources. The scheme of protection that involves precise management measures which the Member States must impose on farmers and which considers the more or less vulnerable nature of the environment receiving the effluent. See Case C-121/03*Commission of the European Communities* v *Kingdom of Spain*, Judgment of 8 September 2005, §4, available at www.eur-lex.europa.eu.

[73] The disaster studies were heralded by the work of Gilbert White, in the 1950s; towards the 1980s, anthropologists, sociologists and geographers increasingly began to challenge the technocratic, hazard-centred approach to disaster. This culminated in the 1983 landmark publication of 'Interpretations of Calamity from the Viewpoint of Human Ecology' by Kenneth Hewitt. He postulated that especially in developing countries, structural factors such as increasing poverty and related social processes accounted for people and societies' vulnerability to disaster. Increased attention on environmental processes and human-induced climate change has marked the advent

resilience as its counterpart based on nonlinear systemic dynamics leading to adaptation or maladaptation'.[74]

V. The Need to Connect the Limits Imposed On The Member State With Issues Of Environmental Justice and Health Protection

The Court could have connected the limits imposed on the Member State with issues of environmental justice and health protection. The European Environment Agency affirms that communities with lower income and education levels are often more impacted by air pollution.[75]

There are evident connections between the stratification of inequalities and the exposure to environmental risk and damage. This relationship is apparent when examining left-behind places or areas of sacrifice. Some authors suggest including the environmental dimension in the notion of left-behind places, recognizing exposure to toxic pollution as a structural socio-economic driver of degradation that requires consideration.[76]

These physical places are shaped by two mechanisms. The first is the notion of the spatiality of power: for instance, the choice to place the polluting plant in a given territory is based on choices of profitability and advantage (eg, placing it in an area that already has a high level of deprivation). The second is the stratification of inequalities: these are the territories where they experience both the disadvantages of globalization and deindustrialization. Highly toxic pollution tends to be concentrated across these areas, further aggravating socio-economic degradation (including unemployment and reduced employment opportunities). In this respect, environmental and social inequality become more stratified.[77]

The most interesting results of the application of the principle of sustainability are obtained, in fact, when the judgment moves from the level of principles to that of the tools to protect fundamental rights.[78] On 8 October 2021, the United

of another disaster studies paradigm in the 1990s. This paradigm emphasises the mutuality of hazard and vulnerability to disaster due to complex interactions between nature and society. D. Hilhorst, 'Unlocking disaster paradigms: An actor-oriented focus on disaster response' *www.ippv.ch*, (2019).

[74] G. Frerks et al, 'The politics of vulnerability and resilience' *Ambiente & Sociedade*, 106 (2011).

[75] EEA Report No 22/2018, *Unequal exposure and unequal impacts: Social vulnerability to air pollution, noise, and extreme temperatures in Europe*. In the Italian context, see L. Bauleo et al, 'SENTIERI Project: Air pollution and health impact of population living in industrial areas in Italy' *Epidemiologia e prevenzione*, 338-353 (2023). The results of the study are suggestive of an impact on health from PM exposure in the industrial areas included in the Sentieri, with a greater impact in the vicinity of the plants, recommending the implementation of urgent impact reduction actions. The Sentieri project provides for the periodic epidemiological surveillance of populations resident in the municipalities that fall within the site of national interest for environmental remediation(SIN).

[76] V. Bez and M.E. Virgillito, 'Toxic pollution and labour markets: Uncovering Europe's left-behind places' *LEM Papers Series*, 5 (2022).

[77] ibid 2.

[78] C.M. Masieri, 'Il principio di sostenibilità nella *Climate Change Litigation*', in S. Lanni

Nations Human Rights Council (UNHRC) adopted Resolution 48/13, which recognised, for the first time, that access to a healthy and sustainable environment is a universal right. The premise of resolution acknowledges that although the consequences of environmental damage affect all individuals and communities around the world, they are most felt by members of the population who are already vulnerable, such as indigenous peoples, elderly people,[79] people with disabilities, women, young women[80] and children in general.[81] This means to adopt an intersectional approach. The concept of intersectionality[82] describes the ways in which systems of inequality based on gender, race, ethnicity, sexual orientation, gender identity, disability, class and other forms of discrimination 'intersect' to create unique dynamics and effects. Indeed, when incidental shocks impact structural vulnerabilities, both normal and extreme events turn into disaster. As explained by the metaphor of nutcracker, the vulnerable are simply crushed[83] in such situations. The European Parliament, in its resolution on the EU biodiversity

ed, *Sostenibilità globale e culture giuridiche comparate. Atti del Convegno SIRD Milano, 22 aprile 2022* (Torino: Giappichelli Editore, 2022), 28. P. Gailhofer et al, eds, *Corporate Liability for Transboundary Environmental Harm. An International and Transnational Perspective* (Cham: Springer, 2022), 122-123 state that 'a closer look at the substantial links between human rights and environmental protection has shown that there is considerable potential to improve the prospects of a (human) rights-based approach to environmental protection'.

[79] Eur. Court H.R., Grand Chamber, *Verein Klimaseniorinnen Schweiz and others* v *Switzerland*, Judgment of 9 April 2024, available at www.hudoc.echr.coe.it. The applicants, an association of senior women and four elderly women, took the Swiss government to the Court. They complain of health problems which worsen during heatwaves and which impact their living and health conditions. The Court found a violation of the right to respect for private and family life (Art 8) and access to court (Art 6, § 1).

[80] The link between gender (and gender discrimination) and climate change has become a constant feature of recent international documents. COP20, in 2014, had already formed the programme work on gender. Decision 3/C 25, § 11 'encourages Parties to appoint and provide support for a national gender and climate change focal point for climate negotiations, implementation and monitoring'.

[81] In March 2023, European Environmental Agency published a report entitled *Air pollution and children's health*. Children are particularly vulnerable to air pollution. Over 1,200 deaths in people under 18 years of age are estimated to be caused by air pollution every year in EEA member and collaborating countries.

[82] K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' *University of Chicago Legal Forum*, 139-167 (1989). For a framing of the origins of the notion of intersectionality and its application, also in supranational and national anti-discrimination protection, see B. G. Bello, *Intersezionalità. Teorie e pratiche tra diritto e società* (Milano: Franco Angeli, 2020). A review of international, European and national case law is contained in INtersecting GRounds of Discrimination (INGRID), 'L'intersezionalità come approccio giuridico: una prospettiva multilivello tra diritto internazionale, diritto europeo, diritto italiano e prospettive di comparazione', available at www.projectingrid.eu (2022). M. Barbera and A. Guariso eds, *La tutela antidiscriminatoria. Fonti, strumenti, interpreti*, (Torino: Giappichelli, 2019), 57 observe that 'although multiple and intersectional discrimination are the norm rather than the exception, up to now, in cases where multiple discrimination was recognised, the Court of Justice appears unwilling to use the cognitive and normative value of the notion'.

[83] G. Frerks and J. Warner, n 75 above, 108.

strategy for 2030,[84] considers that the right to a healthy environment should be recognised in the EU Charter and that the EU should take the lead on the international recognition of such a right. The majority of the Member States of the United Nations, including most EU countries, legally recognise the right to a safe, clean, healthy, and sustainable environment.[85]

Recent climate change litigations[86] demonstrate the increasingly strong link between environmental law and human rights.

Climate change has been the object of a complex international regulatory process, starting with the United Nations Framework Convention on Climate Change (UNFCCC) in 1992 via the Kyoto Protocol of 2005 to the Paris Agreement of 2015.

In general climate litigation, the vast majority of cases have been brought against states and public authorities by individuals, NGOs, or both acting together, and by corporations. Private corporation, emitters of greenhouse gases, are potential respondents too.[87]

The applicants in rights-based climate cases typically consist in individuals and groups or a combination of individuals and groups, and the majority of cases have been brought against states. Applicants in rights-based cases can also seek compensation for harms associated with the impact of climate change, but there

[84] European Parliament, resolution of 9 June 2021, *the EU Biodiversity Strategy for 2030: Bringing nature back into our lives* (2020/2273(INI)).

[85] Human Rights Council, *Right to a healthy environment: Good practices. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/43/53, March 2020.

[86] For a comparative law perspective on climate change litigation, as developed in US and in the EU, see B. Pozzo, 'La climate change litigation in prospettiva comparatistica' *Rivista giuridica dell'ambiente*, 299–318 (2021). See also, A. Giordano, 'Climate change e strumenti di tutela. Verso la public interest litigation?' *Rivista italiana di diritto pubblico comunitario*, 763–790 (2020). F. Garelli, 'The report on the promotion and protection of human rights in the contest of climate change. A pragmatic analysis' *federalismi.it*, 207-233 (2023); E. Fiorini Beckhauser, 'A metamorfose do Direito frente à mudança climática e a contribuição da dimensão ecológica dos direitos humanos' *Rivista quadrimestrale di diritto dell'ambiente*, 462–488 (2021); V. Zampaglione, 'L'accesso alle informazioni ambientali e le prime azioni per danno da cambiamento climatico. Esperienze a confronto' *AmbienteDiritto.it*, 1–30 (2022); L. Moramarco, 'La disapplicazione eccentrica del diritto nazionale per contrasto con la convenzione di Aahrus', comment on Case C-873/19 *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland*, Judgment of 8 November 2022 *Responsabilità civile e previdenza*, 458–472 (2023).

[87] See G. Wagner and A. Arntz, 'Liability for Climate Damage under the German Law of Torts' SSRN, 34 (2021). The authors analyse the climate change litigation between a private plaintiff and the RWE, a major German public utility, has been sued in damages for harm allegedly caused by its carbon emissions (Essen Regional Court, *Lluiya* v *RWE Ag*, case no 2 O 285/15). They conclude that 'the emission rights trading scheme, agreed in Kyoto, and transposed into German law is the adequate response. Tort law is not'. The claimant is a citizen of a Peruvian city and he demands that RWE contributes to the costs of safety measures to be taken at Laguna Palcacocha in proportion to RWE's purported share (0.47%) in anthropogenic emissions of greenhouse gases since the beginning of the industrialization. In the common law scenario, M. Spitzer and B. Burtscher, 'Liability for climate change: cases, challenges and concepts' *Journal of European Tort Law*, 148 (2017), observe that 'if we look at climate change litigation against private entities, we must say that it died where it was born [...] we doubt that climate change is a good case for tort law".

are no examples of serious monetary compensation.[88]

In the European scenario, the leading case, as well known, is *Netherlands* v *Urgenda Foundation*: although the Supreme Court recognized that climate change is a consequence of collective human activities that cannot be solved by one state on its own, it held that the Netherlands is individually responsible for failing to do its part to counter the danger of climate change, which, as the Court affirmed, inhibits enjoyment of ECHR rights (Arts 2 and 8). It's remarkable that the Dutch Supreme Court 'has gone a long way towards anchoring climate change issues to human rights'.[89]

In 2021 the German Federal Constitutional Court found that Germany's climate protection law violates the fundamental rights of young people and future generations, and it must therefore be amended and improved.[90] The plaintiffs argued that the climate law violated their constitutional rights to human dignity, life and physical integrity, freedom of occupation, and property.[91]

In the Italian climate change litigation, called *Giudizio Universale*,[92] the plaintiffs claim the non-contractual liability of the Italian State (Art 2043 Civil Code), underlining the link between climate change and human rights. The responsibility of the State is also additionally based on Art 2051 Civil Code. On 26 February 2024 the Civil Tribunal held the case inadmissible due to the lack of jurisdiction.[93]

The Court of Justice examined its first case related to climate change with the so-called *Carvalho case*.[94] The Court, in both instances, did not address the

[88] A. Savaresi and J. Setzer, 'Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers' *Journal of Human Rights and the Environment*, 15 (2022). In *Notre Affaire à Tous et al* v *France*, the plaintiffs requested symbolic monetary compensation (1 euro) for the moral and ecological damages they allegedly suffered. See M. Poto, 'Salvare la nostra casa comune è l'affaire du siècle', critical comment to Tribunal Administratif de Paris, 3 February 2021 *Responsabilità civile e previdenza*, 1047–1059 (2021); R. Mazza, 'La legittimazione ad agire delle associazioni ambientaliste a partire dall' "affaire du siècle" francese' *Il diritto dell'agricoltura*, 121–140 (2021).

[89] M.F. Cavalcanti and M.J. Terstegge, 'The Urgenda case: the dutch path towards a new climate constitutionalism' *DPCE Online* (2020).

[90] On climate litigation in Germany, see M. Poto and A. Porrone, 'The steady ascent of environmental and climate justice: Constituent elements and future scenarios' *Responsabilità civile e previdenza*, 1783–1797 (2021); G. Puleio, 'Rimedi civilistici e cambiamento climatico antropogenico'*Persona e Mercato*, 486-489 (2021).

[91] R. Montaldo, 'La neutralità climatica e la libertà di futuro (BVerfG, 24 marzo 2021)' *Dirittocomparati.it*, 1-5 (2021). The author observes that the decision of the Bundesverfassungsgericht 'is innovative if compared to previous European climate litigation cases: the Court goes further than meeting the climate neutrality objectives imposed by international law, taking them into account for the interpretation of the Fundamental Law in general, and in particular the obligations under art. 20th GG'.

[92] About italian climate litigation, see L. Saltalamacchia et al, ' "Giudizio Universale". Quaderno di sintesi dell'azione legale', available at www.giudiziouniversale.eu (2021).

[93] L. Moramarco, 'Inammissibile la climate litigation davanti al giudice civile', available at dirittoantidiscriminatorio.it (2024).

[94] Case T-330/18 *Armando Carvalho et al* v *European Parliament, Council of the European Union* (Court of First Instance, 8 May 2019); Case C-565/19/P *Carvalho et al* v *European Parliament,*

substance of the case (ie, the obligation of the European institutions to adopt stricter requirements for greenhouse gas emissions). Instead, the Court ruled on the inadmissibility of the action due to the lack of *locus standi*.[95]

In general, the success of climate change litigation depends on national tort law, which can vary considerably from state to state but in the case-law one can identify 'three bedrock requirements for a successful claim': a damage, which is inflicted by misconduct or breach to a duty of care,[96] and a causal link between them.[97] Because of the difficulty to make a case for misconduct, strict liability is often claimed by the plaintiffs.[98] This option appears to be more consistent with the polluter pay principle[99] and with the current legal regime on environmental damage.[100] However, case law has not afforded any definitive answer to that basic question yet.

The problem of proving a causal connection arises across the spectrum of climate change litigation, both in common law and in civil law systems. The multi-factorial nature of climate change damage requires the adaptation of the system

Council of the European Union, Judgment of 25 March 2021, available at www.eur-lex.europa.eu. Another less well-known case is Case T-141/19 *Peter Sabo et al* v *European Parliament, Council of the European Union* (Court of First Instance, 6 May 2020); Case C-297/20 P *Peter Sabo et al* v *European Parliament, Council of the European Union*, Judgment of 14 January 2021, available at www.eur-lex.europa.eu.

[95] See M. Messina, 'Il locus standi delle persone fisiche e giuridiche e il problema dell'accesso alla giustizia climatica dinanzi al giudice dell'UE dopo la sentenza Carvalho: necessità di riforma della formula "Plaumann"?' *Rivista giuridica dell'ambiente*, 121–148 (2022); F. Gallarati, 'Caso Carvalho: la Corte di Giustizia rimanda l'appuntamento con la giustizia climatica' *DPCE on line*, 2603–2613 (2021).

[96] M. Spitzer, B. Burtscher, n 86 above, 147, observe that 'in US the cases' - when the respondents are the State – 'were not lost on their merits, but on particular doctrines of separation of powers. However, such US particularities do not necessarily have to stand in the way of European claims'. Moreover, the standard of behaviour of the private corporations can be influenced by the public authorisation regime.

[97] ibid 155.

[98] ibid 165 observe that 'since it will be hard to make a case for misconduct, strict liability could come into play'.

[99] The polluter pay principle was implemented by Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. See K.C. Tan, 'Climate reparations: Why the polluter pays principle is neither unfair nor unreasonable' *Wiley Interdisciplinary Reviews: Climate Change*, 827-832 (2023); A. Mauro, 'Il principio 'chi inquina paga' nelle sfide della environmental justice' *Giustiziacivile.com*, 1-23 (2022); U. Salanitro, 'Il principio 'chi inquina paga': responsibility e liability' *Giornale di diritto amministrativo*, 33-38 (2020); F. Giampietro, *La responsabilità per danno all'ambiente. L'attuazione della direttiva 2004/35/CE* (Milano: Giuffrè, 2006); B. Pozzo, *La responsabilità ambientale. La nuova Direttiva sulla responsabilità ambientale in materia di prevenzione e di riparazione del danno ambientale* (Milano: Giuffrè, 2005).

[100] V. Corriero, 'The Social-Environmental Function of Property and the EU Polluter Pays Principle: The Compatability between Italian and European Law' *Italian Law Journal*, 495 (2016), underlines that 'the current legal regime on environmental damage has finally – despite persistent contradictions – brought the Italian system into line with EU legislation, allowing for the application of strict liability to dangerous activities listed in Annex V (as well as to energy industry, refineries, coke ovens, chemical activity, mining, production and processing of metals and waste'.

of liability. A legal scholar proposes the model of market share liability for companies and state.[101] Another issue is that applicants normally act to protect a collective interest. According to some legal scholars[102]their rights could qualify as trans-subjective rights - subjective civil situations whose object transcends the holder - and, therefore, one should imagine a joint destination of the compensation for the damage, for example by setting aside the sums for future generations.[103]

Climate damage cannot be equated to environmental damage,[104] but civil liability could be used as remedy in both cases and the results of the theoretical reflections on the role and function of civil liability should certainly be considered.

VI. Conclusion

The analysis conducted in the Court of Justice's ruling shows the ineffectiveness of the mere imposition of obligations on Member States to protect the right to breathe clean air. The systematic infringement of the limits set by the European directive by the Italian State leads the interpreter to question the need to use more effective remedies, in line with the proposal for a revised Ambient Air Quality Directives. One should also point out the conflict of the action of the Italian State with two principles binding in European and national legislation: the principle of sustainable development and the emerging principle of resilience. With the Italian reform of Arts 9 and 41 of the Constitution,[105] approved in February

[101] M. Zarro, *Danno da cambiamento climatico e funzione sociale della responsabilità civile* (Napoli: Edizioni scientifiche italiane, 2022), 211.

[102] V. Conte, 'Per una teoria civilistica del danno climatico. Interessi non appropriativi, tecniche processuali per diritti trans-soggettivi, dimensione intergenerazionale dei diritti fondamentali' *DPCE on line*, 66–82 (2023). She refers to the theory of trans-subjective rights developed by P. Femia, 'Transsubjektive (Gegen) Rechte, oder die Notwendigkeit die Wolken in einen Sack zu fangen', in A. Fischer-Lescano et al eds, *Gegenrechte. Recht jenseits des Subjekts* (Tübingen: Mohr, 2018), 343–355. P.L. Portaluri, 'Lupus lupo non homo. Diritto umano per l'ethos degli "animali"?' *Il diritto dell'economia*, 658–774 (2018), delving into the extension of legal subjectivity to non-human creatures, analyses the recent theories on trans-subjective rights, situations disengaged from the positivist dogma of the subjective definition of the legal claim.

[103] M. Zarro, n 99 above, 239.

[104] V. Conte, n 100 above, identifies three specific characteristics of climate damage: the global nature, the 'intertemporal' dimension and the inner collective nature of the damage. Therefore the author assumes that the environmental discipline does not apply to the climate damage. Similarly, G. Puleio, 'Rimedi civilistici e cambiamento climatico antropogenico' *Persona e Mercato*, 479–480 (2021). M. Zarro, n 99 above, underlines the private law's role in climate change litigation. The remedy of civil liability is required because of the inadequacy of public law; private individuals have an important role in the implementation of environmental and social justice. In the context of environmental and climate protection, we should consider the deterrent and sanctioning function of civil liability instead of considering merely the preventive and reparative function. See also J. Rossi and J.B. Ruhl, 'Adapting Private Law for Climate Change Adaptation' *Vanderbilt Law Review*, 827-898 (2023). They observe that 'for the vast majority of climate adaptation claims, courts could reinforce the objectives of private law through traditional remedies, such as facilitating compensation, rather than ordering injunctive relief or engaging in judicial selection of adaptation responses'.

[105] M. Cecchetti, 'Virtù e limiti della modifica degli articoli 9 e 41 della Costituzione' *Corti*

2022, the environment is now included in the Constitution as one of the fundamental principles, and the environment represents a limit to the economic activities. This reform can act as a catalyst for policies oriented towards a multi-systemic resilience approach.

Adopting a resilient approach means to 'adopt a system view when regulating natural resources'[106] and a vision that considers all the possible interactions and intersections concerning vulnerability and discrimination. To balance flexibility with certainty and accountability, there are three possible solutions. First, to incorporate substantive standards into laws that frame adaptive management and governance, linked to prohibitions against exceeding particular ecological limits (ie the limit for NO_2). Second, to use default rules that must apply if a particular ecological threshold is reached. Last, recognizing that 'litigation can serve as a healthy source of destabilization that could shift a social-ecological system along the adaptive cycle'.[107]

supreme e salute, 127–154 (2022); Id, 'La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente: tra rischi scongiurati, qualche virtuosità (anche) innovativa e molte lacune' *Forum di Quaderni costituzionali*, 287-314 (2021); Y. Guerra and R. Mazza, 'La proposta di modifica degli artt. 9 e 41 Cost.: una prima lettura' *Forum di Quaderni costituzionali*, 109–144 (2021); G. Santini, 'Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost.' *Forum di Quaderni costituzionali*, 460-481 (2021); G. Arconzo, 'La tutela dei beni ambientali nella prospettiva intergenerazionale: il rilievo costituzionale dello sviluppo sostenibile alla luce della riforma degli articoli 9 e 41 della Costituzione' *Il diritto dell'economia*, 157-185 (2021); A. Lauro, 'Dalla tutela ambientale in Costituzione alla responsabilità politica (anche) verso le future generazioni? Detti e non-detti di un principio di origine giurisprudenziale' *BioLaw Journal - Rivista di BioDiritto*, 115–134 (2022); L. Bartolucci, 'Le generazioni future (con la tutela dell'ambiente) entrano "espressamente" in Costituzione' *Forum di Quaderni costituzionali*, 20–39 (2022); R. Montaldo, 'La tutela costituzionale dell'ambiente nella modifica degli artt. 9 e 41 Cost.: una riforma opportuna e necessaria?' *Federalismi.it*, 187–212 (2022); V. Sartoretti, 'La riforma costituzionale "dell'ambiente": un profilo storico' *Rivista giuridica dell'edilizia*, 119–138 (2022); F. Fracchia, 'L'ambiente nell'art. 9 della Costituzione: un approccio in "negativo" ' *Il diritto dell'economia*, 15–30 (2022); E. Guarna Assanti, 'La nuova Costituzione 'ambientale': note critiche sulla riforma costituzionale' *Il diritto dell'agricoltura*, 309–334 (2022); M. Delsignore et al, 'La riforma costituzionale e il nuovo volto del legislatore nella tutela dell'ambiente' *Rivista giuridica dell'ambiente*, 1–38 (2022); M. Pierri, 'Il limite antropocentrico dello sviluppo sostenibile nella prospettiva del personalismo costituzionale. Riflessioni a margine della riforma degli articoli 9 e 41 della Costituzione italiana' *Rivista quadrimestrale di diritto dell'ambiente*, 234–297 (2022); G. Marcatajo, 'La riforma degli articoli 9 e 41 della Costituzione e la valorizzazione dell'ambiente' *Rivista giuridicaAmbienteDiritto.it*, 1–15 (2022); M. Pennasilico, 'La riforma degli articoli 9 e 41 della Costituzione: "svolta ecologica" o "greenwashing costituzionale"?' *Rivista quadrimestrale di diritto dell'ambiente* (forthcoming).

[106] T.-L. Humby, 'Law and resilience. Mapping the literature' *Seattle Journal of Environmental Law*, 116 (2014).

[107] ibid 124. C. Arnold and L. Gunderson, 'Adaptive Law and Resilience' *Environmental Law Reporter News and Analysis*, 10442 (2013), observe that 'adaptive law principles require linkages between legal processes and nonlegal processes and forces, because law is not sufficient by itself to achieve environmental preservation. Legal reforms, including reforms aimed at making law and legal institutions more adaptive, must consider not only the many effects that they will have on nature and society, but also the those that nature and society, because of their complex, interdependent, dynamic interconnections (ie, panarchy), have on law and legal reform'. M. Cafagno, *Principi e strumenti di tutela dell'ambiente* (Torino: Giappichelli, 2007) 336. See also J.B. Ruhl, 'General Design Principles for Resilience and Adaptive Capacity in Legal Systems - With Applications to Climate Change Adaptation' *North Carolina Law Review*, 1374-1403 (2011).

Hard Cases

Digital Surveillance Under European Scrutiny. A Dangerous Alliance Unveiled

Luca Ettore Perriello*

Nothing was your own
except the few cubic centimeters in your skull
George Orwell, 1984

Abstract

Digital surveillance, whether targeted or mass, has drawn scrutiny from European courts for potentially violating human rights. The balance between security and privacy is challenging, with states often implementing invasive measures in response to threats like terrorism. The European Court of Human Rights and the Court of Justice of the European Union have been striving to balance state security needs with individual rights, reflecting growing public concern over surveillance. Their responses tend to accommodate national security demands while progressively legitimizing digital surveillance. The courts are converging towards a nuanced approach, emphasizing procedural safeguards rather than drawing red lines.

I. Digital Surveillance and Human Rights

In an increasingly digital world, human rights are vulnerable to being infringed by the illegal or improper use of new technologies. Digital surveillance, which states use to neutralize threats from individuals or groups (targeted surveillance) or to implement broad defense strategies (mass surveillance), has been brought to the attention of supranational courts due to potential violations of fundamental rights and freedoms, particularly the right to privacy and freedom of opinion and expression.[1]

The right to privacy, an aspect of the broader right to respect for private and family life, receives multilevel protection as it is provided for in many international and European charters, such as Art 12 of the Universal Declaration of Human Rights, Art 8 of the European Convention on Human Rights (ECHR), and Art 7 of the Charter of Fundamental Rights of the European Union (which today has

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[1] A. Lubin, 'The Rights to Privacy and Data Protection Under International Humanitarian Law and Human Rights Law', in R. Kolb et al eds, *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham, UK – Northampton, MA: Edward Elgar Publishing, 2013), 462.

the same legal value as the Treaties under Art 6 of the Treaty on European Union). Art 8 of the Charter lays down a specific right to the protection of personal data, which must be processed for specific purposes and based on the consent of the individual or another legitimate basis provided for by the law. Every individual has the right to access data collected about them and to obtain rectification of any errors, with these rights being overseen by an independent authority.

Freedom of opinion and expression (Art 19 of the Universal Declaration, Art 10 of the ECHR, Art 10 of the Charter) enjoys privileged protection, as any limitations are allowed only for the expression, not the opinion behind it. The negative aspect of this right includes the right not to be identified for holding a particular opinion, that is, the right to digital anonymity and to freely access encryption techniques. Interpretation of the right to freedom of opinion and expression constantly evolves due to the hermeneutic activities of supranational courts and quasi-judicial bodies operating in the international context.

Privacy and the freedom to form and express opinions have evolved from being mere individual aspirations to constitutional and collective values,[2] aimed not only at preserving personal freedom but also at strengthening the liberal democratic model[3] where anyone can freely participate and communicate without interference. In the European Union (EU), the constitutionalization of these rights has meant that the regulation of personal data processing is no longer addressed solely from a market perspective, as if the goal were only to prevent member states from restricting the free movement of data with undeniable economic value. The Treaty of Lisbon, establishing an autonomous basis for the adoption of secondary legislation on data protection (Art 16(2) of the Treaty on the Functioning of the European Union), has imposed an obligation on EU institutions to pass legislation implementing the right to data protection,[4] which was done with Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, concerning the protection of natural persons regarding the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, or GDPR).

However, human rights can clash with other collective interests represented by states intending to implement digital surveillance measures to counter serious threats to their security, which have become increasingly tangible in light of terrorist attacks, international illegal trafficking, and state conflicts. Balancing these interests

[2] H. Kranenborg, 'Article 8 – Protection of Personal Data', in S. Peers, T. Hervey, J. Kenner and A. Ward eds, *The EU Charter of Fundamental Rights – A Commentary* (Oxford: Oxford University Press, 2021), 223; S. Seubert and C. Becker, 'The Democratic Impact of Strengthening European Fundamental Rights in the Digital Age: The Example of Privacy Protection' *German Law Journal*, 21 (2021).

[3] E. Dubout, 'La Charte et le territoire. A propos du champ d'application territorial de la Charte des droits fondamentaux de l'Union européenne', in Id et al eds, *L'extraterritorialité du droit de l'Union européenne* (Bruxelles: Bruylant, 2021), 225.

[4] H. Hijmans, *The European Union as Guardian of Internet Privacy: The Story of Art 16 TFEU* (New York City: Springer, 2016), 263.

is not always easy.[5] For years, non-governmental organizations dedicated to human rights protection have reported increasingly invasive surveillance measures adopted by authoritarian regimes, which have even threatened to block telecommunications services unless unconditional access to data was granted, or have required the installation of specific software in all computers sold nationally to intercept sensitive information.

Some countries, lacking national legislation on digital surveillance, have purchased sophisticated surveillance systems from private industries to monitor opposition politicians, journalists, and activists. An example is the Pegasus program sold by an Israeli company to Mexico for targeted surveillance of dissidents. States may also transfer their expertise to the private sector through specific partnerships based on the 'revolving door' system. For instance, in the Raven project, United States National Security Agency (NSA) officials with intelligence expertise were seconded to private surveillance entities, which were then engaged by the United Arab Emirates to spy on human rights activists and political dissidents.

Western democracies are not exempt from criticism either.[6] Several political campaigns have been facilitated by systematically acquiring data from social media platforms to profile users and provide tailored information that could influence voting behavior. In 2013, American whistleblower Edward Snowden revealed the NSA's use of a mass digital surveillance program to collect extensive information about foreign states and their citizens' personal data. It was later discovered that allied intelligence services, particularly British intelligence, had acquired substantial personal data from transatlantic submarine cables used for electronic communications. Following the international Datagate scandal,[7] the NSA's powers were curtailed, particularly in terms of the ability to store telephone records, which are now held directly by telephone companies.

More recently, concerns have been raised about COVID-19 tracking apps, which, however, have seemed justified under Art 23 of the GDPR, which allows data protection restrictions to pursue public health and social security goals. Additionally, these apps are usually installed voluntarily by users.[8]

Governmental electronic surveillance programs often strain the system of rights and guarantees recognized by international charters. Distinctions between suspicious individuals and ordinary citizens are not always made. Surveillance can occur without the individual's knowledge or the opportunity to challenge it,

[5] J-P. Jacqué, 'Protection des données personnelles, Internet et conflits entre droits fondamentaux devant la Cour de Justice' *RTD Eur*, 283, 285 (2014).

[6] M. Mastracci, 'Evoluzione del diritto alla "*privacy*" tra Europa e Stati Uniti: dal "*Safe harbor*" al "*Privacy shield*" ' *La comunità internazionale*, 555, 556 (2016).

[7] For a commentary, see M. Nino, 'Il caso "*Datagate*": i problemi di compatibilità del programma di sorveglianza PRISM con la normativa europea sulla protezione dei dati personali e della *privacy*' *Diritti umani e diritto internazionale*, 727 (2013).

[8] G. Della Morte, 'La tempesta perfetta Covid-19. Deroghe alla protezione dei dati personali ed esigenze di sorveglianza di massa' *sidiblog.org*, 30 March 2020.

as procedures are often classified for national security reasons.

Equally concerning is the acquisition of metadata, which, although not directly revealing communication content, are treated as data,[9] on the grounds that they can be aggregated to expose individual habits, preferences, social interactions, thereby providing a detailed profile of the target.[10] It is no coincidence that the European Court of Human Rights (ECtHR), in *Big Brother Watch and Others* v *The United Kingdom*, made it clear that the same safeguards applicable to the collection and processing of communication contents must extend to metadata.[11]

Privacy and freedom of opinion have fully entered the political agenda of supranational lawmakers and the case-law of European courts, driven by growing public concern about constant surveillance.[12] The ECtHR and the Court of Justice of the European Union (CJEU) have responded similarly to this concern, attempting to accommodate state needs for crime prevention and repression.[13]

II. The Procedural Obsession of the European Court of Human Rights

Big Brother Watch and Others v *The United Kingdom*[14] originated from an application to the ECtHR by a group of non-governmental organizations and journalists against the United Kingdom for the use of a digital mass surveillance program by British intelligence services in collaboration with their American counterparts. Much of the evidence was based on information leaked by Edward

[9] Eur. Court J., Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd* v *Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Judgment of 8 April 2014, ECLI:EU:C:2014:238, §27; Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB* v *Post- och telestyrelsen* and *Secretary of State for the Home Department* v *Tom Watson and Others*, Judgment of 21 December 2016, ECLI:EU:C:2016:970, §99; Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others* v *Premier Ministre and Others*, Judgment of 6 October 2020, ECLI:EU:C:2020:791, §117.

[10] Highlighting the artificiality of the distinction in the acquisition of data and metadata, as the latter are likely to reveal sensitive information to the same extent, if not to a greater extent, see A. Iliopoulou-Penot, 'The Construction of a European Digital Citizenship in the Case Law of the Court of Justice of the EU' *Common Market Law Review*, 969, 989 (2022).

[11] Eur. Court H.R., Grand Chamber, *Big Brother Watch and Others* v *the United Kingdom*, Judgment of 25 May 2021, ECLI:CE:ECHR:2021:0525JUD005817013, §§342, 363-364. For a commentary, see A. Lubin, 'Introductory Note to Big Brother Watch v. UK (Eur. Ct. H.R. Grand Chamber)' *International Legal Materials*, 605 (2022).

[12] Eur. Court J., Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd* n 9 above, §37. On this point cf L. Benedizione and E. Paris, 'Preliminary Reference and Dialogue Between Courts as Tools for Reflection on the EU System of Multilevel Protection of Rights: The Case of the Data Retention Directive' *German Law Journal*, 1727 (2019).

[13] Stressing that the Court of Justice has had the merit of strengthening the protection of individual rights through the recognition of European sovereignty over personal data, see V. Benadou, 'La Cour de justice, gardienne d'une "souveraineté européenne" sur les données personnelles' *Revue des affaires europeennes*, 19 (2018).

[14] Eur. Court H.R., *Big Brother Watch and Others* v *the United Kingdom*, Judgment of 13 September 2018, ECLI:CE:ECHR:2018:0913JUD005817013, noted by M. Milanovic, 'ECtHR Judgment in Big Brother Watch v. UK' *ejiltalk.org*, 17 September 2017.

Snowden. The applicants submitted that the United Kingdom had violated the rights to respect for private life and freedom of expression, protected by Arts 8 and 10 of the ECHR.

The Court had already addressed the compatibility of mass surveillance with the Convention in previous decisions. In *Weber and Saravia* v *Germany*,[15] the Court upheld the surveillance measures adopted by the Federal Republic of Germany to prevent armed attacks or acts of international terrorism, outlining the minimum safeguards that the legislation must include to prevent abuse of power.[16] Specifically, legislation must specify: i) the nature of the offenses that may justify interception of communications; ii) the categories of individuals subject to interception; iii) the limits on the duration; iv) the procedures for examining, using, and storing the obtained data; v) the precautions to be taken when data is communicated to third parties; and vi) the circumstances in which recordings can or must be destroyed (§95). These criteria are very lenient, giving states a wide margin of appreciation.[17]

A few years later, in *Roman Zakharov* v *Russia*,[18] concerning the Russian government's power to intercept all lines using a national telephone operator, the ECtHR emphasized that surveillance must not be indiscriminate but rather must be based on reasonable suspicion that the person concerned is planning or has committed offenses or acts undermining national security. The Court also criticized the interception of all telephone communications in the area where the crime was committed, without limiting it to a specific target (§§260 and 265). These conclusions were confirmed in *Szabó and Vissy* v *Hungary*,[19] where it was held that only individual suspicion concerning a specific person conforms to the strict necessity required by Art 8 of the ECHR for any measure restricting the right to respect for private and family life (§§67 and 71). Consequently, the Court found the Hungarian anti-terrorism law – based on which two members of an opposition political organization had been subjected to digital surveillance measures – to be incompatible with the Convention.

In the *Big Brother Watch* v *The United Kingdom* decision of 2018,[20] the Court, only partially confirming its previous positions, ruled that mass surveillance programs do not inherently violate human rights and may fall within the states'

[15] Eur. Court H.R., *Gabriele Weber and Cesar Richard Saravia* v *Germany*, Judgment of 29 June 2006, ECLI:CE:ECHR:2006:0629DEC005493400. For an analysis of the ECtHR's decisions on mass surveillance and Art 8, see A. Stiano, 'Il diritto alla *privacy* alla prova della sorveglianza di massa e dell'*intelligence sharing*: la prospettiva della Corte europea dei diritti dell'uomo' *Rivista di diritto internazionale*, 511, 522 (2020).

[16] A. Lubin, ' "We Only Spy on Foreigners": The Myth of a Universal Right to Privacy and the Practice of Foreign Mass Surveillance' *Chicago Journal of International Law*, 502, 543 (2018).

[17] V. Rusinova, 'A European Perspective on Privacy and Mass Surveillance at the Crossroads' *Higher School of Economics Research Paper No. WP BRP 87/LAW/2019*, 5 (2019).

[18] Eur. Court H.R., Grand Chamber, *Roman Zakharov* v *Russia*, Judgment of 4 December 2015, ECLI:CE:ECHR:2015:1204JUD004714306.

[19] Eur. Court. H.R., *Szabó and Vissy* v *Hungary*, Judgment of 12 January 2016, ECLI:CE:ECHR:2016:0112JUD003713814.

[20] Eur. Court H.R., *Big Brother Watch and Others* v *the United Kingdom* n 14 above.

margin of appreciation (§§314-319). It concluded that the United Kingdom's program violated Arts 8 and 10 of the ECHR only in certain aspects.

Surprisingly, the Court diluted the safeguards cautiously outlined in its previous decisions, particularly claiming that the reasonable suspicion criterion, supported by objective evidence, was in conflict with the states' margin of appreciation in adopting mass surveillance measures. In the Court's opinion, mass surveillance is inherently untargeted, and requiring reasonable suspicion would make it impractical. Even ex-post notification to the affected target would be impractical, since it presupposes surveillance directed at specific individuals, which is not evident in mass surveillance (§317).[21] Furthermore, among the criteria outlined in *Weber*, the Court rejected that national legislation must define the offenses justifying interception and the categories of individuals concerned.

Dissatisfied with the decision, the applicants appealed to the Grand Chamber, which, in a decision delivered on May 25, 2021,[22] confirmed that mass interception regimes do not *ipso facto* violate the Convention, as they can be justified by the need to investigate serious crimes and threats to national security, such as global terrorism, drug or human trafficking, and child pornography. Many of these offenses are committed within an international network of hostile actors with access to sophisticated technology allowing them to operate anonymously and compromise digital infrastructures and the functioning of democratic processes through cyberattacks (§§323, 345). Untargeted surveillance is of vital importance for countering national security threats, and no alternative appears feasible that would obtain the same results (§424).

However, to minimize the risk of abuse of power, the Court emphasized that every stage of the surveillance process must be subject to safeguards to ensure its necessity and proportionality. Mass interception should be subject to independent ex ante authorization and independent ex post review (§350).[23] For domestic legislation to pass the Court's scrutiny, it must meet eight criteria (replacing the six outlined in *Weber*), that is, it must clearly define: i) the grounds for authorizing mass surveillance; ii) the circumstances under which individual communications may be intercepted; iii) the procedure for granting authorization; iv) the procedures for selecting, examining, and using intercepted material; v) the precautions to be taken when the material is communicated to third parties; vi) the limits on the duration of interception, the storage of intercepted material, and the circumstances in which it must be deleted and destroyed; vii) the procedures and modalities for

[21] Considering the notification of digital surveillance measures an essential element to allow the individual to defend against potential abuses by government authorities, see C. Cinelli, 'Sorveglianza digitale, sicurezza nazionale e tutela dei diritti umani' *Ordine internazionale e diritti umani*, 588, 604 (2020).

[22] Eur. Court H.R., Grand Chamber, *Big Brother Watch and Others* v *the United Kingdom* n 11 above.

[23] Applauding the commitment of Italian law to impose judicial authorization to avoid abuses by the judicial police, see C. Cinelli, 'Sorveglianza digitale' n 21 above, 595.

supervision by an independent authority and its powers to sanction non-compliance; and viii) the procedures for independent ex-post compliance review and the powers of the competent authority to handle non-compliance situations (§361).

Based on these eight criteria, the Grand Chamber identified several issues in British legislation, finding a violation of the right to respect for private and family life. In making this finding, the Grand Chamber noted the lack of independent authorization (which was issued by the executive), the vagueness of search terms (also known as selectors) used to request an interception order, and the absence of further internal scrutiny when specific selectors target an individual (§425). Similar issues were found regarding the acquisition of metadata from service providers, which was deemed illegal as it was not limited to the purpose of preventing serious crimes and lacked ex-ante control by an independent judicial or administrative authority (§§518-519). Besides the violation of Art 8 ECHR, the Chamber also found that the United Kingdom's actions had infringed on the freedom of expression, as the surveillance programs did not adequately protect journalistic sources and their confidential communications (§§456-458, 524-525).

The Court's judgment is not a victory for privacy rights and freedom of opinion but reflects a cautious and procedural attitude, which is disappointing in terms of protecting human rights. The principles of necessity and proportionality of surveillance measures translate into mere declarations, with their compliance taken for granted. The Court did not engage in balancing, did not question whether the benefits of surveillance programs outweigh the intrusion into the individual's most intimate relationships, assuming this assessment had already been made by national authorities.

Moreover, prior authorization is not deemed a requirement (instead, it is only recommended), nor is it necessary for authorization to be issued by a judicial authority, as long as it is issued by a body independent of the executive (§351). The procedural framework substantiating the principles of necessity and proportionality is very weak, as national legislation is subject to a global evaluation (§360). Consequently, if one of the eight criteria is lacking, the state can compensate by scrupulously observing another criterion. To this end, the opinion, partially concurring and partially dissenting, of Judge Pinto de Albuquerque appears persuasive, to the extent that it criticizes the unbearable vagueness of the Grand Chamber's language, revealing the concealed intent to expand states' discretion and hesitation in exercising judicial functions, ultimately weakening the ECHR's authority and diminishing the decision's substantive impact.

Following the ruling in *Big Brother Watch*, governments may continue using mass digital surveillance programs with little hindrance and may even share the information obtained with third countries or allow these countries direct access to their archives. The Court subjected intelligence-sharing[24] to some additional

[24] See M. Milanovic, 'Intelligence Sharing in Multinational Military Operations and Complicity under International Law' *International Law Studies*, 1269 (2021).

procedural safeguards: i) domestic legislation must clearly indicate the circumstances under which transmission of information can occur; ii) the transferring state must ensure that the receiving state has adequate protections, particularly regarding safe data storage and restrictions on their disclosure, without necessarily requiring the same level of protection as the transferring state, nor requiring the receiving state to provide assurances before each data transfer; iii) enhanced safeguards are necessary when the transferred material is particularly sensitive; and iv) the transfer *should* be subject to independent oversight (§362).

In this case, the British legislation was found compliant with these standards, which is not surprising given the vague and not entirely adequate criteria that barely touch on the merits of the surveillance measures under scrutiny and the related risks. These risks are particularly high when information is shared with states that do not respect human rights. The Court, without any appreciable reason, overlooked the lack of authorization from an independent body in British legislation. It is unclear why, in this respect, intelligence-sharing should receive different treatment from mass surveillance for internal state purposes.

III. The Demise of Judicial Safeguards by the European Court of Justice

Recent decisions of the European Court of Justice (CJEU) have aligned with similar positions. Indeed, there has been a noticeable shift away from the protective stance seen in the Court's early rulings on digital surveillance, which emerged during the Snowden revelations era.

In *Digital Rights Ireland*,[25] the Court invalidated Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006, on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. This directive, which had been adopted in response to the terror attacks in Madrid and London, mandated telecommunications service providers to retain metadata for up to two years and make it available to public authorities for security purposes. The challenge was brought by an Irish non-governmental organization, Digital Rights Ireland, following significant civil society mobilization. They leveraged the principle, which had been recently established by the Court,[26] that the GDPR does not preclude a national law allowing a consumer protection association to bring legal action, without a specific mandate and regardless of the infringement of specific rights of data subjects, against the alleged violator of data protection laws, claiming breaches of the prohibition of unfair commercial practices, violations of consumer protection laws, or nullity of unfair contract terms, provided the

[25] Eur. Court J., Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd* n 9 above.

[26] Eur. Court J., C-319/20, *Meta Platforms Ireland Limited* v *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.*, Judgment of 28 April 2022, ECLI:EU:C:2022:322.

data processing in question could harm the rights recognized by this regulation to identified or identifiable individuals.

Digital Rights Ireland was the first decision declaring the invalidity of a secondary European legislative source for violating the Charter of Fundamental Rights of the European Union,[27] particularly Arts 7 and 8, which, according to the Court, prohibit the mass and indiscriminate retention of data. The Court warned member states that only targeted data processing with robust safeguards is permissible. This ruling reflects a strategic defense by e-privacy organizations seeking to have the Court annul a legislative act or ensure its interpretation aligns with individual rights in data protection.

In the subsequent *Tele2* case,[28] the Court clarified that the prohibition on mass surveillance also applies to the laws of individual member states, emphasizing that only targeted retention of metadata, coupled with a stringent system of safeguards, is compatible with Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, read in light of the Charter of Fundamental Rights.[29] Following this ruling, some commentators argued that it would hinder public security by preventing law enforcement from accessing historical communication data, thereby depriving states of an effective tool to combat serious crime.[30] Some criticized the Court for unjustified interference in the sovereign prerogatives of states, particularly their fundamental function of ensuring security within their territories, as explicitly recognized by Art 4(2) of the Treaty on European Union (TEU).[31] Many national governments called for a reassessment of the balance between individual freedoms and national security in data processing matters.

Despite the outcry over the *Tele2* decision, the prohibition on general data retention was reaffirmed in *Privacy International*,[32] which concerned the bulk transmission of metadata by British intelligence services for national security

[27] M.P. Granger and K. Irion, 'The Court of Justice and the Data Retention Directive in Digital Rights Ireland: Telling Off the EU Legislator and Teaching a Lesson in Privacy and Data Protection' 4 *European Law Review*, 835 (2014).

[28] Eur. Court J., Joined Cases C-203/15 and C-698/15, *Tele2 Sverige* n 9 above.

[29] Highlighting that the European system for the protection of fundamental rights does not offer double standards in data protection; both the EU and member states are subject to the same duties of protection, see K. Lenaerts, 'The European Union as a Union of Democracies, Justice and Rights' 2 *International Comparative Jurisprudence*, 132 (2017).

[30] H. Hijmans, 'Data Protection and Surveillance: The Perspective of EU Law', in V. Mitsilegas and N. Vavoula eds, *Surveillance and Privacy in the Digital Era* (London: Bloomsbury Publishing, 2021), 235.

[31] J. Sirinelli, 'La protection des données de connexion par la Cour de justice: cartographie d'une jurisprudence européenne inédite' 2 *Revue trimestrielle de droit européen*, 313 (2021).

[32] Eur. Court J., C-623/17, *Privacy International* v *Secretary of State for Foreign and Commonwealth Affairs and Others*, Judgment of 6 October 2020, ECLI:EU:C:2020:790. Defining the decision a victory for fundamental rights, see M. Tzanou, 'European Union Regulation of Transatlantic Data Transfers and Online Surveillance' *Human Rights Law Review*, 545, 546 (2017).

reasons. In the CJEU's opinion, a national law requiring electronic communications service providers to transmit metadata in a generalized and undifferentiated manner to intelligence agencies is disproportionate and unjustified in a democratic society (§81). The British legislation was problematic for several reasons: i) it applied to all users without specifying whether the data transmission should be real-time or delayed; ii) once transmitted, the data underwent automated analysis to uncover unknown threats; iii) the collected data could be cross-referenced with other databases containing different categories of personal data or disclosed outside the agencies and to third countries; and iv) there was no requirement for prior authorization from a judge or independent administrative authority, nor notification to the affected individuals (§§25 and 52).

In the *Schrems* cases,[33] the Court further clarified that European standards for online privacy guarantees must also apply to data transfers outside the Union,[34] invalidating the Commission's adequacy decision on the Safe Harbor principles and the EU-US Privacy Shield, which allowed data transfers to US providers. Given the omnipotence of the US digital surveillance regime, which does not provide adequate protection for European citizens,[35] the Commission's decisions were deemed incompatible with Directive 95/46 (*Schrems I*) and the GDPR (*Schrems II*), read in light of Arts 7 and 8 of the Charter of Fundamental Rights of the European Union. The Court ruled that the adequacy of data protection required for extra-EU transfers must be essentially equivalent to that provided by EU law,[36] ensuring that personal data of any individual within European territory can only be transferred to third countries offering equivalent protection standards. This significantly reduces the Commission's power to negotiate international

[33] Eur. Court J., C-362/14, *Maximillian Schrems* v *Data Protection Commissioner* (*Schrems* I), Judgment of 6 October 2015, ECLI:EU:C:2015:650; Eur. Court J., C-311/18, *Data Protection Commissioner* v *Facebook Ireland Ltd and Maximillian Schrems* (*Schrems* II), Judgment of 16 July 2020, ECLI:EU:C:2020:559.

[34] Highlighting that violations of individual rights perpetrated through mass surveillance techniques have a necessarily extraterritorial nature, see M. Catanzariti, 'La dimensione extraterritoriale della sorveglianza di massa' *Rassegna di diritto pubblico europeo*, 335 (2019). See also P. Cruz Villalon, 'Un principe de continuité? Sur l'effet extraterritorial de la Charte des droits fondamentaux de l'UE', in J. Wildermeersch and P. Paschalidis eds, *L'Europe au présent! Liber Amicorum Melchior Wathelet* (Bruxelles: Bruylant, 2018), 317.

[35] Highlighting the diversity of the European model compared to the American one, to the point where data protection has become the First Amendment of the European Union, see B. Petkova, 'Privacy as Europe's First Amendment' *European Law Journal*, 140 (2019).

[36] Ideally speaking of a 'territory of the Union,' understood as a legal space with a special regime having strong positive implications for the citizens of the Union, see N. Nic Shuibhne, 'The 'Territory of the Union' in EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives' *Yearbook of European Law*, 267 (2019). However, concerns are raised by J. Atik and X. Groussot, 'A Weaponized Court of Justice in Schrems II' *Nordic Journal of European Law*, 18 (2021), claiming that 'constitutional values of one party are ill-suited to satisfactorily resolve a legal conflict between two parties. A constitutional court, such as the CJEU – that sees its own law and not that of the counterparty to the conflict – makes reconciliation and resolution far less likely. Europe may 'win' this contest with the United States – and the CJEU's judgment in Schrems II may contribute to its policy success. But such a 'win' reflects the exercise of power more than law'.

data management agreements. The core idea is that personal data protection within the European space cannot be circumvented through data transfer to non-EU countries without adequate protection standards. Individuals must retain control over their data even when it leaves the Union.

This case law aligns with the GDPR. While it does not contain specific provisions on data acquisition within digital surveillance proceedings conducted by member states for national security reasons, the GDPR requires a data protection impact assessment for systematic large-scale surveillance of a publicly accessible area (Art 35(3)(c)). The data controller must, before proceeding, conduct an assessment of the impact on personal data protection, considering the nature, scope, context, and purposes of the processing, and the high risk that the use of new technologies may pose to individual rights and freedoms. The entire regulation is centered on the idea that citizens control the traces they leave in the digital environment and remain sovereign over their digital identity (see particularly recitals 7, 68, 75, 85).[37] Individual control over one's data underpins many other rights, such as the right of access (Art 15), the right to rectification (Art 16), the right to be forgotten (Art 17), the right to data portability (Art 20), and the right to object (Art 21). Member states may limit these rights if necessary to safeguard, among other things, national security and defense, provided that such limitation respects the essence of the rights and freedoms and is a necessary and proportionate measure in a democratic society (Art 23). The CJEU's case law reflects the logic of individuals' control as subjects of rights, opposing their transformation into objects of generalized surveillance.

This protective stance remained unchanged until the CJEU's ruling in *Quadrature du Net*,[38] which also originated from a challenge by non-governmental organizations and concerned data retention mandated by French law for national security reasons. The CJEU first clarified a competence issue, addressing member states' claims that Directive 2002/58/EC does not apply to national laws safeguarding national security, as intelligence activities aimed at maintaining public order are essential state functions, falling within their exclusive competence under Art 4(2) TEU. Disputing this claim, the Court affirmed the full applicability of EU law to member state legislation requiring electronic communications service providers to retain metadata for national security and crime-fighting purposes (§104). While generally reiterating the prohibition on general and indiscriminate data retention (in this case, metadata), the Court, in response to concerns raised by national governments related to counter-terrorism, allowed for the exception of safeguarding national security against a serious, current, or foreseeable threat. However, the goals of crime-fighting and public safety protection can only justify targeted data retention measures.

[37] Already before the GDPR, see O. Lynskey, *The Foundations of EU Data Protection Law* (Oxford: Oxford University Press, 2015), 14.

[38] Eur. Court J., Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net* n 9 above.

Central to the Court's reasoning is the distinction between national security, on the one hand, and public safety and crime-fighting, on the other. Art 4(2) TEU assigns exclusive competence to each member state for national security, reflecting the primary interest in protecting the essential functions of the state and fundamental social interests, including preventing and sanctioning activities capable of destabilizing the nation's constitutional, political, economic, or social structures, particularly those directly threatening society, residents, or the state itself, such as terrorist activities (§135). Safeguarding national security, however, goes far beyond the goals of general, even serious, crime-fighting and public safety protection. National security threats cannot be confused, by nature and severity, with the risk of public safety disturbances or tensions. The goal of safeguarding national security can justify more severe intrusions into fundamental rights than measures justified by other objectives (§136).

This position was recently confirmed in *G.D.* v *Commissioner of An Garda Síochána*,[39] where the CJEU stated that crime-fighting, including serious crime, cannot be equated with a national security threat. Otherwise, an intermediate category between national security and public safety would be created in order to apply national security requirements to public safety (§63). Unlike crime, a national security threat must be real and current, or at least foreseeable, which requires specific circumstances justifying a generalized and indiscriminate metadata retention measure for a limited period. By nature and severity, such a threat differs from the risk of public safety tensions or disturbances or the commission of crimes (§62). Consistently, the Court specified that metadata cannot be subject to general and indiscriminate retention for crime-fighting purposes, and access for these purposes must be prohibited. If these data have been exceptionally retained, without distinction, to safeguard national security against a serious, current, or foreseeable threat, national criminal investigation authorities cannot access these data in criminal proceedings, lest the prohibition on data retention for crime-fighting purposes be rendered ineffective (§100).

Accordingly, the Court outlines a hierarchy of objectives that can be pursued by legislation on digital surveillance: national security is placed first, followed by combating serious crime and preventing threats to public security. The bulk retention of data is permitted in the event of a national security threat, provided certain procedural conditions are met: i) the retention must be for a limited and strictly necessary period of time. Although the retention of data may be renewed due to the persistence of the threat, the duration must not exceed a foreseeable time frame; ii) the member state must be facing a serious, actual or foreseeable national security threat; iii) strict limitations and safeguards must be in place to effectively protect the personal data of the individuals concerned against the risk of abuse; and iv) the measures requiring electronic communication service

[39] Eur. Court J., C-140/20, *G.D.* v *The Commissioner of the Garda Síochána and Others*, Judgment of 5 April 2022, ECLI:EU:C:2022:258.

providers to retain data must be subject to review by a judge or an independent authority, whose decision must be binding and aimed at verifying compliance with the prescribed conditions and safeguards.[40] These are precisely outlined criteria, based on an extensive reading of secondary rules in light of the Charter of Fundamental Rights and the principle of proportionality. The Court's activism may raise suspicions that it is overstepping its role and becoming a quasi-legislative body,[41] which, however, seems necessary given the lack of harmonization, at the European level, regarding digital surveillance.

In compliance with these safeguards, member states may continue to intercept anyone using electronic communication means, without the individuals concerned having to find themselves, even indirectly, in a situation that could lead to criminal investigations. Mass digital surveillance can also involve people for whom there is no indication that their behavior might have a connection, even indirectly or remotely, with serious crimes, and, in particular, without there being a correlation between the data to be retained and a threat to public security.[42]

While specifying that bulk data retention cannot be systematic and must meet certain conditions, the Court nevertheless leaves some questions open: what is meant by a foreseeable threat? What is the maximum duration for data retention?

Another crucial issue is whether it is possible for data acquired in a generalized and indiscriminate manner for national security purposes to be declassified and transmitted to authorities for use in other purposes, such as combating crime. In the *Quadrature* case, the Court seems to give a negative answer, holding that member states must clearly establish, in their legislation, the purpose for which data retention can occur (§164) and that access to such data can, in principle, only be justified by the general interest for which the retention was imposed on communication service providers (§166). The reasons for accessing the data must be the same as those that originally justified their retention.

In contrast, the fight against serious crime and the prevention of equally serious threats to public security are secondary objectives, which can only justify targeted digital surveillance measures. These measures must be limited to what is strictly necessary concerning the categories of data to be retained, the means of communication used, the individuals involved, and the time period (subject to possible renewal due to the ongoing necessity for such retention). Specifically, the scope of targets should be confined based on objective elements capable of revealing at least an indirect connection with acts of serious crime, contributing

[40] Eur. Court J., Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net* n 9 above, §§137-139.

[41] See O. Pollicino, *Judicial Protection of Fundamental Rights on the Internet. A Road Towards Digital Constitutionalism?* (London: Bloomsbury Publishing, 2021), 99, criticizing the judicial attempt to build a European fortress of personal data and to regulate in a regional manner a matter necessarily requiring a transnational dimension.

[42] Eur. Court J., Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net* n 9 above, §143.

in some way to the fight against serious crime, preventing a significant risk to public security, or a risk to national security. In *GD* v *Commissioner of the Garda*,[43] the Court emphasized the need to adopt non-discriminatory criteria for targeted surveillance, focusing, for instance, on individuals under investigation or other ongoing surveillance measures or those listed in the national criminal registry with a previous conviction for serious crimes that may pose a high risk of recidivism (§70).

There are also some concerns around targeted surveillance, related to the ambiguity of the requirement of a serious threat to public security. Although it is true that individuals subject to interception must be identified in advance based on objective criteria, the connection to serious crime can also be indirect, significantly broadening the pool of surveilled subjects.

The Court also allows for a geographic connection when national authorities consider that one or more areas are characterized by a high risk of preparing or committing acts of serious crime. Such areas can include places with a high incidence of crime or those prone to criminal acts, such as infrastructures regularly attended by large numbers of people, or strategic locations like airports, train stations, or toll areas.[44] In the subsequent case *GD* v *Commissioner of the Garda*, the Court specified that national authorities could adopt targeted retention measures based on a geographic criterion, such as the average crime rate in a geographic area, even without evidence of the preparation or commission of serious crimes in the affected areas.[45]

However, such a criterion, as the experience in the US has shown, risks being discriminatory and disproportionately directing targeted surveillance toward vulnerable groups in society, such as immigrants, ethnic minorities, and the poor, who often reside in high-crime areas.[46] The consequence could be that the most marginalized individuals in society are the ones being surveilled.

IV. Open Doors to Mass Data Retention and Automated Data Analysis

Mass and targeted data retention for national and public security purposes are not the only measures allowed to member states. In *Quadrature*, the Court of Justice also permitted, with some precautions, the indiscriminate retention of IP addresses and data related to the civil identities of users of electronic communication systems, as well as the automated analysis of metadata.

IP addresses do not reveal a specific communication but are generated to

[43] Eur. Court J., C-140/20, *G.D.* v *The Commissioner of the Garda Síochána and Others* n 39 above.

[44] Eur. Court J., Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net* n 9 above, §150.

[45] Eur. Court J., C-140/20, *G.D.* v *The Commissioner of the Garda Síochána and Others* n 39 above, §80.

[46] See C. O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (New York: Crown, 2016), passim.

identify the owner of the terminal from which internet communication is made. In the Court's opinion, IP addresses have a lower sensitivity level and can receive differentiated treatment compared to other traffic data, as long as only the IP address of the origin of the communication, and not that of the recipient, is retained. This means no information would be disclosed about third parties who were in contact with the person originating the communication (§152). At the same time, the Court acknowledged that the retention of these addresses amounts to a serious interference with the fundamental rights of the internet user, as they can be used to track the user's entire browsing history and thus their online activity, allowing for the creation of a detailed profile of the monitored person (§153).

However, measures for processing IP addresses can be justified as the only investigative tool that allows the identification of the person to whom the address was attributed at the time of committing online crimes, especially serious offenses such as child pornography, including the purchase, distribution, transmission, or making available of child pornographic material online (§154). Given the severity of the interference with the exercise of fundamental rights enshrined in Arts 7 and 8 of the Charter of Fundamental Rights, the generalized and indiscriminate retention of IP addresses is subject to some precautions: i) the retention period must not exceed what is strictly necessary in light of the pursued objective; and ii) such a measure must include strict conditions and safeguards regarding the use of such data, particularly through tracking, in relation to the communications and activities carried out online by the individuals concerned (§156).

As mentioned, alongside the retention of IP addresses, the Court also allowed the retention of data related to the civil identity of all users of electronic communication means for the purposes of preventing, investigating, detecting, and prosecuting crimes, as well as safeguarding public security, without the requirement that the crimes or threats to public security be serious. Such data, in fact, do not per se allow for knowing the date, time, duration, and recipients of the communications made, nor the locations where such communications occurred or their frequency with certain individuals over a specified period. Aside from providing contact information such as addresses, they do not offer any information on data communications and, consequently, on the users' private lives. Accordingly, the interference caused by the retention of such data cannot, in principle, be classified as serious (§157). Indiscriminate access to IP addresses and the civil identities of digital users signals that the era of online anonymity is effectively over.[47]

As far as the automated analysis of metadata is concerned, namely data related to traffic and location, in *Quadrature*, the Court of Justice acknowledged that the interference with personal rights is particularly severe, as the data subject to automated analysis can reveal the nature of the information consulted online. Furthermore, such analysis applies globally to all individuals using electronic

[47] M. Tzanou, '*Privacy International* and *Quadrature du Net*: One Step Forward Two Steps Back in the Data Retention Saga?' 28(1) *European Public Law*, 123, 141 (2022).

communication means, including those for whom there is no indication that their behavior might have even an indirect or remote connection to terrorist activities (§174).

Automated analysis can meet the requirement of proportionality only when the member state faces a serious threat to national security that is real and current or foreseeable, provided that data retention is limited to the strictly necessary period (§177). Additionally, strict conditions must be observed: i) national regulations must establish the substantive and procedural conditions for using the data automatically (§176); ii) the measure authorizing automated analysis must undergo effective oversight by a judge or an independent administrative body, whose decision is binding, to verify the existence of a situation justifying the measure and compliance with the required safeguards (§179); iii) the models and predefined criteria underlying this type of data processing must be specific and reliable, enabling results that identify individuals reasonably suspected of participating in terrorist activities, and non-discriminatory (§180); iv) since automated analysis inevitably involves a certain error rate, any positive result must undergo individual review with non-automated tools before any individual measure with adverse effects on the concerned person is taken and the reliability and updating of the predefined models and criteria as well as the databases used must be regularly reviewed (§182); and v) the national authority must publish general information related to automated analysis without individually informing the concerned persons. However, if the data meet the parameters specified in the measure authorizing automated analysis and the authority identifies the concerned person to analyze their data more thoroughly, individual notification of such a person is necessary. This notification must occur only when it does not compromise the functions of the authority (§191).

The Court acknowledged that automated analysis based on criteria such as ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership, health, or sexual orientation of a person could violate the rights guaranteed by Arts 7 and 8 of the Charter of Fundamental Rights, in conjunction with Art 21 of the same Charter. The predefined models and criteria for such analysis aimed at preventing terrorist activities posing a serious threat to national security cannot be based solely on such sensitive data (§181). However, the scope of the prohibition on using sensitive data in automated anti-terrorism analyses is not clear. It appears that national authorities may use databases that combine sensitive and non-sensitive data, but the Court overlooked that discriminatory effects can also arise indirectly from the intersection of multiple non-sensitive data, including proxy attributes, such as postal codes of certain geographical areas, which can sometimes reveal a person's ethnic origin. On the other hand, the complete exclusion of sensitive data from the dataset used to train the algorithm does not seem entirely advisable, as it could paradoxically negatively impact the precision and accuracy of the algorithm, and distort the reality the artificial

intelligence relies on, rather than the biases on which it bases its decisions.[48]

Further concerns arise from the right to individual review that the Court granted to every subject subjected to automated analysis and the corresponding *ex post* duty (since it is subsequent to the processing) imposed on national authorities. This protection is not entirely in line with what is provided by Art 22 GDPR, which, on one hand, stipulates that the data subject has the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning them or significantly affects them in a similar way. On the other hand, in exceptional cases where automated decision-making is authorized by EU or member state law to which the data controller is subject, the data subject has at least the right to obtain human intervention from the controller, to express their point of view, and to challenge the decision. The GDPR generally prohibits automated decision-making, except in some cases, while the Court requires individual review in absolute terms, without exceptions, not even questioning whether, in principle, automated analysis is necessary or prohibited for anti-terrorism purposes, or if, when necessary, it is indispensable or simply useful along with other measures. Furthermore, the individual review mentioned by the Court does not include a prior control of the algorithm, which, on the contrary, the GDPR implements through the data protection impact assessment (Art 35). The Court did not seem to consider the difficulties of ex post review either, given that the algorithm is often a black box, and the justificatory reasons behind its choices are not always trackable, not even through reverse engineering techniques.[49]

V. Dangerous Arrangements and Procedural Fetishes of European Courts

A careful analysis of the decisions of the ECtHR and the CJEU reveals some differences. While the latter operates within a framework of a fundamental incompatibility of mass surveillance with fundamental rights, even when justified by security reasons, the ECtHR views indiscriminate and undifferentiated data retention as a valid technological tool for identifying and combating new threats in the digital world.[50]

The ECtHR considers mass interception as a gradual process where interference with the right to respect for private and family life increases with

[48] C. Dwork et al, 'Fairness Through Awareness' *Cornell University ArXiv*, 2012, arxiv.org/abs/1104.3913. Arguing that the use of sensitive data is essential precisely to avoid algorithmic discrimination: I. Žliobaitė and B. Custers, 'Using Sensitive Personal Data May Be Necessary for Avoiding Discrimination in Data-Driven Decision Models' 24 *Artificial Intelligence and Law*, 183 (2016).

[49] On the black box problem in algorithms, see Y. Bathaee, 'The Artificial Intelligence Black Box and the Failure of Intent and Causation' 31(2) *Harvard Journal of Law & Technology*, 889 (2018).

[50] Eur. Court H.R., Grand Chamber, *Big Brother Watch and Others* v *the United Kingdom* n 11 above, §323.

each stage: i) initial interception of communications and metadata; ii) application of specific selectors to the obtained data; iii) data analysis; and iv) retention and use of the final product, and possible sharing of data with third parties.[51] Conversely, the CJEU seems to consider each of these phases as potential autonomous interferences with fundamental rights.

In reality, beyond these minimal divergences, it appears that in balancing the relationship between new technologies and personal rights, the two courts are heading in the same direction.[52] Both courts have abandoned the strict defense of privacy to build a more nuanced approach to mass surveillance, based on what has effectively been called a procedural fetish.[53] This approach minimally affects the substantive interests of intercepted individuals but provides some procedural safeguards for data authorization, retention, access, and review of decisions made by authorities.[54] There are no more red lines, prohibitions, or limits; digital surveillance measures are now permitted based on procedures, safeguards, and criteria.

The responses given by supranational courts are undoubtedly capable of satisfying the security demands repeatedly raised by national governments, but at the same time, they alter the balance between the right to respect for private and family life, freedom of opinion and expression, and the public interest in fighting crime through the progressive legitimization of digital surveillance, even targeted surveillance. It is likely that the convergence between the two courts will influence future European reforms on personal data protection, strengthening the negotiating power of governments and national security authorities.

[51] ibid §325.

[52] M. Zalnieriute, 'A Dangerous Convergence: The Inevitability of Mass Surveillance in European Jurisprudence' *ejiltalk.org*, 4 June 2021.

[53] M. Zalnieriute, 'Procedural Fetishism and Mass Surveillance under the ECHR' *Verfassungsblog*, 2 June 2021.

[54] M. Milanovic, 'The Grand Normalization of Mass Surveillance: ECtHR Grand Chamber Judgments in Big Brother Watch and Centrum för rättvisa' *ejiltalk.org*, 26 May 2021.

Insights & Analyses

Street Art as 'Supervened' Conformed Property: Civil Law Issues and Hermeneutic Solutions Between Italy and The United States

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Abstract

This essay examines the phenomenon of street art and its fascinating interconnection with property law. Framed in the complex intersection of law, social, and institutional practices in urban space, non-commissioned street art is characterized by its inherent impact on property law. To suggest possible solutions for the interpretation of the phenomenon, an analysis is proposed aimed at configuring a 'supervened' conformed property to further valorize these artworks that, overlooking the urban landscape, ultimately become part of it. To support this attempt, specific cases that have animated the legal debate in both the United States and Italy are examined, highlighting a crucial aspect for understanding the phenomenon: its evolution and the attempts that interpreters must make for its proper legal framing.

I. Foreword: For a Preliminary Overview of the Phenomenon

The phenomenon of street art is today globally recognized as belonging to the larger category of contemporary art,[1] even though the practice of painting on

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[1] J.C. Fromer and C.J. Sprigman, *Copyright Law: cases and materials* (v. 6.0, 2022), 334, available at copyrightbook.org. See also A. Sau, 'Street art: le ragioni di una tutela, le sfide della valorizzazione' *federalismi.it*, 149-151 (2021), where it is noted how street art has transformed from an act of vandalism to a hot commodity by noting from the famous Art Price database that in 2021 the category represents 15 percent of the world's secondary art market in the contemporary art sector, 45 percent in the modern art sector and 24 percent in postwar, 'with an auction turnover of just under two billion dollars'. The author notes how 'with the entry of street artwork into the secondary art market can be said to have definitively fulfilled the parabola of the movement that from an act of vandalism has become for all intents and purposes hot commodity, the great discovery and the last frontier of contemporary art'. Street artworks, as commodity goods, would therefore not be exempt from the mercantile dynamics peculiar to the art world, and thus the question of the work's authenticity must also be reflected upon in this regard. See, in this regard, the zealous research on the subject of G. Frezza, 'Art and Law: Authentication and Assessment Within the Italian Legal System' *The Italian Law Journal*, 131-147 (2022); Id, 'Alla ricerca della verità in pittura fra autenticazione e accertamento' *Persona e Mercato*, III, 421-436 (2023); Id, *Arte e diritto fra autenticazione e accertamento* (Napoli: Edizioni Scientifiche Italiane, 2019); Id, 'Opere d'arte e diritto all'autenticazione' *Diritto di famiglia e delle persone*, 1734-1751 (2011); Id, 'Cultura, arte e diritto. In ricordo di un maestro' *Actualidad Juridica Iberoamericana*, 216-241 (2022); Id, 'L'ammissibilità dell'azione di accertamento dell'autenticità di un'opera d'arte come tutela del contenuto intrinseco del diritto di proprietà' *Diritto di famiglia e delle persone*, I, 145-157 (2022); Id, 'Sulla condanna all'archiviazione dell'opera d'arte' *Arte e diritto*, II, 339-

walls and in common spaces has ancient origins – just think of graffiti on Egyptian cliffs, in the remains of the Pompeian civilization,[2] in the Addaura caves in Sicily.[3]

The term 'graffiti' summarizes all kinds of original forms of creativity that find support in public space: wall art, street art, post-graffiti, tags, and paste-ups. In the category of urban art graffiti and street art are considered synonymous, they become collectibles, and graffiti takes on commercial value by becoming a consumer product.[4]

The question arises as to whether, as an expression of an artistic movement that began about half a century ago, street artworks can be equated with 'traditional' works of art by bringing them back to the 'simple' category of goods that enter the market, being subject to ownership, commercial sale and copyright, or whether they should be appreciated as 'artifacts' that can be preserved as part of the cultural heritage or be understood as a type of artwork that requires the creation of new legal categories and forms of interpretation of their meaning.[5]

For convenience of exposition, we will refer by the generic designation street art to all the above-mentioned categories of urban art, both commissioned and spontaneous and/or 'illegal', with a focus on the latter. The use of vandalism as the very medium of achievement has made street art revolutionary from an artistic as well as a social and political point of view. This subversive aspect, or rather illicitness, 'elevate' the violation of the law to more than just a crime, characterizing its existence as an artistic practice.[6]

The tendency to consider unauthorized street art as not only a violation of private citizens' property, but also a potential threat to urban decorum, the preservation of cultural heritage, and the fight against decay is evident from the

360 (2023). See also: P. Virgadamo, 'Autenticità dell'opera d'arte e archiviazione: nessun potere di coazione sull'ente certificatore' *Giurisprudenza italiana*, III, 611-619 (2022); G. Garofalo, 'Accertamento dell'autenticità di un'opera d'arte e azione di condanna all'archiviazione' *Il Diritto di famiglia e delle persone*, II, 544-570 (2023).

[2] See S. Rosano and B. Kurtz, 'Tear down this wall? The destruction of sanctioned street art under US and Italian Law' 30 *Fordham Intellectual Property Media &Entertainment Law Journal*, 767, 769-770 (2020).

[3] G. Bolzoni, 'Nuove osservazioni sulle incisioni della grotta Addaura del Monte Pellegrino' *Atti Società Toscana Scienze Naturali*, 92, 321-329 (1985).

[4] M. Van Fiel, 'Symbolic Learning in the City. Street Art in the Regeneration of Public Space' 13(24) *Disegnarecon*, 24.3 (2020). See also P. Bengtsen, *Street Art World* (Granada: Lund University: Alemendros de Granada Press, 2014); U. Blanché, 'Street Art and related terms-discussion and working definition' 1(1) *Street Art & Urban Creativity Scientific Journal*, 32-39 (2015); D. Novak, 'Historical dissemination of graffiti art' 3(1) *Street Art & Urban Creativity Scientific Journal*, 29-42 (2017).

[5] F.L. Bastos, 'Legal Implications of street art as a 'democratized'/'open' form of art' *Revista Opinião Jurídica*, 210-230 (2020); M. Tomassini, *Beautiful Winners, la street art tra underground, arte e mercato* (Verona: Ombre Corte, 2012).

[6] A. Baldini, *A philosophy guide to Street Art and the Law* (Leiden-Boston: Brill, 2018), 86. See also: A. Young, *Street Art, Public City: Law, Crime and the Urban Imagination* (Abingdon: Routledge, 2014); R. Gastman, *Wall Writers: Graffiti in its Innocence* (Berkeley: Gingko Press, 2016); C. Lewisohn, *Street Art: The Graffiti Revolution* (London: Tate Publishing, 2008).

extensive body of legislation devoted to the effects of this phenomenon.[7] However, at the same time, the protection of urban artworks is supported by a justification that encompasses not only private interests, such as the moral right of the artist, but also public interests or those that may affect the community, including the preservation of artistic heritage, the protection of cultural property, and the control of the art market. One recent proposal made has been to consider street artworks as common goods.[8] According to this perspective, the artist's intervention ought to be viewed as a collective practice, meaning both as a resource to be managed in common and in particular as belonging to the category of urban commons.[9]

The artistic value of street art emerges more and more often in court proceedings, to the point of eliminating the unlawfulness of the artist's action, elevating the judge to an art critic.[10] A trend certainly not free from criticism as it requires a judge to make an inevitable subjective assessment of the street artist's intention: whether that of intending to create a work of art or that of damaging another's property.[11]

The authorship of the work constitutes an important civil law issue. An analysis of the contrast between Italian and US law concerning the authorship of street art, for example, brings out the potential conflict between the right of the artist and the right of the owner of the medium. Italian law does not offer an unambiguous and specific solution or strict rule on authorship. In contrast, authorship of street art in the United States has been regulated instead by the Visual Artists Rights Act since 1990.

From these premises, a first glance at a *summa divisio* appears. On one hand, official street art (meaning street art where the work is commissioned by public or private entities and may be exhibited in museum spaces or sold to collectors) is a contractual phenomenon regulated by legally relevant agreements and legislation. On the other hand, independent street art, meaning street art where the creation is made illegally and is a violation of the dominant rights of others, carries with it civil and criminal consequences. The complexity of the relationship between legal systems and street art highlights the paradox of rewarding and punishing similar behavior. Street art is globally recognized as

[7] B. Mastropietro, 'Street Art, ovverosia quando la libertà creativa dell'artista incontra la proprietà altrui' *Rassegna di diritto civile*, III, 962, 965 (2021).

[8] See P. Virgadamo, 'La protezione giuridica dell'opera d'arte ai confini del diritto d'autore (e oltre): dalla logica mercantile all'assiologia ordinamentale' *Il Diritto di famiglia e delle persone*, XLVII, 1478, 1492 (2018).

[9] M.R. Marella, 'Le opere di Street Art come Urban Commons' *Rivista critica del diritto privato*, IV, 481, 471-496 (2020). See also: U. Mattei and A. Quarta, 'Right to the City or Urban Commoning? Thoughts on the Generative Transformation of Property Law' 1(2) *The Italian Law Journal,* 303 (2015).

[10] See, in this sense, F. Lemme, 'Street art: di chi è il muro? Quanto vale ora?' *Il Giornale dell'arte*, available at https://tinyurl.com/3en8jdkt (last visited 30 September 2024).

[11] ibid. See also B. Mastropietro, n 7 above, 966.

contemporary art but is prosecutable and punishable due to its illicit nature.[12]

Street artwork is usually created on walls, buildings, or other public or private surfaces, and, without the prior permission of the owner of the medium, exposes the artist to infringement of private property rights. The owner of the medium can legitimately consider the work as damage to his or her property and demand its removal.[13] The illicit and clandestine ways in which the works are made are considered an impediment to copyright protection. The author of the street artwork, however, usually holds the intellectual property rights to the work itself even if the protection of these rights is made difficult by the ephemeral nature of the work and its placement on media in publicly usable spaces. The author retains the right to be recognized as such and to have control over the use and dissemination of the work and, should the owner of the medium decide to remove it without the author's consent, he or she would risk violating the author's rights, who could, in turn, take legal action to obtain compensation for damages suffered.[14]

II. The Legal Issue in the United States: The Relevant Legislation and Doctrinal Positions

The modern street art movement emerged around the 1960s in the United States as a new form of urban youth expression. The movement reflected economic and social changes brought about by the transition of cities from industrial to post-industrial. During the 1970s, main US cities faced economic and social upheavals, including the displacement of manufacturing employment overseas, suburbanization, and the financial difficulties of municipal governments. This led to the deterioration of urban landscapes, especially in suburban areas. The New York City subway, well known to be plagued in the 1970s by crime and decay, became a visible symbol of neglect. Its trains were used by young people as a canvas for expression, highlighting the sharp economic divisions within the city.[15]

The theorization of street art occurs, via the media, with the 'Taki 183 Spawns Pen Pals' interview with street artist Taki 183 in the New York Times on July 21, 1971.[16] This was followed quickly by the publication of the book 'Subway Art' in 1984 and the film 'Style Wars' in 1983, both of which contributed to spreading the movement nationally and internationally.[17]

[12] N.A. Vecchio, 'Problemi giuridici della street art' *Il diritto dell'informazione e dell'informatica*, XXXI, 625, 629-630 (2016).

[13] See A. Young, n 6 above; R. Gastman, n 6 above; C. Lewisohn, n 6 above.

[14] N.A. Vecchio, n 12 above, 632-633.

[15] C.F. Bruce, *Painting Publics. Transnational Legal Graffiti Scenes as Spaces for Encounter* (Philadelphia: Temple University Press, 2019), 27.

[16] A. Saltarelli, 'Street Art e diritto: un rapporto ancora in via di definizione' *Businessjus*.com, 1-20 (2017). On the topic, see also A. Dal Lago and S. Giordano, *Graffiti. Arte e ordine pubblico* (Bologna: il Mulino, 2016); M. Corallo, *I graffiti* (Milano: Xenia, 2000).

[17] C.F. Bruce, n 15 above.

The conflict between an artist and a property owner represents, even in the United States, a very complicated issue since it involves two rights that are accorded extensive protection: the right to free expression enshrined in the First Amendment and the right to property as consecrated in the last paragraph of the Fifth Amendment.[18]

In the context of the Constitution of the United States, traditional common law categories of property law such as loss, abandonment, donation, and accession (which represent not a few points of contact with the same categories in the Italian legal system) are not considered convincing, as noted by some scholars, to settle disputes on the subject.[19] For example, on the topic of accessions (a category quite similar to that in Italian law), US doctrine also distinguishes depending on whether the work is authorized or not. In fact, under the law, a willful trespasser generally acquires no right to another's property from any changes made to that property through the trespasser's labor or skill, since a party can neither obtain any right nor derive any benefit from his or her wrongdoing.[20]

It should also clarify the differences in how damage to private property related to street art is punished by the laws of each state in the United States. San Francisco has a very strict graffiti ban policy, other cities restrict the sale of spray cans to minors, and still others require property owners to bear the cost of erasing or removing street art, regardless of whether they find aesthetic or commercial value in the works.[21]

Symmetrically, concerning the rights of the owner, copyright, protected by the Visual Artists Rights Act (VARA) of 1990, is of great importance in the United States. Under VARA, the moral right of authorship is distinguished from copyright by providing the right to prevent the destruction of works of art if they are of 'recognized stature'[22] and also by guaranteeing (in a completely similar way to the Italian system) the right to object to any distortion, mutilation or modification of the work that may cause harm to the author's reputation.[23]

VARA would find its application in removable works only.[24] A work of visual art is 'removable' if it can be removed from a building without being destroyed, distorted, mutilated, or otherwise damaged, and the author of the work has the right

[18] Translated US Constitution available at https://tinyurl.com/2hyx9nca (last visited 30 September 2024).

[19] P.N. Salib, 'The Law of Banksy: Who Owns Street Art?' 82 *University of Chicago Law Review*, 2293-2329 (2015).

[20] 1 Am Jr 2d Accession and Confusion para 1 at 497 (2005).

[21] L. Carron, 'Street Art: Is Copyright for "Losers©™"? A comparative perspective on the French and American legal approach to street art' *Association* available at https://tinyurl.com/54axhbuc (last visited 30 September 2024).

[22] S. Rosano and B. Kurtz, n 2 above, 798. Citing *English* v *BFC&R E. 11th St. LLC*, 97 CIV. 7446 (1997). About VARA, see also R.J. Sherman, 'The Visual Artists Rights Act of 1990: American artists burned again' 17 *Cardozo Law Review*, 373-390 (1995); D.E. Shipley, 'The empty promise of VARA: the restrictive application of a narrow statute' 83 *Mississippi Law Journal*, 985-1048 (2014).

[23] 17 USC § 106A (a).

[24] *Pollara* v *Seymour*, 150 F. Supp. 2d 396 (2001).

to prevent its alteration or change in any case (Section 113 VARA). Despite this, 'removability' is, to date, a requirement that has proven far from peaceful. VARA stipulates that before proceeding with the destruction of an artwork, the property owner must notify the artist with at least ninety days' notice. If the artist does not remove the work or pay for its removal within that period, the property owner has the right to proceed with the removal. In addition, VARA releases the owner from any liability if he or she has made a good-faith attempt to send the notice to the author's address registered with the Register of Copyrights.

Finally, subsection 3 of Section 113(d) foresees the registration with the Copyright Office of artworks on buildings. This provision gives authors of works of visual art, that have been incorporated into or are part of a building, the opportunity to register their identity and address with the Copyright Office. Section 113 (d)(3) provides that:

> 'The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building, may record his or her identity and address with the Copyright Office. The Register shall also establish procedures under which any such author may update the information so recorded, and procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection'.

The provisions of Section 113(d) are extremely relevant to the rights of street artists who create artwork on other people's property and to the procedure parties must follow to protect their rights.[25]

III. USA Case Law: The Delicate Balance Between Economic Interests and the Moral Rights

The substantial body of case law in the United States has played a key role in settling the interests at stake, given also how respect for judicial precedent represents one of the cardinal principles in common law systems. Regarding the conflict between artists and the owners of the supports, since the enactment of VARA, some courts have had to rule on the statute's ambit of application.[26]

The seminal case of 5Pointz highlights many of the issues that have arisen concerning VARA's application when the owner of a building destroys street artwork.

[25] S. Rosano and B. Kurtz, n 2 above, 773-776.

[26] For instance, see the cases *Pollara* v *Seymour*, 150 F. Supp. 2d 393 (2001) and *English* v *BFC&R. E. 11th Street LLC,* 97 Civ., 7446 (1997). S. Rosano and B. Kurtz, n 2 above, 773-776. More generally, on the pivotal role of judicial precedent in the US, see *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the principle of judicial review); *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833 (1992) (affirming the doctrine of *stare decisis* and the importance of precedent in upholding constitutional rights); *Citizens United* v *Federal Election Commission*, 558 U.S. 310 (2010) (demonstrating the Court's approach to precedent in cases involving First Amendment rights).

The 5Pointz building was an old, unused warehouse located in Long Island City, New York, 'curated' since 2002 by street artist Meres One. The 'Mecca of Graffiti', soon became a hub for world-renowned street artists and recognized by the community as a place of artistic interest. The building's owner, real estate developer Jerry Wolkoff, initially welcomed the artists into the building and tolerated their activity, only to express a desire to demolish the building in 2013.[27] The tangled case involving the artists' request for an injunction, and the unfair action of the owner who whitewashed the building before waiting for the outcome, resulted in the award of the maximum amount of statutory damages under VARA, totaling six point seventy-five million. Despite the sum awarded by the judge's sentence, the building was demolished soon after.[28]

Despite the significant victory won by street artists in damages, the position that economic compensation is sufficient to satisfy artists' moral prerogatives has been emphasized with demolition. However, looking closely, VARA para 106A first recognizes the right of artists to prevent any intentional distortion, mutilation, or other modification that would be prejudicial to their honor or reputation, specifically protecting works of recognized stature from destruction. Economic compensation is considered only if the violation of these moral rights occurs, prioritizing the preservation of the artist's moral rights over their creations before addressing any

[27] See *Cohen* v *G & M Realty L.P.*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018). There had even been a proposal to preserve the building and declare it a city monument advanced to the NY-City Landmarks Preservation Commission, although it was supported by online protest petition of 13,000 signatures, which was rejected on the grounds that the works painted on the building had been done less than 30 years earlier and meanwhile New York City Planning was giving the green light to the building plan for new construction. At this point, all conditions had been met to proceed with the demolition of the building. On 10 October 2013, a group of artists who had helped create the murals at 5Pointz took legal action against Wolkoff, accusing him of violating VARA. The artists also sought an injunction, known as a 'preliminary injunction', to prevent the demolition of the building, invoking the moral right of integrity contemplated by para 106A of the Copyright Act, which allows for the avoidance of destruction of a work of visual art. This was the first occasion in which a court had to determine whether a work of street art could enjoy legal protection. In November 2013, Judge Block of the US Eastern District Court for the Eastern District of New York denied the artists' request for injunctive relief based on assessments relevant to what in the Italian civil proceedings would be called *fumus boni iuris*, ie, likelihood of success on the merits, and *periculum in mora*, ie, whether the plaintiffs demonstrated that they were likely to suffer irreparable harm. Indeed, despite acknowledging that some of 5Pointz's graffiti was likely to be of recognized stature, Judge Block used its ephemeral nature and marketability to exclude its status as art worthy of VARA's protection from destruction and to conclude that, in balancing the interests of the parties, the issuance of an injunction was inappropriate. Only a few days after the preliminary injunction was denied and before the grounds were even filed, Wolkoff had all the surfaces of the building whitewashed, effectively precluding the possibility of appealing the denial of the preliminary injunction. The unexpected and overnight action was considered extremely improper by the art community and the public and was in fact later used as the basis for claims by the artists. Cf C. Leman, 'Protecting Artistic Vandalism: Graffiti and Copyright Law' 2 *NYU Journal of Intellectual Property and Entertainment Law*, 295, 332, 304-305; L. Giordani, *Graffiti, street art e diritto d'autore: un'analisi comparata* (Trento: Trento Law and Technology Research Group, 2018), 84.

[28] R. Chused, 'Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz' 41 *Columbia Journal of Law & the Arts*, 583, 596-597 (2018).

potential economic compensation.[29]

The 5Pointz court case has, therefore, raised important questions regarding artists' rights and the value of street art. It highlights the need to balance property rights with the protection of artists' interests and stimulates a broader debate on the definition and protection of street artworks.

IV. The Legal Issue in Italy: The Relevant Legislation and the Positions of Italian Doctrine

In Italy, the modern street art movement that arrived in the late 1980s is now present in many Italian cities and is seen as representing an important form of artistic and cultural expression.[30] Promoted and valued by local governments with the specific goal of redeveloping degraded spaces and enhancing suburbs, street art is also exhibited and musealized in settings far removed from the spaces where it was originally conceived.[31]

The conflict between an artist and a property owner is among the most interesting issues involving two rights of constitutional importance in Italy: the right to free expression (Art 21 Italian Constitution) and the property right (Art 42 Italian Constitution). Italian courts are called upon to balance these two rights; to attempt to strike a balance between protecting creativity and artistic freedom, while also protecting the rights of property owners whose property serves as the medium for street artworks.

Limiting the analysis to the relationship between the artist and private citizen, it is of fundamental importance to distinguish whether the work was created with the permission of the owner of the medium. In the case where any work is authorized (under Art 936 of the Italian Civil Code), in the absence of any agreement to the contrary, the owner of the building also becomes the owner of the work, while the artist remains the owner of the copyright, including the corresponding economic rights and moral right, unless he decides to transfer the economic rights to a third party. However, the owner of the building would be within his or her rights not to appreciate the artistic quality of the work and its market value and may wish to remove it or destroy the building on which it is located. The owner may choose, then, to keep the work in exchange for a payment paid to the artist for the use of materials, tools, and labor or an amount equal to the increase in value enjoyed by the building due to the work; or (Art 936, para 5), he may require the person who made the works to remove them, at his own

[29] L. Giordani, n 27 above, 86.

[30] S. Rosano and B. Kurtz, n 2 above, 785.

[31] B. Mastropietro, n 7 above, 965-967. See, in this sense F. Falchini, 'Street Art, verso la musealizzazione' available at https://tinyurl.com/ycxnu9ks (last visited 30 September 2024); see also M. Berto, *Street Art: l'arte della strada verso la musealizzazione, tra legge penale e diritto d'autore* (Venezia: Università Ca' Foscari, 2017); F. Benatti, 'La Street Art musealizzata tra diritto d'autore e diritto di proprietà' *Giurisprudenza commerciale*, V, 781-822 (2017).

expense, within six months from when he has notice of the incorporation of the work in the building (Art 936, para 6), subject also to compensation for damages.

Another possible scenario is one in which the owner understands the value of the work and wishes to profit from it by recognizing a significant property enhancement to the building. In this case, a legal problem would arise regarding the unjust enrichment of the owner himself, who would have no property title to the artwork.[32]

In the matter of copyright on the unlawfully made work, Italian doctrine is divided on whether or not to use the US 'unclean hands' theory, according to which the plaintiff obtains the protection of his right only if he acted in good faith and no wrong has been committed. Indeed, some consider it contrary to Art 1 of the Italian Copyright Act (legge 22 April 1941 no 633), which does not consider the lawfulness of the work to be a requirement aimed at copyright protection, but merely grants protection to a list of categories of creative works regardless of the medium or form of expression by which they are made.[33] Despite its frequent mention, it is very rarely received in our field of inquiry.[34]

Although there is no specific legislation in Italy that can regulate the conflict of interest between owner and artist,[35] the most recent trend is to tolerate street artworks, regardless of the lawfulness of their creation.[36]

V. Italian Case Law: The Debate on the Artistic Value of Street Artworks

Among the most recent cases involving Italian jurisprudence is the case of the famous Banksy in Venice – a street artwork depicting a child 'in the rushing wind of a landing, wearing a life jacket and holding a flare, fluorescing in the night'.[37]

[32] N.A. Vecchio, n 12 above, 669-670.

[33] S. Rosano and B. Kurtz, n 2 above, 796.

[34] See *Villa* v *Pearson Education, Inc*, 03 C 3717 (N.D. Ill. Dec. 9, 2003). As referred by G.M. Riccio, 'Arte negli spazi pubblici e superamento delle logiche proprietarie: suggerimenti e suggestioni dall'analisi comparatistica' *Rivista di Diritti Comparati*, I, 5, 8 (2020). It should be emphasized, in fact, that the objection regarding the illegality of an abusive street art work, which forms the basisof the crime of defacement, is overcome by taking into account the autonomy of the different regulatory areas. In this way, the unlawfulness of the graffiti author's behavior would not be relevant to the protection of the copyright of the work itself. This is done by virtue of the principle of neutrality, which implies the indifference of the legal system to the manner in which the work of art was created. This principle is also confirmed indirectly by Art 6 of the Copyright Law, which recognizes the mere creation of the work as the original title for the acquisition of related rights. Moreover, to deny authorship protection would be tantamount to imposing a double penalty against the same infringing conduct, violating the principle of proportionality. See also, in this regard, B. Mastropietro, n 7 above, 989. Further, Corte di Cassazione 14 September 1912, *Giurisprudenza italiana*, 280 (1913), as referred by A. Sau, n 1 above, 159.

[35] C. Cosentino, 'La tutela delle opere di "street art" tra diritto d'autore e regole proprietarie' *Rivista critica di diritto privato*, IV, 529, 540-541 (2017).

[36] S. Rosano and B. Kurtz, n 2 above, 796.

[37] Available at https://tinyurl.com/cj8vxka7 (last visited 30 September 2024).

The artwork was the subject of a complaint to the Public Prosecutor's Office by the Venice Superintendent's Office pursuant to Art 169, para 1, lett a of the Italian Code of Cultural Heritage and Landscape since it was illegally executed on Palazzo San Pantalon, a building subject to cultural restrictions and owned by a private individual. Indeed, the cited article prohibits unauthorized demolition, removal, modification, restoration, or any works on cultural properties, as well as the unauthorized detachment of frescoes and other decorations, and the execution of urgent temporary works without notifying the Superintendent. Nevertheless, the complaint did not fail to specify the artistic character of the work, which implied that the property owner would have to have the painting removed by experts should he wish to remove it. It was precisely the artistic character of the painting that contributed, along with the impossibility of tracing the author, to the request for the case to be dismissed, 'since, although the crime is alleged, it is, in fact, a work of art that does not deface or damage the building'.[38] The case is of legal interest since it was precisely the artistic nature of the work that contributed to the non-feasibility of constituting the matter as a crime. In acknowledgment of the artistic value of Banksy work, Banca Ifis acquired Palazzo San Pantalon to preserve the painting and renovate the space for public use. Supported by the Ministry of Culture and the Superintendence, this project aims to establish an exhibition area for both established and emerging artists. Launched in October 2023, the effort seeks a public-private collaboration to protect the painting, highlighting important themes and fostering societal reflection.[39]

Among the most recurrent grounds for the acquittal of urban artists in similar lawsuits is the contribution of improvements to buildings and walls, countering the inherent nature and meaning of vandalism, which refers to a pejorative alteration of other people's property. However, this trend is truly a more recent one. Artist Alice Pasqualini was sentenced in 2016 to a fine of eight hundred euros for defacing some walls in Bologna, having seen no benefit from this jurisprudential orientation. In fact, in that case, the Bologna judges did not consider the artist's reputation or the already degraded condition of the walls, choosing instead to focus specifically and objectively on the illegality of the action, having considered the assessment of the artistic character of the work to be an excessively subjective operation for the judicial interpreter.[40]

Also famous is the case of artist Sqon who painted his iconic brightly colored cats in some Venetian alleyways that had peeling walls. The artist was acquitted of the charge of defacing another's property (Art 639 of the Italian Criminal Code, that punishes who defaces or soils others' property) thanks to the testimony of some residents who claimed the work was a 'beautification' of the walls that were

[38] See https://tinyurl.com/ycyd5ee9 (last visited 30 September 2024).

[39] B. Mastropietro, n 7 above, 962-963. See https://tinyurl.com/u2frr7cy (last visited 30 September 2024).

[40] Tribunale di Bologna 15 February 2016 no 674, available at https://tinyurl.com/mwj6scd8 (last visited 30 September 2024).

in a state of disrepair.[41]

Another similar case was that of the artist Blu, who had painted on a concrete wall of a railway underpass. In the ensuing lawsuit, the judge upheld the nonexistence of defacement, instead considering Blu's painting as ameliorative, bringing 'ornament, value and visibility to a gray, and anonymous public work'.[42]

In the case of the conflict between the artist's copyright and the property owner's right, the progressive tendency developing has been for courts to consider the crime of defacing other people's property as non-existent if the artistic character of the work and the artist's intent to make improvements are recognized; these were pivotal elements considered in the case of a well-known Sardinian artist who case later reached the Italian Supreme Court.[43]

After all, this trend espouses the increasingly recent validation of urban artworks as assets in public spaces belonging to the community. The work 'Tuttomondo', by renowned artist Keith Haring, painted on the back wall of the convent of the church of Sant'Antonio in Pisa in 1989, was bound by the Ministry of Cultural Heritage and Activities and Tourism, Regional Directorate for Cultural and Landscape Heritage of Tuscany by Decree no 335 of 2013, as it was considered worthy of protection. Its detachment was forbidden under Art 50 Legislative Decree no 42/2004[44] and the historical artistic interest of the mural was recognized according to Art 10 para 3 letter d) and 11 para 1 letter d) of the aforementioned decree. The decree described the importance of safeguarding, preserving, and enhancing the work as an 'artistic testimony of our time', declaring it to be of cultural interest, and regardless of its qualification as a work of street art.[45]

VI. Possible Hermeneutic Solutions in Light of an Initial Comparison of the Two Legal Systems. Toward a 'Supervened' Conformed Property

In both Italy and the United States, courts find themselves balancing the interests of street artists and the owners of the properties serving as a canvas for these works. As illustrated by the 5Pointz case, US federal law under VARA

[41] See https://tinyurl.com/fjyjejcc (last visited 30 September 2024).

[42] See https://tinyurl.com/57uw23v2 (last visited 30 September 2024). It is noted how the artist, moreover, in protest against the musealization of urban artworks has erased with chisel most of his paintings in Bologna, putting the spotlight on the great proprietary paradox of urban art: to whom does the painting belong, and to what extent? The artist's act was, not surprisingly, placed in correspondence with the opening of the exhibition 'Street Art Banksy & Co. Art in the Urban State' at Palazzo Pepoli, with works 'detached' from the walls they belong to under permission of the owners of the walls themselves. See https://tinyurl.com/2x6u2a5p (last visited 30 September 2024).

[43] Corte di Cassazione-Sezione penale II 20 April 2016 no 16371, *Diritto e Giustizia* (2016).

[44] S. Rosano and B. Kurtz, n 2 above, 793.

[45] Decreto no 335/2013, Ministero dei beni e delle attività culturali e del turismo. Direzione Regionale per i Beni Culturali e Paesaggistici della Toscana.

provides certain protections for artists' works, but these protections are more likely to apply if the street artists have obtained permission from the property owner before creating their work. At the same time, property owners must notify artists of their intention to destroy their works and give them ninety days to remove them to avoid claims for damages.

Italian law, on the other hand, is currently unclear on the scope of protection for street art. Based on the various Italian sources that lend themselves to regulating the matter and the few judicial decisions to date, there appears to be a tendency to prefer the interests of owners over those of street artists, unless there is a formal authorization or contract between the two parties, or the work is declared a cultural interest.

In criminal cases, however, street artists can point to the uncared-for or ruinous condition of the walls or surfaces as they existed before the artistic intervention as a potentially winning argument to protect their artworks and avoid criminal consequences. Although there is general skepticism about recognizing the artistic value of a work of art to absolve an artist from criminal consequences (because it would be the result of a judge's subjective assessment), some courts are becoming more open to the use of this valuable exemption. In both Italy and the United States, however, it is appropriate for artists to seek express written permission from property owners before painting on their property. Obtaining such authorization seems to be the only practical means of protecting the artist's moral rights. Without this permission, the artist risks losing the work with no recourse beyond facing lengthy and costly litigation.[46]

The main conflict between the rights involved, which is the most intriguing legal issue, concerns the destruction of street artwork that is indeed recognized as a work of art. The question arises whether the right to the integrity of the work, as the moral prerogative of the artist, includes the right to object to its destruction.

In the United States, this possibility is expressly provided only for works of 'recognized stature' as in the case of 5-Pointz. In the Italian context, over time, there has been a tendency for the courts not to consider such behavior as criminal if the artistic character of the work and the artist's intent to make improvements are recognized during the trial. It is precisely this tendency that also reflects a recent recognition of urban artworks as assets belonging to the community in public space.

While in the United States, VARA underscores a distinction between vandalism and works deserving of protection, with the criterion for that being a 'recognized stature', under the Italian legal system such a distinction could only be delineated by the Ministry of Cultural Heritage and Activities and Tourism with a specific declaration of cultural interest of the work, certifying it, if the requirements set forth in Art 10 Italian Code of cultural heritage and landscape are met, which include the work's historical, artistic, archaeological, or ethno-anthropological significance, and its importance for public interest due to its cultural value. In any case, the

[46] S. Rosano and B. Kurtz, n 2 above, 803-804.

criterion of 'recognized stature' proves difficult to use both because of the inevitable subjectivity of any aesthetic evaluation and because of the role its implementation requires of judges – to act as arbiters of disputes among art critics. In the case of 5-Pointz, the 'recognized stature' of those works ultimately allowed the artists to achieve a historic judicial victory, but not to save the place housing those artistic interests, with the presiding judge preferring instead to safeguard the economic interests of the owner.[47]

Italian copyright law offers protection to all works that show even a modicum of creativity, adopting a rather low threshold of significance on this point, but without providing clear guidance on which ones fall under this privileged treatment. One could extend protection from destruction only to works of particular value, as is the case in the United States. However, when trying to introduce a judgment of artistic value into the legal framework, several difficulties emerge.[48] These include, for example, the subjective nature of artistic value, the potential for inconsistent evaluations, and the difficulty of establishing objective criteria for what constitutes 'particular value'. For instance, experts may diverge in their assessments of the cultural significance of contemporary street art compared to classical paintings.

It is easier, indeed, to address this issue for works that fall into the category of cultural property, since in those cases a value judgment has already been provided through official recognition of artistic value.

One interesting proposal is to introduce at the legislative level the obligation for owners, before taking action on the work, to apply to the Superintendency with jurisdiction over the area, requesting prior authorization to which a response should be provided within a defined period.[49] After that period has elapsed, a mechanism similar to silent consent could come into operation, which would allow the owner to take action on the work, including the possibility of destroying it. This process could see the involvement of precisely those bodies in charge of the process of declaring a cultural interest, hopefully, joined by experts in the field of street art.[50] This approach would have the advantage of relieving the owner of the

[47] L. Giordani, n 27 above, 126.

[48] ibid 126.

[49] G.M. Riccio, n 34 above, 18-19; After all, there is already such a mechanism in Art 50 of the Italian Code of cultural heritage and landscape, which regulates the prohibition, 'without the permission of the superintendent, [to] arrange for the detachment of frescoes, coats of arms, graffiti, gravestones, inscriptions, tabernacles and other decorative elements of buildings, whether or not exposed to public view. It is forbidden, without the permission of the superintendent, to order and carry out the detachment of coats of arms, graffiti, tombstones, inscriptions, tabernacles as well as the removal of memorial stones and monuments, constituting vestiges of the First World War within the meaning of the relevant regulations'. The main purpose of the rule, which is rooted in several provisions found in the edicts of the pre-unification era for the preservation of city ornamentation and in some regulations in force in the Grand Duchy of Tuscany, is to provide specific protection to certain types of heritages that, although not falling into the category of cultural heritage in the strict sense, are nonetheless deserving of special forms of protection. Cf F. Astone, 'Art. 50', in M.A. Sandulli ed, *Codice dei Beni Culturali e del Paesaggio* (Milano, Giuffrè Francis Lefebvre, 2019).

[50] See G.M. Riccio, n 34 above, 18-19. However, it is emphasized as 'a similar mechanism'

medium of the costs and uncertainty associated with identifying the author since works are often signed with a pseudonym. It would also resolve the long-standing diatribe regarding the right to destroy works potentially worthy of protection.[51]

In the Italian legal system, there are already limitations to the right of ownership based on the artistic character of certain assets: for example, the assets recognized as having an artistic character are regulated by the Code of Cultural Heritage, for which the owner's freedom of disposition is limited by the public interest aimed at protecting the asset. Art, then, in this sense, takes on a social function. Indeed, some authors bring it back to the category – not exempt from criticism by authoritative doctrine[52] – of the 'beni comuni' (common goods), and even if the property belongs to one individual, everyone's interest in its preservation within the cultural heritage is protected.[53]

Among all the issues noted emerges the need to go beyond the attempt to interpret street art events exclusively from a private perspective, renouncing an individualistic approach and adopting one that is attentive to the generality of the interests involved, recognizing the intangible value of this type of art that goes, in fact, far beyond the materiality.[54]

If we exclude the individual interest of the author or owner of the work, it is important to recognize that the legal system protects works not only for their aesthetic or artistic value but also as cultural and historical records that deserve to be preserved for future generations as

> 'things that express utilities functional to the exercise of fundamental rights as well as to the free development of the individual' and that must be protected and safeguarded by the legal system 'also for the benefit of future

because as known in para 4 of Art 20 Legge no 241/1990 important exceptions are typified concerning which silence cannot count as assent but – except in cases of silence rejection – should be qualified as silence-fulfillment, and precisely among the exceptions cultural and landscape heritage is noted. About the need to involve qualified parties in the discussion on the artistic value of street art, a commission of experts was formed and has already been presented as part of the Icomos Italy Ordinary Members' Meeting at the Ministry of Culture in Rome in 2023 available at: https://tinyurl.com/2wdawpms (last visited 30 September 2024).

[51] ibid 18-19.

[52] The notion of 'beni comuni' has been questioned as ambiguous: 'Instead of proposing uncertain and dangerous changes to the Civil Code, it would be necessary to take seriously – without prejudice, distrust or conservatism – principles and general clauses already offered by the current legal system'. G. Perlingieri, 'Criticità della presunta categoria dei beni c.dd. «comuni». Per una funzione e una «utilità sociale» prese sul serio' *Rassegna di diritto civile*, I, 136, 161 (2022).

[53] L. Giordani, n 27 above, 126. On 'beni comuni', see the insightful analysis of: U. Mattei, E. Reviglio and S. Rodotà eds, *Invertire la rotta. Idee per una riforma della proprietà pubblica* (Bologna: il Mulino, 2007); M.R. Marella ed, *Oltre il pubblico e il privato. Per un diritto dei beni comuni* (Verona: Ombre Corte, 2012); D.G. Ruggiero, *Destinazione culturale e proprietà dei beni* (Napoli: Edizioni Scientifiche Italiane, 2019).

[54] G.M. Riccio, n 34 above, 12-13.

generations'.[55]

This perspective goes beyond the traditional dichotomy between public and private[56] and overcomes the logic of urban space oriented toward individual and neoliberal interests. On the contrary, artworks can play a unifying role and be a cohesive element for entire urban communities. Think of projects involving numerous neighborhoods, with artworks that recall the history of such places. Often these works are commissioned by local governments, but specific regulations are often lacking. This situation opens the possibility that a future administration of a different political orientation may intervene and infringe on those same works commissioned by earlier governments and even remove them over differences of opinion.[57]

In this direction attentive doctrine has formulated the reconstructive hypothesis of street art as an asset for public use, configuring its legal regime as *dictatio ad patriam* where the artist voluntarily makes his work available to the community, subjecting it to the corresponding use, which contributes to the refinement of the object itself to satisfy a common need 'uti cives' and this regardless of the motives behind such behavior, its spontaneity or the motivation that animates it.[58]

It seems undeniable that some street artworks because they often have an actual connection to the history, art, and culture of a place, represent a significant asset for the community where it is located, so much to theorize a genuine 'right of public use to enjoy the cultural value of the asset'.[59] In this sense, in the case of works of street art whose artistic value can be equated with that of cultural property, Art 90 Italian Code of Cultural Heritage and landscape could be considered

[55] See 'Relazione Commissione Rodotà' available at https://tinyurl.com/4j6wezb3 (last visited 30 September 2024).

[56] It is argued that 'the notion of the common goods does not deserve special attention, to the point of justifying the call to go 'beyond the public and the private', both because history already delivers us the category of the so-called res in usu pubblico and Marciano's *res communes omnium*, as well as public state property (which, unlike 'common goods', appropriately enhances the role of institutions), and also because it seems ambiguous, to say the least, to discuss 'common' goods concerning very heterogeneous cases ... whose legal statutes, indeed, deserve the utmost attention, but are necessarily to be reconstructed case by case, in relation to the nature and peculiarity of the function and interests specifically involved. After all, the problem is not the creation of one category rather than another, nor is it to establish whether or not *res communes omnium* are to be excluded from the list of goods, but to understand that the legal connection between 'things' and 'persons' can take place in the most disparate ways and must not be analyzed only in terms of belonging; so that the notion of good must be rethought precisely in the light of function and social utility and prescinding from the problem of appropriability'. See G. Perlingieri, n 52 above, 141- 143. See also: P. Perlingieri, *Introduzione alla problematica della «proprietà»* (Napoli: Edizioni Scientifiche Italiane, 1st ed, 1971); Id, 'Normazione per principi: riflessioni intorno alla proposta della Commissione sui beni pubblici' *Rassegna di diritto civile*, IV, 1184-1190 (2009).

[57] G.M. Riccio, n 34 above, 15-16. See also, on this topic, E. Pellecchia, 'Valori costituzionali e nuova tassonomia dei beni: dal bene pubblico al bene comune' *Foro italiano*, I, 573 (2012); A. Dani, 'Il concetto giuridico di "beni comuni" tra passato e presente' *historiaetius.eu*, 1-48 (2014).

[58] cf A. Sau, n 1 above, 180.

[59] cf B. Graziosi, 'Riflessioni sul regime giuridico delle opere della street art' *Rivista giuridica dell'edilizia*, IV, 423, 440, (2016).

functional to their discovery, which, concerning fortuitous discoveries of cultural property with prompt reporting, could offer the interpreter a possible solution if applied to the finding of works of street art.[60] One could assimilate the position of the owner who accidentally discovers a cultural asset to that of the owner of the wall on which an uncommissioned work of street art appears. The main objective should always be the preservation of works that represent significant evidence of a historical era, along the line of what is enshrined in Art 9 of the Italian Constitution, which states that the Republic promotes the development of culture and scientific and technical research. It also safeguards natural landscape and the historical and artistic heritage of the nation.[61]

In conclusion, one could hypothesize about the perspective of reform, a conformed property of an innovative character, that is the one of being 'supervened', where the conformation of the ownership of property insisting (in our case the wall painting) on real estate is operated directly by the state or regional law, in compliance with the reservation of law provided by Art 42 Italian Constitution to which is entrusted the task of determining the modes of acquisition, modes of enjoyment and the relative limits of private property.

Indeed, to preserve real estate that possesses special historical, urban, or environmental characteristics, constraints on the property may be established through a specific plan or act, for example, precisely as a result of a declaration of cultural interest. As a consequence of such a constraint, there will exist a reduction of the faculties attributed to the owners, imposing, for example, obligations of doing (preservation of the property, carrying out maintenance work) and not doing (alteration, destruction, damage, modification). This would be a conforming constraint since the affixing of the constraint follows the ascertainment of the existence in the property of pre-existing characteristics defined in general by law. Specifically, in our case, the result would be a 'supervened' conformed property, since the property does not come into existence already 'restricted' in terms of possible use, as the imposition of constraints on the property is not original, that is, native concerning the property itself, but arrives with the act of creating the artistic work.[62]

[60] See G. Pistorio, 'Art. 90', in M.A. Sandulli ed, *Codice* n 49 above. The article specifies that anyone who fortuitously discovers immovable or movable objects as indicated in Art 10 must report it within twenty-four hours to the superintendent, mayor, or public security authority, and ensure their temporary preservation in the same condition and location as found. The superintendent also notifies the Carabinieri responsible for cultural heritage protection.

[61] G.M. Riccio, n 34 above, 20.

[62] Indeed, if we intended the property in its materiality, conforming property would indeed arise because the object was already there before, and was limited by the act of creating the artistic work. But if we consider that concurrently with the creation of the new work an *ex novo* property came into being, a new legal entity would in fact be born already 'limited'. On conformative constraints, see E. Casetta, *Manuale di diritto amministrativo* (Milano: Giuffrè Francis Lefebvre, 2023), 317-318. See also: F. Longobucco, 'Beni culturali e conformazione dei rapporti tra privati: quando la proprietà "obbliga" ' *Politica del diritto*, 47, 547-562 (2016); G. Alpa et al, 'La proprietà, le proprietà. Materiali in tema di proprietà conformata e proprietà vincolata' *Diritto&Diritti*, 2004.

We do not omit to reflect further on the cases in which acclaimed street artists place their works precisely on an already listed cultural asset, thus wondering which work 'prevails' in this case for its preservation. Consider the hypothesis in which a renowned artist creates a work on a cultural asset, although this eventuality, at the moment, does not seem to be documented in Italy.

This eventuality would be considered rare because of the tendency of well-known street artists to show marked sensitivity to cultural goods, usually avoiding intervening on them. However, if such a situation were to occur, a discussion could be opened on the legal category of supervened conformed property. In this context, it could be argued that the cultural property hosts a new contemporary work, thus generating a unique and complex entity. This raises the need to develop new approaches and strategies for legal protection and cultural valorization.

As was with the case of Banksy in Venice, the Superintendence could not avoid reporting the graffiti to the prosecutor's office since it was an intervention on a restricted property. The dismissal that 'settled' the case, however, cannot satisfy the interpreter. If Banksy's painting is itself declared to be of cultural interest, in this case, resolving the conflict would require a thorough analysis and balance between preserving the existing cultural heritage and recognizing the added value brought by Banksy's work. Specific legal and institutional mechanisms would therefore be required to deal with such unique situations, and indeed the acquisition of Palazzo San Pantalon by Banca Ifis to preserve the artwork and create an exhibition space for artists indicates a recognition of the collective value of such works.

One could hypothesize as an abstract solution the aforementioned 'supervened' conformed property, where the legal system protects the intermingling of the street artwork and the 'hosting' medium according to the 'new' nature of its object.

This is a conceptual conjecture, and perhaps a bold one, but one that, upon reflection, enjoys illustrious precedents in the history of art, dense with the layering of various works superimposed in different periods into a single artifact that, today, represents in its *unicum* 'the' protected artistic asset.[63]

On conformed property see: F. Gazzoni, *Manuale di diritto privato* (Napoli: Edizioni Scientifiche Italiane, 20th ed, 2021), 218-219; A. Gambaro and U. Morello eds, 'Proprietà e possesso', in *Trattato dei diritti reali* (Milano: Giuffrè, 2008), I, 300-304. S. Pugliatti, 'Interesse pubblico e interesse privato in diritto di proprietà' *La proprietà nel nuovo diritto,* (Milano: Giuffrè, 1964), 3.

[63] Cultural heritage has always been the subject of 'perturbing itinera', especially in the case of architectural assets, which are almost never made in one go and by a single author. If St. Peter's in Rome owes its definition to Michelangelo, it certainly cannot be considered his work, not so much because of the Bramantean premises as because of the extension made by Maderno, the later interior decoration and the changes made to the domes. In the course of time many architectural goods have been the subject of actions of various kinds aimed at their completion, modernization or restoration. Interventions on architectural works already built or in progress take on aspects conspicuous in their frequency and paradigmatic in their significance. In many examples new interventions have given new life and new functions to even 'modest' works. The artist's own potential and the incidence of the culture of the time are the constants that characterize interventions on pre-existing structures. It is often in the history of art and

The aforementioned proposals and observations highlight the inevitable need to carefully consider the phenomenon of street art as belonging to the intangible cultural heritage (which accurately coordinates with the ephemeral nature of the works under consideration), a category that is still not supported by a sufficiently organic discipline.[64]

The 'supervened' conformed property, then, would be an innovative category, but, at the same time silently present in the very history of art both near and far and deserving, most simply, of legal emergence.

architecture the overlapping of various personalities in the same work: a factory may continue over time (Santa Maria del Fiore), it may undergo radical modernization once completed (Basilica of Santa Maria degli Angeli on the Baths of Diocletian, Cathedral of Syracuse), or it may receive a restoration aimed at its enhancement (St. Peter's in Rome or Palermo Cathedral). See G. De Angelis D'Ossat, 'Restauro: architettura sulle preesistenze, diversamente valutate nel tempo' *Palladio*, III, XXVII, 2, (1978), passim; S. Boscarino, 'Storia e storiografia contemporanea del restauro' in G. Spagnesi ed, *Storia e restauro dell'architettura, proposte di metodo* (Roma, Istituto della enciclopedia italiana fondata da G. Treccani, 1984), 51-62.

[64] See, in this regard, the meticulous examination of the issue conducted by M. Timo, *L'intangibilità dei beni culturali* (Torino: G. Giappichelli Editore, 2022), passim. Indeed, it is noted that the process of adapting the concept of 'cultural heritage' to the so-called 'intangible cultural heritage' is still in progress since the Italian legal system does not currently provide a precise definition of intangibility in relation to cultural interest.

Insights & Analyses

Causes of Reflection on the Use of AI in Civil Justice

Giuliana Amore and Maria Margherita Lazzara*

Abstract

Paper focused on two particularly relevant profiles. The first focus is the relationship between the use of artificial intelligence (AI) in the process and the protection of personal data as referred to in the European Union General Data Protection Regulation (GDPR). Predictive justice is a kind of justice foreseen by algorithms that carry out calculations starting from large masses of data (big data), to find recurrences to forecast outcomes and distinguish systems of evidence. The second focus relates to the use of constitutional principles to give reasons for sentences, in compliance with the more general principle of the human in command which gave inspiration to Art 22 GDPR and the Artificial Intelligence Act. The paper highlights, in particular, the reasoning or motivation behind judicial civil sentences. It will deepen the considerable methodological expedients that are required to respect some of the principles of the Italian Constitution while using AI, so that due process remains under human control.

I. Introduction

In 1963 the American jurist Reed C. Lawlor wrote

> 'There will come a day when man will be able to insert a set of data into a machine that has precedents, rules of law and rules of reasoning inside and in which the machine will be able to offer the reasoning step by step through which one may be able to arrive at a decision. We will be able to study it and decide whether the machine has proposed something right or wrong'.[1]

Today, that day has arrived.[2]

In 2018 (3 December), in Strasbourg, the CEPEJ (European Commission for the Efficiency of Justice) deemed it appropriate to draft the 'European Ethical Charter on the use of Artificial Intelligence in judicial systems and related areas'. It defines artificial intelligence (AI) in judicial systems as the

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[1] R.C. Lawlor, 'What Computers Can Do: Analysis and Prediction of Judicial Decisions' 49 *American Bar Association Journal,* 337 (1963).

[2] Think that day is currently still far away: M. Libertini et al, Giustizia predittiva e giurisdizione civile. Primi appunti', in A. Pajno et al eds, *Intelligenza artificiale e diritto: una rivoluzione?* (Bologna: il Mulino, 2022), 515.

'set of scientific methods, theories and techniques aimed at reproducing the cognitive abilities of human beings through machines'.

To start, our first question is: how dare a machine *per se* be considered 'better' than a human, especially in the complex matters entailing human justice?[3] As machine learning techniques are improved, artificial intelligence (AI) systems being used to assist human decision-makers in almost all fields.[4] However, attention must be focused on two particularly relevant profiles, which will form the two guidelines of this work: the first profile concerns the relationship between the use of AI in trials and the protection of personal data as referred to in the GDPR. In fact, predictive justice is a kind of justice foreseen by algorithms that carry out calculations starting from large masses of data (*big data*), to find recurrences in order to forecast outcomes and distinguish systems of evidence.[5]

The second focus, strictly connected to the first one, relates to the use of constitutional principles to give reasons for sentences, in compliance with the more general principle of the human in command, inspiring Art 22 GDPR (which restricts the automated decision, with limited exceptions)[6] and the Artificial Intelligence Act.[7]From the European Proposal of Regulation, the paper will highlight, in particular, the reasoning or motivation behind judicial civil sentences. In other words, this paper will deepen the considerable methodological expedients that are required to respect some of the principles of the Italian Constitution while using

[3] E. Lance, 'When AI Judges Our Human Judges And The Judgment Of The Courts', available at https://tinyurl.com/4dfvu68r (last visited 30 September 2024).

[4] S. Greenstein, 'Preserving the rule of law in the era of artificial intelligence' 30 *Artificial Intelligence and Law*, 291 (2022). 'A challenge for the future will be how to reap the benefits of AI for society while at the same time protecting society from its harms, essentially promoting innovation while at the same time balancing it against the interests of society. A challenge will be to determine which values to balance technology against. In this regard, it is argued that the values enshrined in the rule of law operate as a good starting point in determining the fabric of any society. Herein lies the value of protecting the rule of law from technologies incorporating AI'.

[5] See A. Guerra and F. Parisi, 'Investing in Private Evidence: The Effect of Adversarial Discovery' 14 *The Journal of Legal Analysis*, 2 (2022). 'Technological progress has reduced the cost of evidence technology, facilitating access to a wide range of information in court proceedings. Notwithstanding some resistance to the use of private evidence technologies and the legal challenges raised against the admissibility of the data collected in court proceedings, European legal systems have revised and extended the application of some of their evidence rules, leveragingon the opportunities offered by these technological transformations'. O. Pollicino, *Judicial Protectionof Fundamental Rights Online: A road Towards Digital Constitutionalism?* (Oxford: Hart, 2021).

[6] In particular, see M. Kaminski, 'The Right to explanation' 34 *Berkeley Technology Law Journal*, 189 (2019); S. Wachter et al, 'Why a Right to Explanation of Automated Decision Making Does not Exist in the General Data Protection Regulation' 7 *International Data Privacy Law*, 76 (2017); B. Goodman and S. Flaxman, 'European Union Regulations on Algorithmic Decision Making and Right to explanation' 38 *AI Magazine*, 50 (2017).

[7] Proposal Regulation of the European Parliament and of the Council. Laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and Amending certain Union Legislative acts [2021], available at https://tinyurl.com/cjsvv55c (last visited 30 September 2024). European Commission, White Paper on Artificial Intelligence - A European approach to excellence and trust, 2020/65/EC of 19 February 2020, available at commission.europa.eu.

AI (in the scope of upholding general legal principles in civil lawsuits), so that due process remains under human control.[8]

Many scholars wonder: how might machine learning improve judicial decision-making, or the sentencing process in general?[9] Proposals to incorporate AI into the sentencing process, range from modest to ambitious, from merely supporting judges, to replacing them entirely.

The length of the legal process timeline and the need for legal certainty, speed, cost reduction and quality decision-making have favored the use of 'prediction technology' and 'Predictive Justice': a system that allows for a prediction of the possible outcome of a dispute on the basis of the previous solutions given to analogous or similar cases and through the analysis of the data entered into the system by an algorithm.[10] In other words, it is a way of applying the law by exploiting AI and to determine, by means of the application of quantitative techniques (AI algorithms), the probabilities of each possible outcome of a dispute. The aim is to predict judicial decisions using algorithms 'trained' to analyze databases containing precedents and other information useful for increasing the degree of legal certainty and the quality of decisions, as well as solving other problems of justice such as long trial timelines.[11]

Further, as is known, several projects for the use of AI in the field of civil jurisdiction are already active throughout the world.[12] Even in Italy, 'predictive

[8] Human contribution does not always ensure greater certainty in decisions. For instance, a jury design is a critical element of criminal adjudication. Valid/important studies - F. Parisi et al, 'Accuracy of Verdicts under Different Jury Sizes and Voting Rules' 28 *Supreme Court Economic Review* (2020) - show that the use of either large non-unanimous juries or small unanimous juries are alternative ways to maximize the accuracy of verdicts while preserving the functionality of juries. Perhaps, AI systems through the elimination of the unanimity requirement in the presence of large juries can help appraise US Supreme Court decisions to improve fairness.

[9] J.V. Ryberg and J. Roberts, *Sentencing and Artificial Intelligence; Studies in Penal Theory and Philosophy* (New York: Oxford University Press, 2021).

[10] Think of a software like *Prometeia*, which allowed the Superior Court of Justice of Buenos Aires to resolve one thousand (repetitive) cases within seven days (instead of eighty three) with a success rate (parameterized to the solutions then actually adopted by the magistrates) of ninety six percent of cases. *Prometeia* was also the subject of experimentation at the Paris State Council. See G. Pasceri, *La predittività delle decisioni* (Milano: Giuffrè, 2022).

[11] In 2017, the English platform *Case Crunch* conducted the first competition between AI and Lawyers: AI won with an accuracy of eighty six point six percent against sixty two point three percent of lawyers on intellectual property cases discussed before the Financial Ombudsman Service. With an algorithm used in 2017 by the University of Sheffield, an experiment was conducted on five hundred eighty six judicial cases decided by the European Court of Human Rights in the field of due process, privacy and inhumane treatment.

[12] The following are a few already active projects which use AI in the field of civil jurisdiction: in Estonia the predictive justice program will be applied to all small claims (with a value not exceeding seven thousand euros), AI will formulate a decision on the basis of documents and information introduced by the parties and this decision can be challenged before a human judge (E. Niiler, 'Can AI be a fair Judge in Court? Estonia think so' *Wired*, available at https://tinyurl.com/4kjmvf9p (last visited 30 September 2024). In France, the project called *Datajust* aims to carry out an automated processing of data relating to the liquidation of personal damages, in which the Conseil National des Barreaux fears the infringement of fundamental rights on personal data (G.

justice' projects represent initiatives undertaken individually by certain judicial offices, often in collaboration with universities.[13] The purpose of these type of projects is therefore to provide users with elements that allow the possible outcome of a judgment to be predicted with variable margins of certainty, also discouraging cases of rash disputes and encouraging parties who have no chance of success at the judiciary level to follow other paths such as conciliatory ones.[14]

What are the main questions?

The use of AI tools in proceedings and the relationship between the exercise of the judicial function and AI raises several questions in the legal field.[15] In particular, in the face of an undeniable economic utility and efficiency, with a considerable reduction in the timelines and costs of justice, these technologies tend to collide with numerous issues[16] including: the autonomy and independence of the judge to the ancillary or decision-making role of the machine and the liability regime and its compatibility with AI tools and traditional institutions (such as the Italian Court of Appeal and the Court of Appeal in Cassation).

II. Data Protection in the Field of Predictive Justice

In relation to the first question, by its nature, AI collects a vast amount of

De Pasquale, 'La giustizia predittiva in Francia: il trattamento Datajust' *Judicium*, available at https://tinyurl.com/33tumxcx (last visited 30 September 2024).

[13] I intend to refer, citing only a few examples, to the Courts of Appeal of Brescia, Venice, Bari and Genoa. At the moment, it is only a question of a use of algorithms intended as a support to the activity of the judges, ie, without leading to entrusting decisive decision-making tasks to the software in the context of a judgment as so happened in the famous Loomis Case. In particular, for the purposes of our reflection, the project of predictability of the decisions of the Court of Appealof Bari stands out, which focuses attention on the 'motivation' of the sentences, trying to adapt it to the legal paradigms and to simplify it in the case of serial issues. The case concerned an American citizen who in Wisconsin was given a sentence determined on the basis of the score assigned by AI. It involved a man accused of driving a used car during a shooting and not stopping at a police checkpoint. The judge, in establishing the penalty, had applied a particularly severe penalty of six years imprisonment using the results of an algorithm called Compas to quantify it *in peius*. The predictive software worked by analyzing the answers given to a questionnaire of one hundred thirty seven questions concerning age, work, social and relationship life, level of education, drug use, personal opinions and criminal history of the accused, also managing to determine the risk of recidivism. In the present case, Loomis had in fact been classified as a high-risk subject and for this reason he had been convicted not only for what he had done, but also for what he could have done in the future based on the result of a questionnaire elaborated on by the algorithm.

[14] See M. Libertini et al, 'Giustizia predittiva' n 2 above, 515; C. Castelli and D. Piana, *Giusto processo e intelligenza artificiale* (Sant'Arcangelo di Romagna: Maggioli, 2019); C. Giannacari, 'Il processo civile nell'era digitale: spunti di diritto comparato', in G. Alpa ed, *Diritto e intelligenza artificiale* (Pisa: Pacini, 2020), 623 ss; E. Katsh and O. Rabinovich Einy, *Digital Justice, Technology and the Internet of Disputes* (Oxford: Oxford University Press, 2017); G. Zaccaria, 'Figure del giudicare: calcolabilità, precedenti, decisione robotica'*Rivista di diritto civile*, 277 (2020); E. Battelli, 'Giustizia predittiva, decisione robotica e ruolo del giudice' *Giustizia civile*, 281 (2020).

[15] See the contributions in A. Carleo, *La decisione robotica* (Bologna: il Mulino, 2019).

[16] G. Di Vita, 'Production of Laws and Delay in Court Decisions' 30 *International Review of Law and Economics*, 276 (2010).

data. This 'silent' collection of data through the IOT (Internet of Things), the automated processing of large amounts of data through big data analytics techniques and its storage on cloud, are only some aspects of the impact of the use of AI on the protection of personal data. Given the close connection between data and algorithmic technologies, the link between the recent Proposal for a European Regulation on AI (Artificial Intelligence Act) and the General Data Protection Regulation (GDPR) is of particular importance.[17]

More generally, the use of AI (even in proceedings) seems to conflict with the general principles of the GDPR.[18] Apart from the problem of the integrity and completeness of the introduced data (such as procedural elements and jurisprudential precedents), the principle of transparency is especially jeopardized due to the protection offered by legal systems to algorithms. The principles of purpose limitation and minimization conflict with the possible re-use of personal data for different purposes by automated systems. The principle of minimization, then, also conflicts with the need to increase the amount of data to correlatively increase the degree of accuracy and reliability of the decision-making process. Finally, the principle of accountability requires the identification of a data controller. This identification is not easy in the case of predictive justice, with a consequent slowdown in innovation and a negative impact on the safeguard of the right to data protection.

On the other hand, the use of AI in justice, instead, makes it easy to obtain information on disputes submitted to the judicial authorities on the names of the parties, the professionals involved and the judges who ruled on them. This results in an intrusion into the sphere of people's private lives. Because of the need to guarantee people the control and protection of their personal data, a trend is developing that leans towards the so-called 'anonymization' of judgments and judicial measures, ie the obscuring of data that enable the identification of the persons mentioned.[19]

Is this tendency compatible with the principle of publicity of the process?

[17] In this regard, see R. Gellert, *The Risk Based Approach to Data Protection* (Oxford: Oxford University Press, 2020), 2; C. Casonato and B. Marchetti, 'Prime osservazioni sulla proposta di regolamento dell'Unione Europea in materia di intelligenza artificiale' *BioLaw Journal*, 415 (2021); G. Finocchiaro, 'Intelligenza artificiale e protezione dei dati personali' *Giurisprudenza italiana*, 1670, 1671 (2019); U. Pagallo and W. Barfield, *Advanced Introduction to Law and Artificial Intelligence* (Cheltenham-Northampton: Edward Elgar Publishing, 2021), 14; T. Wischmeyer and T. Rademacher, *Regulating Artificial Intelligence* (Cham: Springer International Publishing, 2020).

[18] F. Pizzetti, *Intelligenza artificiale, protezione dei dati personali e regolazione* (Torino: Giappichelli, 2018), 60; T. Zarsky, 'Incompatible: The GDPR in the Age of Big Data' 47 *Seton Hall Law Review*, 995 (2017).

[19] In this regard, see M. Van Opijnen et al, 'Online Publication of Court Decisions in the EU. Report of the Policy Group of the Project Building on the European Case Law Identifier', available at *bo-ecli.eu*; E. Groudytè and S. Milciuvienê, 'Anonymization of Court Decisions in the EU: Actual and Comparative Issues' 18 *Law Review*, 60 (2018); C. Iannone and E. Salemme, 'L'anonimizzazione delle decisioni giudiziarie della Corte di giustizia e dei giudici degli Stati membri dell'Unione europea', in A. Ciriello and G. Grasso eds, *Il trattamento dei dati personali in ambito giudiziario* (Roma: Scuola Superiore della Magistratura, 2021), 103.

How should the balance be struck between the protection of the data of the persons involved (ie 'data subjects') and the principle of transparency of justice?[20]

To answer these questions, it is necessary to start from Art 6 of the European Convention on Human Rights (ECHR), which, as well as outlining requirements of a fair trial, establishes that 'the sentence must be rendered publicly', unless the opposite is required by 'morality, public order, national security (...) interests of minors, protection of the privacy of the parties involved'.

Not even the GDPR to date has addressed the issue of the anonymization of judgments and provisions of judicial authorities. However, with specific reference to the judicial function, in Art 9, it excludes from the prohibition of processing 'sensitive' or 'particular' personal data (such as racial origin, political opinions, religious beliefs, genetic and biomedical data) when 'the processing is necessary to ascertain, exercise or defend a right in court or whenever the courts exercise their functions'.

In the absence of common rules on the anonymization of judgments, substantial differences emerge across the European Union. For example, the General Court of the European Union and the European Court of Human Rights provide for the blacking out of personal data only upon request by a party and for 'legitimate reasons'. The principle, therefore, is that of the complete publication of judgments and sentences. For the European Court of Justice, however, the rule of anonymization applies. Italy is an exception to this trend. Its legal system (Art 52 of the Privacy Code) identifies some limited cases in which, due to the delicacy of the situation (such as persons offended by sexual violence), or the characteristics of the person involved (for example, minors), the anonymization of judicial judgments is mandatory. In all other cases, it is up to the individual judicial authorities to balance the opposing needs and decide whether or not to order the anonymization of a judgment. When considering this balance, due weight should be given to the principle of transparency of justice. The same Constitutional Court has underlined how the principle of publicity and transparency of the process 'guarantees justice and removes any suspicion of bias. Advertising is the essence of justice (because) it puts the judge himself, as he judges, under judgment'.[21]

[20] E. Gruodyte, 'Anonymization of Court Decisions: Are Restrictions on the Right to Information in Accordance with The Law?' 9 *Baltic Journal of Law&Politics*, 150 (2016); G. Grasso, 'Il trattamento dei dati di carattere personale e la riproduzione dei provvedimenti giudiziari' *Il Foro Italiano*, 349 (2018); E. Concilio, 'Atti giudiziari e tutela dei dati personali (TAR Lazio no 579/2021)' *Questione Giustizia*, available at https://tinyurl.com/myczzmas (last visited 30 September 2024); F. D'Alessandri, 'La privacy delle decisioni giudiziarie pubblicate sul sito internet istituzionale della Giustizia Amministrativa', available at https://tinyurl.com/54h3yh8h (last visited 30 September 2024): in his opinion, a generalized anonymization through the use of initials or the elimination of references to natural persons would be sufficient.

[21] J. Bentham, 'Principles of Judicial Procedure', in J. Bowring ed, *The work of Jeremy Bentham* (Edimburgo: William Tait, 1838-1843).

III. Automated Proceedings and Constitutional Limits

In this context of 'due process', the constitutional obligation to provide reasons judgments serves not only to guarantee the exercise of the right of action and defense of the parties in the judgment, but also to allow for a check on the work of the judge. AI certainly has many advantages in the field of predictive justice.[22] It 'knows' all the jurisprudence, it is always able to examine all the questions and all the arguments of the parties, and it can decide but not give reasons. However, deciding is analogous to providing reasons. Reasoning is the founding element of traditional jurisdiction and represents the biggest critical point of the use of AI in proceedings.

In a very uncertain and jagged European and international regulatory context, there is more than one reason why a machine-learned sentence represents an unconvincing alternative to judicial decision-making. This section of the paper explains and focuses on these reasons. The topic is very broad. For this reason, specific attention will be paid to the coordination between constitutional principles and the indications of the European Proposal for regulation of AI.[23] From the European Proposal of Regulation, the paper will try to highlight, in particular, the reasoning or motivation behind judicial civil judgments.

This important, and new law-text has the intention of harmonizing the rules on AI (Artificial Intelligence Act).[24]It is in the European Union's interest to preserve its technological leadership and to ensure that Europeans can benefit from new technologies developed and functioning according to EU values, fundamental rights and principles.[25] In particular, such action is especially needed in high-impact sectors, including in relation to climate change, environment and health, the public sector, and the administration of justice. The European Parliament

[22] The digitalization systems for access to justice are very advanced. Virtuous examples are now proven practice throughout Europe. On this practice see C. Giannaccari, 'Diritto e intelligenza artificiale', in G. Alpa ed, *Diritto e intelligenza artificiale* n 14 above, 632.

[23] Proposal Regulation of the European Parliament and of the Council. Laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and Amending certain Union Legislative acts [2021]. Available at https://tinyurl.com/r6t6fdkv (last visited 30 September 2024). European Commission, White Paper on Artificial Intelligence - A European approach to excellence and trust, 2020/65/EC of 19 February 2020, available at commission.europa.eu.

[24]AI is a fast-evolving family of technologies that can bring a wide array of economic and societal benefits across the entire spectrum of industries and social activities. AI has great potential in all areas of our lives, but it also presents risks for fundamental rights and the rule of law. The European Union is trying to create a balanced regulatory framework based on the pros and cons of AI. On 21 April 2021, the EU published a comprehensive proposal for AI regulation, which should protect and promote European rights and values, without impeding the technological, industrial, and commercial development of AI.

[25] The Explanatory Memorandum states: 'Reasons for and objectives of the proposal: by improving prediction, optimising operations and resource allocation, and personalising service delivery, the use of artificial intelligence can support socially and environmentally beneficial outcomes and provide key competitive advantages to companies and the European economy'.

(EP) has also undertaken a considerable amount of work in the area of AI.[26] The EP Resolution on a Framework of Ethical Aspects of Artificial Intelligence, Robotics and Related Technologies specifically recommends to the European Commission to propose legislative action to harness the opportunities and benefits of AI, but also to ensure the protection of ethical principles. The resolution includes a text of the legislative proposal for a regulation on ethical principles for the development, deployment and use of AI, robotics and related technologies. [27]

The specific objectives of the Proposal are to: a) ensure that AI systems placed on the Union market and subsequently used are safe and respect existing laws on fundamental rights and Union values; b) ensure legal certainty to facilitate investment and innovation in AI; c) enhance governance and the effective enforcement of existing laws on the fundamental rights and safety requirements applicable to AI systems and d) facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation.[28] An extremely brief summary and without any claim to exhaustiveness, considers that it is useful to remember that in the proposed regulation, the following are distinguished, according to pyramid logic: a) prohibited AI practices, as they expose us to an unacceptable risk; b) high-risk AI systems, permitted on the European market

[26] In October 2020, it adopted a number of resolutions related to AI, including on ethics (European Parliament resolution 2020/2012/INL of 20 October 2020 on a framework of ethical aspects of artificial intelligence, robotics and related technologies [2020]); liability (European Parliament resolution 2020/2015/INI of 20 October 2020 on a civil liability regime for artificial intelligence, and copyright [2020]; European Parliament resolution 2020/2015/INI of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies [2020]; European Parliament Draft Report 2020/2016/INI of 13 July 2021 on Artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters, [2020]). All the documents are available at eur-lex.europa.eu. In 2021, those were followed by resolutions on AI in criminal matters (European Parliament Draft Report 2020/2017/INI of 19 May 2021 on Artificial intelligence in education, culture and the audiovisual sector [2020]). In that regard, the Commission has adopted the Digital Education Action Plan 2021-2027: Resetting Education and Training for the Digital Age, which foresees the development of ethical guidelines in AI and Data usage in education – European Commission 2020/624/EC of 30 September 2020 available at eur-lex.europa.eu.

[27] These indications come out of a long consultation and elaboration process that preceded the drafting of the AI Act. On this, it its necessary to mention the European Commission for the Efficiency of Justice that teaches when Artificial Intelligence is used 'it is essential to ensure that the AI tools do not undermine the guarantees of the right of access to a judge and the right to a fair trial (equality of arms and respect for the adversarial process)'. Also, the High-Level Expert Group on Artificial Intelligence, Policy and Investment Recommendations for Trustworthy AI were given seven requirements for trustworthy AI: (a) human intervention and surveillance; (b) technical robustness and safety; (c) data privacy and governance; (d) transparency; (e) diversity, non-discrimination and equity; (f) social and environmental well-being and (g) accountability.

[28] § 1.1. To achieve those objectives, this proposal presents a 'balanced and proportionate horizontal regulatory approach to AI that is limited to the minimum necessary requirements to address the risks and problems linked to AI, without unduly constraining or hindering technological development or otherwise disproportionately increasing the cost of placing AI solutions on the market. The proposal sets a robust and flexible legal framework. At the same time, the legal framework includes flexible mechanisms that enable it to be dynamically adapted as the technology evolves and new concerning situations emerge'.

subject to compliance with certain mandatory requirements and an ex ante conformity assessment by suppliers and c) non-high-risk AI systems, for which suppliers are encouraged to adopt codes of conduct aimed at encouraging the voluntary application of the requirements for high-risk systems.

From the AI Act, it is worth citing point 8 of Annex III. Here the high-risk AI Systems list and its definitions can be found specifically: 'AI systems intended to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts'.

It is important to stress an initial focal point: the concept of *assisting rather than substituting the judge* is mentioned. The same idea can be found in the AI Act, at Art 40, where a high-risk system is classified as

> 'Administration of justice and democratic processes, considering their potentially significant impact on democracy, rule of law, individual freedoms as well as the right to an effective remedy and to a fair trial. In particular, to address the risks of potential biases, errors and opacity, it is appropriate to qualify as high-risk AI systems intended to assist judicial authorities in researching and interpreting facts and the law and in applying the law to a concrete set of facts'.

Another fundamental indication is at Art 28:

> 'AI systems could produce adverse outcomes to health and safety of persons, in particular right to an effective remedy and to a fair trial, right to be defended and the presumption of innocence, right to good administration'.

It is necessary to mention GDPR once again. Here Art 22 sets out the rules concerning automated individual decision-making. It states that

> 'The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her'.

These summary points show only the tip of an iceberg that sails in a boundless sea of problems connected to the administration of justice.

As is well known, due process of law is strictly connected with cross-examination and the reasoning behind a decision. So, the reasons why a machine-learned sentence represents an unconvincing alternative to judicial decision-making are numerous. It is a fundamental principle of the Rule of Law that legal decisions must be justified. Explicit legal norms for this justification can seldom be found in most legal systems, unlike in Italy. According to the Italian Constitution, to guarantee the right to defense (Art 24), judicial decisions, must be justified (Art 111) and proceedings must respect the rules of an effective cross-examination (Art 111). That is to say that sentencing must be justified in order to make the logical-argumentative reasoning followed by the judges after cross-examination, transparent.

Above all, it is crucial to consider that human legal reasoning is not a purely logical process. Some legal questions might be solvable using relatively logical *textbook rules*. However, judges will often be confronted with *hard cases* where the existing rules are insufficient.[29] These cases require the interpretation of a rule or the creation of new rules by referring to *policy goals* or the requirements of justice and equity.[30] As is well known, a judge not only applies legal rules but also resolves interpretation problems and justifies his doing so in a reasoned decision. This task requires fundamental *human* qualities such as common sense as well as moral, social and cultural awareness.[31] Authoritative scholars have pointed out that many limits, both internal and external, to the decision-making mechanism can be ascribed to structural factors specific to the judicial decision, so exist even in the case of a decision taken by a human-judge.[31bis] The principal factor is the own nature of the so-called 'judgement of fact' or the 'judgement of law'. Furthermore, the loss of a secure hierarchy of law-sources, in our multilevel system, is not in line with the functioning of the decision algorithm which instead operates according to probabilistic and statistical criteria.[31ter]

One of the more important problems in the study of legal argumentation is the question regarding 'which standards of soundness the argumentation should meet'.[32] The judge has to explain why the legal rules are applicable to the concrete case. How can the interpretation of a legal rule be acceptably justified? What, in the context of legal justification, is the relation between legal rules, legal principles and general moral norms and values?[33] When judges resolve an interpretation

[29] J. Ryberg and J.V. Roberts, *Sentencing and Artificial Intelligence. Studies in Penal Theory and Philosophy* (Oxford: Oxford University Press), 2022.

[30] T.J. Miceli, 'Sentencing Guidelines, Judicial Discretion, And Social Values' *Economics Working Papers* available at https://tinyurl.com/3kvy8afs (last visited 30 September 2024), studies judicial discretion in criminal sentencing. There are opposing views regarding its function. The Papers affirm how the key question concerns the optimal interaction between the stringency of legislative guidelines and the degree of judicial discretion within this sequential process, given that legislatures and judges may hold differing views regarding the social function of punishment.

[31] Scholars from various backgrounds have attempted to explain the structural features of legal decision-making and justification from different points of view: M. Bagaric and G. Wolf, 'Sentencing by Computer: Enhancing Sentencing Transparency and Predictability and (Possibly) Bridging the Gap between Sentencing Knowledge and Practice' 25 *George Mason Law Review*, 653-709 (2008); C. Vincent, 'Predicting Proportionality: The Case for Algorithmic Sentencing' 37 *Criminal Justice Ethics*, 238-261 (2018).

[31bis] A. Carratta, 'Decisione robotica e valori del processo' *Rivista di diritto processuale*, 498, 450 (2020).

[31ter] A. Pajno et al, 'AI: profili giuridici. Intelligenza Artificiale: criticità emergenti e sfide per il giurista' *BioLaw Journal*, 228 (2019).

[32] J. Nieva Fenol, *Intelligenza artificiale e processo* (Torino: Giappichelli, 2019), 105; E.T. Feteris and H. Kloosterhuis, 'Law and Argumentation Theory: Theoretical Approaches to Legal Justification', available at https://tinyurl.com/nu6m9m29 (last visited 30 September 2024).

[33] In the past thirty years, the study of law and argumentation has become an important interdisciplinary discipline. It draws its data, assumptions and methods from legal theory, legal philosophy, logic, argumentation theory, rhetoric, linguistics, literary theory, philosophy, sociology, and artificial intelligence; E.T. Feteris and H. Kloosterhuis, n 32 above.

problem in deciding a case, they can choose different types of *interpretative arguments* to justify their decision. For instance, they may choose different normative sources which have previously been screened and selected among the relevant real-life cases. These arguments must be recognizable in the justification of the legal decision.

So, a relevant technological difficulty of programing a *computer judge* stems from the nature of judicial reasoning, and the challenges of entering the appropriate data relevant to the sentencing decision. The data should be entered on a case-by-case basis as a result of statements of principle, the reaction between actions and exceptions, which the plaintiff and the defendant express during proceedings. It should not be forgotten that the principle barrier to creating a functioning sentencing algorithm lies at the input stage. The complexities of inputting appropriate information have been overlooked by AI advocates.[34] For these reasons, some would argue the AI aspects need to be rethought and that it should not be presumed that AI should be working on its own (ie, fully autonomously).

For these reasons, in this moment in time my recommendation is that AI should only supplement judicial decision-making. So how can AI be employed in a way that supports judicial decision-making? It can be done by speeding up our legal process, promoting greater access to justice and implementing its efficiency. AI could readily be used to prepare guidelines[35] and document templates (of Court applications, of judge's rulings, lease agreements, etc) as well as in finding search options (these tools could link various sources: eg, constitutions and conventions,

[34] Regardless of the issues deriving from the use of AI, important studies argue how the amount of information possessed can change the decision on whether to litigate rather than settle a dispute. In areas where the law requires information on the defendant's level of compliance with a legal standard and where defendants have more information on this than plaintiffs do, win rates will be low (that is, below 50 percent). If neither party has an informational advantage, a 50 percent win rate should be observed K.N. Hylton, 'Asymmetric Information and The Selection of Disputes For Litigation' 22 *The Journal of Legal Studies*, 187-210 (1993).

[35] T.J. Miceli, 'Sentencing Guidelines and Judicial Discretion: Balancing Deterrence and Retribution', in Id, *The Paradox of Punishment* (London: Palgrave Macmillan, 2019). This chapter examines the interplay between legislatures, which enact sentencing guidelines *ex ante*, and judges (courts) that implement actual sentences *ex post*, subject to legislative guideline.

international laws,[36] all case-law enhancement[37] and legal theory).[38]

Through some guidelines, AI would also make other contributions to more consistent and transparent sentencing and can better perform the following task: it could empirically verify the weight carried by different factors in previous sentencing decisions and identify any over-arching misapplications of the guidelines. Specifically, it could mitigate human cognitive biases and discrimination in sentencing. However, it is precisely with regard to the 'development risk' that the AI Act is completely inadequate, even in other regulatory sectors.[38bis] This approach has already guided various sentencing information systems developed in recent decades in some countries.[39] The judge consults a computer-derived recommendation, much as Courts in jurisdictions consult guidelines for sentence recommendations (or binding legal precedent). The use of data science and AI techniques on Court activity data can help improve the efficiency of justice by

[36] G. Di Vita, 'Production of Laws' n 16 above, 276.

[37] With an emergency resolution of 30 March 2023, the Italian Guarantor for the protection of personal data temporarily limited the use of ChatGPT software in Italy in the absence of the information provided to users and all interested parties whose data is collected by the supplier, the company OpenAI. Above all, it was due to the absence of a legal basis that justifies the massive collection and storage of personal data, for the purpose of *training* the algorithms underlying the functioning of the platform. The same provision adds that, based on the checks already carried out up to that point, the information provided by ChatGPT does not always correspond to the real data, thus resulting in inaccurate processing of personal data. Following an initial operational response from the service provider, the Guarantor, with a subsequent decision on 11 April 2023, suspended the effectiveness of the precautionary order, but issued further severe operational instructions aimed at data processing, on the compliance with which constant investigation was carried out. Even in this case, however, it is clear that the sanction to the artificial AI system does not enter into the merits of the possibility of using it but it stops at the (decisive) phase of the collection of information and personal data then used to train the program. Also, in this case, therefore, nothing in itself prevents the use of an artificial intelligence system, as long as this guarantees the transparency and traceability of the data used.

[38] This is the reasoned order (order and decision) of the Court of the Southern District of New York of the USA of 22 June 2023, *Mata* v *Avianca* 1461 US (2022), available at https://tinyurl.com/a7ycb6pc (last visited 30 September 2024). It is the imposition of a pecuniary sanction (of USD 5000) on two lawyers of the plaintiff in a civil case for compensation for damages brought by a passenger against an airline. In support of the arguments in favor of the customer, they had made precise and extensive reference to jurisprudential precedents, completely invented and therefore non-existent and furthermore articulated in a poor manner, by means of an AI system known as ChatGPT. They had also, at least initially, solemnly insisted on the genuineness of their submissions. The relevant jurisdictional provision, however, does not sanction - in and of itself taken into consideration - the use of an AI system in the preparation of the party's judicial action, but only its clumsy use, ie without the expression of a final supervisory role on the reliability of the references indicated and on the formal and substantial technicality of the individual arguments.

[38bis] M. Rabbitti, 'Intelligenza artificiale e finanza. La responsabilità civile tra rischio e colpa' *Rivista trimestrale di diritto dell'economia*, 297, 312 (2021). In her work, the A. is assigned the solidity of traditional liability models. In the face of the challenges of technological evolution, the A. points out that the absence of shared liability rules in Europe does not contribute to the certainty of the regulatory framework, nor does it favor the creation of trust in new technologies which is prerequisite for a physiological evolution of law.

[39] In Austria, AI tools are used in courts for rapid reading, classification and attribution of documents to the registry sections and also to monitor the activity of the courts.

making it possible, for example, to carry out quantitative and qualitative evaluations and to make projections.[40] Key performance indicators could be drawn up on this basis and reduce the costs and duration of litigation. Above all, these tools would significantly reduce the number of civil cases, being able to predict the chances of success.

Finally, it is worth mentioning that AI could increasingly be used as a first stage of a judicial decision or as an *advisory sentence system*.[41] In these hypothesized cases, a human judge would then review the AI *decision* and decide whether to let it stand or override it.[42]

IV. Conclusion

Modern technologies are increasingly being used within society, AI being a prime example. As machine learning techniques are improved, AI systems are increasingly being employed to assist human decision-makers in almost all fields. It should be anticipated that as these technologies become better at assisting with decisions, more control and responsibility will be transferred to them. It is therefore important that heed should be taken to the fact that these technologies are challenging the ideals associated with the rule of law as a concept of traditional law. In addressing the harms associated with AI in relation to the rule of law, a common denominator that stands out is the manner in which AI potentially inhibits the flourishing of humans.[43] While this may traditionally not be the first association in relation to the rule of law as a concept, it is nevertheless important to address, as human agency can be argued to be a cornerstone of society. A challenge for the future will be how to reap the benefits of AI for society while at the same time protecting society from its harms, essentially promoting innovation

[40] It is recommended that legal professionals, especially judges, be involved in the implementation of these tools, in terms of taking ownership of them and of analyzing the results in conjunction with factors relating to the specific features of the court in question or the quality of justice (for example, the need to preserve access to justice).

[41] Hong Kong has recently approved (2020) a law for the rapid resolution by AI of disputes related to the pandemic, with a value not exceeding 50000 euros and with at least one of the parties being a citizen of Hong Kong. Access to a trial is optional and consists of three phases: negotiation, mediation and arbitration. The role of the human professional continues to be central and the gain in terms of efficiency of the judicial system seems remarkable. In the United Kingdom, *Online Courts* have been designed to resolve cases worth less than £25000. The European e-Justice Action Plan 2019-2023 includes several projects aimed at facilitating the online circulation of judicial data in the EU.

[42] For instance, in China, the Beijing Internet Court has set up around a hundred robots with the task not of pronouncing sentences, but of assisting judges in the decision-making process. This virtual judge has a female appearance and voice and assists the human judge in carrying out the most repetitive tasks such as receiving appeals, and jurisprudential analysis of cases with similar outcomes. This is to relieve the magistrates of the simplest and most repetitive activities, speed up procedural times, and also achieve predictive justice.

[43] On the *flourishing of humans* concept, see in particular S. Greenstein, n 4 above, 316.

while at the same time balancing it against the interests of society. The challenge will be to determine with which values to balance technology.

In this field, considering the wide scope of the applicability of the GDPR, it is not inconceivable that the GDPR will be relevant in many circumstances where AI is used even in the justice system. In general, the impact of AI on the rights and freedoms of data subjects raises concerns in several respects and the legal scholar has the task of investigating critical issues relating to data protection and resolving conflicts with the use of AI in the jurisdiction, in order to guide the legislators in the challenges they are called to face. With particular regard to the anonymization of sentences, Italy is an exception compared to other European countries in making in some cases anonymization mandatory. In other cases, it is up to the judges to balance the right to protection of personal data with freedom of information. In order to harmonize regulation in this regard, it would be desirable for the legislator to intervene on the matter, introducing generalized anonymization through the use of initials only or the elimination of references to natural persons. In this way, an adequate level of protection will be guaranteed, on the one hand, and transparency of Court decisions, on the other, in order to combine the publicity of the process. This allows due control over a power exercised in the name of the people and the right to data protection not only of the parties, but also of third parties (think, for example, of witnesses). The publication of personal data in a sentence, especially online, provides an important wealth of information and is the greatest source of risk of indexing, decontextualized reproduction, alteration, even manipulation, in no way comparable to paper publications and Art 52 GDPR. This Article advocates that the following two measures are insufficient: that an interested party may request, for legitimate reasons, an annotation be placed on the original copy of a judgment aimed at precluding, in the event of the reproduction of the judgment in any form, the indication of their personal details and of other identifying data reported in the judgment (§ 1); that a judicial authority may also order *ex* officio an annotation, 'to protect the rights or dignity of the interested parties' (§ 2). Rather, the relationship between rule and exception should be reversed: personal data, in judgments, should normally be anonymized, unless particular reasons (public health, public figures involved and the like) require its transparency.

As noted above, the aim of ensuring greater efficiency through the calculability and predictability of decisions proposed by this approach would be theoretically compatible with the very aim of the judicial decision. The fear is that decisions will be based on the outcome of an algorithm, putting at risk the principles of impartiality and free conviction of the judge. Whether this approach is fair cannot be evaluated exclusively in terms of efficiency and duration, but, instead, on the quality of the decision, respect for people and their rights, the evaluation of the concrete case in compliance with constitutional principles and the essential

value of fairness.[44]

The uncertain and jagged regulatory context suggests some modifications and adaptations must be made to adapt the Italian Civil Lawsuit Code to the use of certain forms of AI. For instance, no intrinsic limit is imposed on the preparation of a judicial document under the current legislation. The Civil Law Code expressly provides, in the second sentence of Art 121 Code of Civil Procedure, that 'All the documents of the trial are drawn up in a clear and concise manner'; with provision taken up and specified for the individual documents of the trial (Art 163, no 4; Art 167; Art 281-*undecies*; Arts 342 and 434; Art 366, no 3, 4, 6; Arts 473-bis.12, 473-*bis*, 473-*bis*.17, 473-*bis*.32 Code of Civil Procedure). An interesting starting point to work on and integrate AI into the Italian trial may be found under Art 46 of the Italian Civil Procedural Code:[45] it provides that

> 'When they are drawn up in the form of an electronic document, they comply with the legislation, including regulations, concerning the drafting, signing, transmission and reception of electronic documents'.

The same rule also provides that failure to comply with the technical specifications on the form, the layout, the criteria and limits for drafting the document does not lead to invalidity, but can be assessed by the judge for the purposes of deciding on the costs of the trial. Further, above all, the Article concludes that the judge draws up the documents and provisions in compliance with the criteria set out in this Art.[46] So, the judge's task is not limited to the mere final decision of the case brought to their attention, but is also characterized by a series of further activities. A collaborative model that is based on a complementarity between man and machine and allows the human to maintain control over the algorithm is warranted.[47]

[44] We must not forget that evolutionary interpretation and the essence of the jurist's work, does not belong to AI systems today. They learn from the past and tend to repeat a pattern, which happened in the cases in the United States that penalized access to parole for people of color, reproducing biases. Therefore, in the activity of innovative interpretation, there is currently no space for AI systems.

[45] Art 46 of the Civil Procedural Code (amended by Art 4, § 3, b, of decreto legislativo 10 October 2022 no 149) refers to a subsequent ministerial decree, to be issued after consulting the superior Council of the Judiciary and the National Forensic Council, to define: on the one hand, the schemes of the judicial documents with the structuring of the necessary fields for entering information into the trial registers; and on the other hand, the limits of the procedural documents, taking into account the type, value, complexity of the dispute, the number of parties and the nature of the interests involved.

[46] Possible further research developments should focus on legal instruments to ensure the observance of other fundamental constitutional principles of the process: context of discovering, contemporaneity of decisions with social evolution, correspondence of the Judge and judged, computer/human symmetry.

[47] This is because AI learns from itself and from the experience it acquires from time to time, but it does not have - or, at least, does not yet have - the creativity and capacity for intuition and abstraction typical of the human mind, so it would run the risk of embalming reality in a theoretical scheme preset *ab externo*.

To reach this objective, the approach must not be that of a law that has to suffer or defend itself from the impact of AI, but rather that of a law that governs AI and regulates its use.[48] It does not appear that the European Regulation Proposal has adopted this line of action but rather that of a defensive outlook. Unfortunately, it must be noted that, for the profiles considered here, there are no specific rules, but only disciplinary classificatory and definitional indications. It is enough to consider that, contrary to indicated by the most authoritative scholars, the European legislator, once again, does not give rules on the civil liability regime damages caused by AI.[49] Under this method, algorithms, even before having to respect the provisions of the Proposal for a Regulation, must be considered on a par with legal rules, ie, they must respect the general principles of the legal system in which they operate. The transparency of reasoning is the most important foundation of the right to defense.[50]

The goal is to use machine learning and algorithm systems, to guarantee a judicial provision with the following characteristics: conscientious creativity, transparency of reasoning and consistency with the local constitutional value system.

[48] Interesting lessons by F. Parisi, *Sources of law and the production of legal rules: an economic perspective, Economic Analysis of Law: A European Perspective* (Cheltenham: Edward Elgar Publishing, 2012).

[49] M. Rabbitti, 'Intelligenza artificiale' n 38bis above, 307. It is highlighted that the relevance of human behavior is inverse proportional to the degree of autonomy of AI.

[50] E. Rulli, 'Giustizia predittiva, intelligenza artificiale e modelli probabilistici: chi ha paura degli algoritmi' *Analisi giuridica dell'economia*, 533 (2018).

Insights & Analyses

Collective Redress 3.0 in Italy: From Consumer Class Action to Consumer Representative Action

Laura Bugatti*

Abstract

The paper explores consumer collective enforcement mechanisms, particularly the consumer representative action, by examining both the European Union context and Italy's specific framework.

Initially, the analysis delves into the European Union's approach to consumer law collective enforcement, highlighting key policies and initiatives (para I). Next, the evolution of collective redress in Italy is traced, from consumer class actions to general collective actions (para II). The focus then turns to the consumer representative action (para III), analyzing its coverage, procedural intricacies and mechanisms such as the opt-in system. The paper also scrutinises critical aspects of collective enforcement in Italy that are integral to its functioning, including lawyers' fees, costs and funding mechanisms. Some considerations on the transformative potential of the new consumer representative action conclude the paper (para IV).

I. Setting the Scene: The European Union Legal Framework on Consumer Collective Enforcement

With the Representative Actions Directive no 1828/2020 (RAD),[1] the European Union (EU) has completed a slow and troubled path towards the introduction into the European framework of more effective and efficient private enforcement tools, particularly concerning consumer protection.

The EU was initially reluctant to implement collective redress mechanisms within Europe, relying primarily - in the private enforcement realm - on individual and institutional mechanisms.[2] Moreover, the original form of collective aggregation, namely the United States (US) style class action,[3] has been looked upon with

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[1] European Parliament and Council Directive 2020/1828/EC of 25 November 2020 on representative actions for the protection of the collective interests of consumers [2020] OJ L409/1.

[2] S. Benedi Lahuerta, 'Enforcing EU Equality Law through Collective Redress: Lagging Behind?' 55 *Common Market Law Review*, 783 (2018).

[3] The US class action that developed in the 1960s can be considered as the most popular modern form of collective redress, even if the collective redress mechanism does not represent an original product of the US legal tradition; the roots of collective redress mechanisms can be traced to the English representative suit (see *Brown* v *Vermuden*, [1676] 22 *English Reports* 796, 802 (Ch. 1676)) or even 'beyond the seventeenth century and indeed beyond the pale of Chancery itself to the misty era of the Eyres of thirteenth and fourteenth-century England': R.B. Marcin,'Searching from the Origin of Class Action' 23 *Catholic University Law Review*, 515, 516-517 (1974); for an

suspicion by continental Europe and, in some respects, considered incompatible with the European legal culture[4] if not outright unnecessary.[5] Nevertheless, the growing complexity and the collective dimension of several disputes have begun to highlight the inefficiency and ineffectiveness of individual litigation and the need to provide for some form of collective redress to enrich the European private enforcement toolkit.[6]In the early 2000s, some Member States began to rethink their opposition to class action and to adopt some sort of collective redress mechanism, even if under different terminology (collective action, group action, class action, popular action, group litigation order, multiparty proceeding, etc).[7] For example, in the United Kingdom (UK), Group Litigation Orders (GLOs) were introduced in 2000 in response to perceived shortcomings in existing collective action mechanisms. They were designed to enable the court to effectively manage claims brought by numerous claimants in cases that give rise to common or related issues of fact or law.[8] In 2007, the consumer class action regulation saw the light in Italy,[9] Sweden introduced a system of group actions in 2003[10] and

excursus see also G. Scarchillo, *Class Action. Dalla comparazione giuridica alla formazione del giurista: un caleidoscopio per nuove prospettive* (Torino: Giappichelli, 2nd ed, 2022), 13; S.C. Yeazel, *From Medioeval Group Litigation to the Modern Class Action* (New Haven, CT: Yale University Press, 1987), 38; G.C. Lilly, 'Modeling Class Actions: The Representative Suit as an Analytic Tool' 81 *Nebraska Law Review*, 1008-1013 (2003); ibid 515-516. See also J. Story, *Commentaries on Equity Pleadings, and the Incidents Thereof: According to the Practice of the Courts of Equity, of England and America* (Boston: C.C. Little & J. Brown, 1844), 122.

[4] Enforcing US class action judgments in Europe was considered contrary to public policy: R.B. Cappalli and C. Consolo, 'Class actions for continental Europe? A preliminary inquiry' 6 *Temple International and Comparative Law Journal*, 217 (1992); M. Taruffo, 'Some Remarks on Group Litigation in Comparative Prospective' 11 *Duke Journal of Comparative & International Law*, 405 (2001); A. Giussani, *Studi sulle «class actions»* (Padova: CEDAM, 1996).

[5] L.S. Mullenix, 'For the Defense: 28 Shades of European Class Actions', in A. Uzelac and S. Voet eds, *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Cham: Springer International Publishing, 2021), 43-44.

[6] See European Commission, Supplementary Communication from the Commission on Consumer Redress, COM(87) 210 final, 7 May 1987; European Commission, A New Impetus for Consumer Protection Policy, Luxemburg, Office for Official Publications of the European Communities, 1987; European Commission, Three Year Action Plan of Consumer Policy, COM(90) 98 final, 3 May 1990; Council of Europe, Recommendation no R (81) 2 Concerning the Legal Protection of the Collective Interests of Consumers by Consumer Agencies, 1981. These attested to the attention of the European institutions towards consumer redress dating back to the 1980s. The European debate resulted in the enactment of the Injunctions Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L166/51. No major steps had been made concerning collective redress measures until the mid-2000s. See D. Fairgrieve, 'Collective redress in Europe: Moving forward or treading water?' 71 *International and Comparative Law Quarterly*, 465 (2020).

[7] Directorate General for Internal Policies Policy - Department A: Economic and Scientific Policy, *Overview of existing collective redress schemes in EU Member States* (Brussels: European Parliament, 2011).

[8] Rule 9, The Civil Procedure (Amendment) Rules 2000, UK Statutory Instrument, 2000, n. 221(L.1).

[9] See para 2.

[10] *Lag om grupprättegång* 2002:599. See L. Ervo, 'Group Actions in East-Nordic Legal

the Netherlands adopted the 2005 Act on collective settlements.[11]

At the European level, the debate concerning collective redress initially found fertile ground in competition law: in 2005, the Commission adopted a Green Paper on damages in antitrust actions,12 followed by a White Paper published in 2008,[13] thereby formulating some policy suggestions specifically for antitrust collective redress. In the same year, the EU broadened its focus, shifting from antitrust damage actions to consumer collective redress;[14] in the Green Paper on consumer collective redress, the Commission judged the existing consumer redress and enforcement tools in Europe to be unsatisfactory and envisaged the need for future action.[15] In 2011, a public consultation concerning the introduction of 'a more coherent European approach to collective redress'[16] was conducted, and the EU Parliament called for the adoption of a horizontal framework with common principles in order to ensure uniform access to justice through collective redress within the EU, addressing, among other matters, the infringement of consumer rights.[17] Notwithstanding the strong opposition of some Member States to the mandatory imposition of a collective redress system at the European level,[18] the

Culture', in A. Uzelac and S. Voet, n 5 above, 177. See also Denmark: Ges. no 181, 28/2/2007: Sec. 254a-k Administration of Justice Act; Norway: Chap. 35 Act relating to Mediation and Procedure in Civil Disputes.

[11] *Wet Collectieve Affwickling Massaschade* (WCAM), Book 7, Title 14, Arts 1013-18 Dutch Civil Procedure Code.

[12] European Commission Communication COM/2005/672 of 19 December 2005, available at www.euro-lex.europa.eu.

[13] European Commission Communication COM/2008/165 of 2 April 2008, available at www.euro-lex.europa.eu.

[14] European Commission Communication COM/2008/794 of 27 November 2008 'Green Paper on Consumer Collective Redress'; Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee COM/2007/99 of 13 March 2007, 'EU Consumer Policy Strategy 2007–2013 Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them'; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM/2010/135 of 31 March 2010 'Commission Work Programme 2010 - Time to Act'. Concerning the consumers' protection, attention had previously been limited to the injunction mechanisms: European Parliament and the Council Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L166/005-0055). Parliament resolution of 2 February 2012, Towards a Coherent European Approach to Collective Redress (2011/2089(INI)). B. O'Sullivan, 'Is a Class Action System for Consumer Desirable in Europe?' 9 *Hibernian Law Journal*, 123 (2010).

[15] See the possible 'options' presented by the Commission in order to introduce more effective mechanisms that work for consumers as well as traders: European Commission Communication COM/2008/794 of 27 November 2008 available at https://eur-lex.europa.eu/. For a comment see, among others, B. O'Sullivan, n 14 above, 123.

[16] European Commission Communication COM/2010/135 of 31 March 2010 available at https://eur-lex.europa.eu/.

[17] Towards a coherent European approach to collective redress European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)).

[18] Namely Germany and Austria: see P. Rott, 'The EU Legal Framework for the Enforcement of Consumer Law', in H.-W. Micklitz and G. Saumier eds, *Enforcement and Effectiveness of Consumer*

Recommendation of the Commission 'on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law' (2013) provided an impetus towards greater openness to collective redress within Europe.[19] The Recommendation provides for some common principles to be applied at the national level in the development of judiciary or out-of-court collective mechanisms for redress and injunction in the case of a violation of rights granted under EU law to ensure a balance between the goal of enhanced access to justice and the aim of avoiding abuse. Although the Commission recommendations are not legally binding, the new course of action prescribed by this soft law has persuaded some Member States (MSs) to transform their national debates on the adoption or improvement of collective redress systems into concrete legislative measures.[20] For example, Belgium introduced new legislation in 2014 on compensatory collective redress for consumer claims.[21] In that year, major changes occurred even in France, with the adoption of an '*action de groupe*', a collective redress procedure for consumers and competition claims (*Loi Hamon*-2014).[22] In 2015, the English Consumer

Law (Cham: Springer, 2018), 249, 278; S. Voet, 'Actions for Collective Redress' *Consortium of European Universities, Max Planck Institute Luxembourg for Procedural Law*, *An Evaluation of National Procedural Laws and Practices in Terms of Their Impact on the Free circulation of Judgments and on the Equivalence and Effectiveness of the Procedural Protection of Consumers Under EU Consumer Law*, 251, 260 (2017); L.S. Mullenix, n 5 above, 46.

[19] Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60; See also European Commission Communication, Towards a European Horizontal Framework for Collective Redress, COM(2013) 401 final, 11 June 2013.

[20] See British Institute of International and Comparative Law (BIICL), *State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation* JUST/2016/JCOO/FW/CIVI/0099, 2018, available at https://tinyurl.com/4cky9x5v (last visited 30 September 2024). Nevertheless, the Commission was skeptical when reporting in its 2018 Commission Report that 'Legislative activities affected by the Recommendation have remained somewhat limited in the Member States' and several 'reforms have not always followed the principles of the Recommendation': European Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU)' available at www.eur-lex.europa.eu.

[21] *Loi portant insertion d'un titre 2 'De l'action en reparation collective' au livre XVII 'Procédures juridictionnelles particulières' du Code de droit économique et portant insertion des definitions propres au livre XVII dans livre 1er du Code de droit économique*, 28 March 2014, in *Moniteur belge*, 29 March 2014, 35201. In 2018 the scope of application was extended to SMEs and Businesses: *Loi portant modification, en ce qui concerne l'extension de l'action en réparation collective aux P.M.E., du code de droit économique*, 30 March 2018, in *Moniteur belge*, 22 May 2018, 41950. S. Voet, 'Class Actions in Belgium: Evaluation and the Way Forward', in A. Uzelac and S. Voet eds, n 5 above. See A. Stadler, 'Are Class Actions Finally (Re)Conquering Europe? Some Remarks on Directive 2020/1828', 30 *Juridica International* 14, 15 (2021), which defines this as the 'second wave of national reforms'.

[22] Act 2013-344, 17 march 2014, *Loi Hammon*; the scope of the group action was extended in 2016 and 2018 to other sectors, including medical and cosmetics products, discrimination at

Rights Act, which amended the Competition Act 1998, introduced an opt-out collective proceedings regime for competition claims to be brought in front of the Competition Appeal Tribunal.[23] In 2015, Lithuania implemented a collective redress mechanism for the first time,[24] and Hungary did as well.[25] In Slovenia, the Commission's Recommendation was taken into consideration in drafting the Collective Actions Act in 2017.[26] The Netherlands introduced a true group-action system in 2019.[27]In 2013, the Italian Parliament, following the European input, presented a reform project to introduce a generalised class action regulation; however, this specific legislative proposal stalled in the Senate.[28]

Whilst some MSs have adopted specific rules or modified the existing law on representative or collective actions, the overall collective redress framework within Europe remains scattered and uneven and requires harmonisation efforts. This inconsistency across the EU was also underlined in the report published by the Commission in 2018 on the impact of its previous Recommendation and the progress made by MSs in its implementation.[29]

Large-scale events, including the Dieselgate scandal, testified to both the need for an effective collective response to mass harm situations in which one-to-one litigation proves to be inadequate and the persistent lack of collective redress tools in most MSs. In business to consumer (B2C) relationships, the explosion of mass consumption in a market that is increasingly consumer-oriented, cross-border, interconnected and digital has contributed to the growing recognition of the need to secure consumer rights through better access to collective redress

work, environmental protection, protection of personal data and real estate leases. M.J. Azar-Baudand and A. Biard, 'The Dawn of Collective Redress 3.0 in France', in A. Uzelac and S. Voet eds, n 5 above.

[23] Consumer Rights Act 2015, schedule 8.

[24] Art 441-1 to 441-17 Code of Civil Procedure 2015, Chapter XXIV.

[25] *Polgári perrendtartás* (Civil Procedure Code) MK 2016 no 190, 7878, Part 8 Chapter XLII of 2016.

[26] Zakon o kolektivnih tožbah (ZKoIT), in Off. Gaz. of RS, no 55/17. See A. Galic and A. Vlahek, 'Challenges in Drafting and Applying the Bew Slovenia Collective Actions Act', in A. Uzelac and S. Voet eds, n 5 above, 215, 216; A. Piletta Massaro, 'The New Directive on an EU-Wide Representative Action and Third-Party Litigation Funding: An Opportunity for European Consumers?' 1 *Revija Kopaoničke Škole Prirodnog Prava*, 95-105 (2021); C.I. Nagy, 'European models of collective actions', in C.I. Nagy ed, *Collective actions in Europe* (Cham: Springer, 2019), 71-112; J. Sladič, 'A new model of civil litigation in Slovenia: is the Slovenian judiciary prepared for the challenges presented by the new law on collective actions?', in A. Uzelac and C. Hendrik van Rhee eds, *Transformation of civil justice. Unity and diversity* (Cham: Springer, 2018), 213.

[27] *Wet afwikkeling massaschade in collectieve actie* (WAMCA), available at https://tinyurl.com/y4upmbj3 (last visited 30 September 2024).

[28] Proposte di legge nos 1335-3017 A, *Disposizioni in materia di azione di classe*. In 2018 a new legislative proposal, similar in content to the previous one, was submitted, resulting in the adoption of legge 12 April 2019 no 31; G. Scarchillo, n 3 above, 149.

[29] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee COM 2018/40 of 25 January 2018 on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), avalaible at www.eur-lex.europa.eu.

mechanisms. Globalisation and digitalisation have increased the risk that consumers – sometimes located in different countries – will be harmed by the same unlawful practice. At the same time, infringement of consumers' substantive rights often results in claims unfit to be enforced through private individual litigation, which is characterised by high costs and lengthy and complex procedures: Claims by several consumers are not cost-effective actions, considering the individually small amounts at stake.[30] Consumer rational apathy, together with the free-riding mechanism[31] and the information asymmetry in B2C relationships,[32] constitute the primary factors contributing to the lack of success of private enforcement.[33] Therefore, the strengthening of substantive consumer rights depends to a large extent on the development of private enforcement mechanisms that allow aggregation of the small-value claims in order to overcome existing barriers in terms of access, affordability and effectiveness of individual claims. At the same time, preventing the multiplication of individual disputes leads to beneficial results for both the judicial system, which is at risk of congestion, and for traders that are in a position to solve or settle all the clams once and for all.[34]

It is thus not surprising that one of the cornerstones of the 'New deal for consumers' (2018)[35] was to provide consumers with more efficient tools to enforce their rights by repealing the Injunctions Directive and proposing a system of representative actions to protect consumer interests in a case of mass harm, while at the same time, ensuring injunctive relief and compensatory redress. This goal has resulted in the adoption of the Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers (RAD),[36] which

[30] For example 'rational disinterest': A. Stöhr, 'The implementation of Collective Redress - A Comparative approach' 21 *German Law Journal*, 1606 (2020); see also G. Wagner, 'Collective redress - Categories of loss and legislative options' 127 *Law Quarterly Review*, 55-82 (2011). See, for example, the 2019 consumer conditions scoreboard pool: twenty-two percent of consumers stated that they had encountered problems in the last 12 month when purchasing a product or service; two-thirds of them had complained; twenty-two point five percent had waived their rights and did not complain in order to not face lengthy, costly and uncertain proceedings; European Commission, Consumer Conditions Scoreboard: Consumers at home in the Single Market - 2019 edition (8) available at www.commission.europa.eu (last visited 30 September 2024).

[31] Free riders prefer to wait for others to initiate legal procedures, allowing them to reap the benefits without shouldering the associated costs. This behavior becomes problematic when too many individuals adopt this approach, as it hinders the initiation of any legal procedure.

[32] When consumers are unaware of their rights or harbour concerns about lacking sufficient information to meet the burden of proof, they may refrain from initiating legal proceedings: see R.J. Van den Bergh, 'Private enforcement of European competition law and the persisting collective action problem' 20 *Maastricht Journal of European and Comparative Law*, 12 (2013).

[33] L. Visscher and M. Faure, 'A Law and Economics Perspective on the EU Directive on Representative Actions' 44 *Journal of Consumer Policy*, 455, 457-458 (2021).

[34] ConsumerPro, Collective Redress Theoretical background document 2022-2023, 9-10, available at https://tinyurl.com/4shc3hv4 (last visited 30 September 2024).

[35] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM/2018/183 of 11 April 2018 available at www.eur-lex.europa.eu/.

[36] European Parliament and Council Directive 2020/1828/EC of 25 November 2020 on

intends to modify the landscape of collective litigation for consumer protection in the EU.

The RAD upholds the intent of the Commission to ensure that at least one effective and efficient procedural mechanism for representative actions for both injunctive and redress measures is available to consumers in all MSs to achieve a high level of consumer protection as well as to contribute to the smooth functioning of the internal market. In this way, consumer confidence would be enhanced and their rights effectively enforced; in addition, traders would benefit from fair competition and a level playing field.[37]

The RAD confirms the EU trend to distance itself from US-style class actions,[38] relying on mechanisms and safeguards that testify to the authenticity of the European approach towards the collective redress system; these include the recognition of the *locus standi* to designated representative legal entities that possess specific requirements and, eventually, to public authorities, the ban on punitive damages, the preference for an opt-in system, the provision of 'loser pays' principles, the ban on contingency fees for lawyers, the mention of the funding of an action – including third party litigation funding – supported by the related provisions to ensure transparency and avoid conflicts of interest. The RAD fixes minimum standards and gives MSs a great deal of leeway in implementing its rules; therefore, choices made at the national level will inevitably have a direct impact on the effectiveness of the collective redress in the EU.

Italy's response came with decreto legislativo 10 March 2023 no 28, which came into force on 25 June 2023 and addresses offences committed thereafter.[39] The Italian system is not new to collective litigation nor to injunction and compensatory class actions specifically structured for the benefit of consumers. The following paragraph (para 2) will shed some light on the former and current Italian collective redress framework as a preface to introducing the new rules on the consumer representative action - decreto legislativo no 28of 2023 (para 3) - with particular regard to the scope of application and subject matter, procedural features and particular mechanisms, such as the opt in, lawyers' fees, costs and funding issues. Some final considerations on the impact of possible representative actions on consumer protection concludes the paper (para 4).

representative actions for the protection of the collective interests of consumers [2020] OJ L 409/1. A. Biard, 'Collective redress in the EU: A rainbow behind the clouds?' 19 *ERA Forum*, 189 (2018).

[37] See in particular recital nos 7 and 8 RAD.

[38] Concerning the hostility of Europe towards the US class action, it has been noted that: 'in many countries, the debate over class action adoption is dominated by the concern that, whatever the new procedure looks like, it should not be an "American-style" class action'; D.R. Henseler, 'The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding'79 *The George Washington Law Review*, 306-308 (2011); see also, H.L. Buxbaum, 'Class Actions, Conflict and the Global Economy' 21(2) *Indiana Journal of Global Legal Studies*, 585 (2014).

[39] Decreto legislativo 10 March 2023 no 28, 'Attuazione della direttiva (UE) 2020/1828 del Parlamento europeo e del Consiglio, del 25 novembre 2020, relativa alle azioni rappresentative a tutela degli interessi collettivi dei consumatori e che abroga la direttiva 2009/22/CE'.

II. Collective Redress in Italy: From Consumer Class Action to General Collective Action

The Italian legal framework has long been familiar with collective litigation that is tailored to protect consumer interests, including actions for injunctions and compensatory class actions.

After national discussions lasting for years, a consumer collective action regulation was introduced in the Italian legal system for the first time in 2007 through Art 140-*bis* of the Consumer Code,[40] which came in the wake of some financial crises and defaults (see Parmalat and Cirio scandals as leading cases).[41] Before this new piece of legislation entered into force, it was replaced in 2009[42] with a significant shift from collective action towards class action and from the protection of collective interests to the protection of individual rights, transferring the *locus standi* from consumer associations and committees directly to consumers and users.

The rule became effective in 2010, but its life was short: after partial amendment in 2012,[43] the consumer class action was repealed in 2019 as a result of a major national reform concerning collective redress mechanisms.

Under the former consumer regulation, each member of the class - consumers and users individually or through *ad hoc* associations or committees to which they granted power - were entitled to bring class actions against traders in order to protect homogeneous consumer rights originating either in contracts or, to a lesser extent, in tort law (in particular, in case of product or service provider liability, unfair commercial practices and breach of competition rules). The procedure followed a two-stage process: once the class action was admitted,[44] the court defined the characteristics of the individual rights involved in the judgment, set out terms and conditions to give adequate public notice to the action and fixed the mandatory term (which could not exceed 120 days) for consumer adhesion

[40] Art 2, section 446, legge 28 December 2007 no 224, 'Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2008)', as emended by art 6 of decreto legge 24 January 2012 no 1, 'Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività', ratified by legge 24 March 2012 no 27 'recante disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività'.

[41] On the introduction of the consumer class action in Italy see L.S. Benvenuto et al, *Guida alla Class Action* (Milano: Il Sole 24 ore, 2009).

[42] Legge 23 July 2009 no 99, recante disposizioni per lo sviluppo e l'internazionalizzazione delle imprese, nonché in materia di energia'. F. Camilletti, 'Il nuovo art. 140-bis del codice del consumo e l'azione di classe' *I Contratti*, 1179 (2009); C. Consolo, 'Come cambia, rivelando ormai a tutti e in pieno il suo volto, l'art. 140-bis e la Class Action consumeristica' *Corriere Giuridico*, 1297 (2009); T. Galletto, 'L'azione di (seconda) classe (considerazioni sul novellato art. 140 bis del codice del consumo)' *Nuova giurisprudenza civile commentata*, 539 (2009).

[43] Decreto legge 24 January 2012 no 1 and legge 24 March 2012 no 27.

[44] The class could be declared inadmissible at this preliminary stage if at least one of these four elements is found to be present: (a) the claim is manifestly unfounded; (b) there is a conflict of interest; (c) the individual claims lack homogeneity; or (d) the claimant is not in the position to adequately protect the interests of the class.

(based on an opt-in mechanism). Once this term had expired, the Court judged on the merits of the case. The final judgment - which could be challenged in front of the Court of Appeal - had binding force for all the consumers who had opted-in to the lawsuit, even if they did not technically become parties to the trial.[45]

Alongside the class action for redress, the Consumer Code set the rules for the collective action for injunctive relief (Art 139 and 140 Consumer Code):[46] representative consumer associations (ie, the entities that met the requirements set by the law and were included in the register pursuant to Art 137 Consumer Code) were entitled to seek injunctive relief for violations of the collective interests of consumers due to an unlawful conduct carried out by a trader. In particular, the consumer representative entities were qualified to protect the collective interests of consumers and users by requiring the court - in the case of failure of any and prior conciliatory procedures and of the official request for termination of the behaviour - to prohibit the unlawful conduct harming consumer interests, to adopt suitable measures to remedy or eliminate the damaging effects of any breaches and to order the publication of the measures in one or more national or local newspapers if it may help to correct or eliminate the effects of any established breaches. Moreover, upon request of the plaintiff, the courts were entitled to fix a penalty to be paid to the state in case of non or delayed compliance by the trader wrongdoer.

Despite covering a diverse array of legal matters and handling some important cases,[47] the consumer class action has been less successful than expected, with both an underuse of this collective remedy and a low success rate regarding settlements and decisions acknowledging infringements and awarding damages.[48]

[45] For more details on the former consumer class action *ex* 140-*bis* ICC see: R. Caponi, *Italian 'Class Action' Suits in the Field of Consumer Protection*: *2016 Update,* available at https://tinyurl.com/33pxdzd9 (last visited 30 September 2024); G. Pailli and C. Poncibò, 'In search of an effective enforcement of consumer rights: The Italian case', in H.W. Micklitz and G. Saumier eds, n 18 above, 360, 172; Id, 'The transformation of consumer law enforcement: An Italian perspective' 8 *Comparative Law Review*, 1, 19 (2017); M.L. Chiarella, 'Overview of class actions: Italian consumer law and cross-border litigation' 4 *Athens Journal of Law*, 165, 172 (2018).

[46] In 2007, to comply with the Directives 98/27/EC and 2009/22/EC, the discipline was partially amended and transferred into the Consumer Code.

[47] For an overview see L. Bugatti, 'The Directive (Eu) 1828/2020 and the Consumer Representative Actions In Italy: A Step Back o Forward?' *Revue Européenne de Droit de la Consommation*, 289, 293 (2024).

[48] F. De Dominicis, 'I numeri e lo stato dell'arte dei primi dieci anni di vita dell'istituto', in V. Barsotti et al eds, *Azione di classe: la riforma italiana e le prospettive europee* (Torino: Giappichelli, 2020), 261; A. Bonafede, 'Il "mosaico" della class action italiana: la Legge n. 31/2019', available at https://tinyurl.com/ut6y4cw8 (last visited 30 September 2024); E. Silvestri, 'Rebooting Italian Class Action', in A. Uzelac and S. Voet, n 5 above, 201-202; R. Pardolesi, 'La classe in azione. Finalmente' *Danno e responsabilità*, 301 (2019), who in 2019 has underlined that '*I risultati positivi latitano. Li si conta sulle punte delle dita di una mano (monca…)*', recalling: Corte d'Appello di Milano 25 August 2017, *Repertorio Foro italiano*, entry no 3 '*consumatori e utenti*' (2018) and *Giurisprudenza italiana*, 105 (2018), noted by A. Dondi and A. Giussani, '*Commonality* all'italiana e avvio (timido) della nostra azione di classe' *Giurisprudenza italiana*, 106; Tribunale di Napoli 18 February 2013, *Foro italiano*, I, 1719 (2013), commented by A. Palmieri; Corte di Cassazione 31 January 2018 no 2320, *Danno e responsabilità*, 113 (2019), commented by M. Natale, 'Diritti

The general lack of satisfaction with consumer collective actions has led to a review of the entire discipline aimed at providing a more effective and accessible legal mechanism for addressing legal disputes with collective implications. In 2019, the consumer injunction and class action regulations were abandoned in favour of general rules transposed into the Civil Procedural Code.[49]Currently, the relevant provisions on class actions and on the collective action for the release of an injunction will be set forth by section IV, Title VIII *bis*, Civil Procedural Code, Arts 840-*bis* to 840-*sexiesdecies*.[50]

This intervention introduced some significant changes to the legislative framework with the aim of addressing the shortcomings and pitfalls of the previous consumer class action, rendering the collective proceedings more 'plaintiff friendly' and increasing recourse to this procedural mechanism. The new regulation - which applies only to claims related to conduct that took place from 19 May 2021 - extended both the scope and subject matter of application of the former consumer class action: In particular, it extended the scope of class action beyond consumer law, making this instrument generally accessible. Each member of the class (whether or not they are consumers and users) holding 'individual homogeneous rights' as well as non-profit associations and organisations that are listed in a specific public registry held by the Ministry of Justice and that have statutory objectives that encompass the protection of the rights claimed by the class[51] are entitled to bring a collective action seeking compensatory and/or injunctive remedies against businesses, public service providers, or public utilities for any infringements, not just those related to specific types of misconduct such as breach of contract, productor service provider liability, unfair commercial practices, or breach of competition rules as previously defined.

The new rules regulate both compensatory and injunctive remedies. The claimant can seek relief in the form of redress, claiming the establishment of liability and the award of damages and/or restitution, as well as an injunction requiring the adoption of measures to cease the practice at issue by omission or commission.

omogenei e potenziamento dell'azione di classe'; Tribunale di Venezia 12 January 2016, *Foro italiano*, I, 1017 (2016).

[49] Legge 12 April 2019 no 31, 'Disposizioni in materia di azione di classe'. This applies only to claims related to conducts which took place from 19 May 2021.

[50] For a comment see, among others, A.D. De Santis, 'The new Italian class action: Hope springs eternal' 5 *The Italian Law Journal*, 757 (2019); E. Silvestri, n 5 above, 203; C. Consolo, 'La terza edizione dell'azione di classe è legge ed entra nel c.p.c. Uno sguardo d'insieme ad un'amplissima disciplina' *Corriere Giuridico*, 737 (2019); P.F. Giuggioli, *L'azione di classe. Un nuovo procedimento collettivo* (Padova: CEDAM, 2019).

[51] See Decreto ministeriale 17 February 2022 no 27, 'Regolamento in materia di disciplina dell'elenco pubblico delle organizzazioni e associazioni di cui agli articoli 840-bis del codice di procedura civile e 196-ter delle disposizioni per l'attuazione del codice di procedura civile, come introdotti dalla legge 12 aprile 2019, n. 31, recante disposizioni in materia di azione di classe', available at https://tinyurl.com/yck4bctp (last visited 30 September 2024).

III. The Consumer Representative Action

With the implementation of the RAD through decreto legislativo no 28 of 2023,[52] Italy added a new and distinct representative procedure that supplements the collective action regulated by the Civil Procedural Code, thus enriching the collective enforcement tools.[53]

According to the RAD, qualified entities (QEs) are entitled to bring representative actions to protect the collective interests of consumers whose rights have been affected or may be affected by the trader's infringement of one or more of the laws listed in annex II-*septies*, which recalls the list proposed by the Annex I RAD. It is therefore clear that the subject matter and the scope of application of the new representative action are stricter than those of the general collective actions introduced in 2019 (see below 1). Nevertheless, even if the new representative actions are distinct from the collective actions based on the Civil Procedural Code, they share the same main features and procedural mechanisms as the former. Considering the wide range of leeway left to MSs, the Italian choices made during the implementation of the RAD confirmed, wherever possible, the rules set in 2019 and transposed them into this new piece of consumer legislation. The following paragraphs will shed light on the core traits of the collective actions and consumer representative actions in Italy.

1. Coverage and Content: Representative Action's Boundaries

Unlike the former consumer class action and the general class action introduced in 2019, both exclusively or alternatively providing each member of the class with the right to pursue an action, the consumer representative action can only be brought by 'qualified entities' (QEs).

Among the QEs are, first, the nationally representative consumer associations registered in a special list held by the Ministry of Enterprises and Made in Italy. Pursuant to Art 137 Consumer Code, these organisations must fulfil a set of mandatory requirements to be included on the list. These requirements are identical to the former criteria in the Consumer Code to determine the most representative consumer associations: to have been established according to national law for at least three years; to have a statute that provides for the exclusive objective of consumer protection and a democratic order; to have a non-profit making character; to demonstrate at least three years of activity in the protection of consumer interests; to have a minimum number of members (list annually updated with the indication of the membership fee paid); the legal representatives are not subject to criminal judgments connected to the

[52] Decreto legislativo 10 March 2023 no 28, 'Attuazione della direttiva (UE) 2020/1828 del Parlamento europeo e del Consiglio, del 25 novembre 2020, relativa alle azioni rappresentative a tutela degli interessi collettivi dei consumatori e che abroga la direttiva 2009/22/CE'.

[53] Arts 140-*ter*-140-*quaterdecies* Consumer Code.

Association's activity and they are not traders involved in the same field as the Association; to have a national relevance (members must represent 0.5/1000 of the national population and the organisation is present in at least five regions (0.2/1000 local pop.); and to have an annual financial reporting system. The general list of QEs entitled to protect the collective interests of consumers at the national level is complemented by a subsection for those entitled to bring cross-border actions (including consumer organisations representing members from different MSs). Another set of mandatory requirements must be met to be enrolled in this subsection, and they are the same as the criteria imposed by Art 4, para 3, RAD. These requirements concern the structure, the activities, the independence and the transparency of the entity. A comparison of the two sets of mandatory criteria reveals that those required of QEs to bring domestic class actions are stricter than those imposed to be enrolled in the subsection on cross-border legal standing; just to mention a few, for the latter, 12 months of actual public activity in the protection of consumer interests prior to its request for designation is required instead of the three years for QEs, a legitimate interest in protecting consumer interests (and not an exclusive interest statutory purpose) is sufficient; the time for which the entity has been established has no relevance; and the national relevance and the representative character in terms of a minimum number of members of the entity are not taken into account. This mismatch is hardly acceptable, considering that cross-border representative actions are likely to be more complicated than domestic ones and that this discrepancy introduces an unnecessary element of confusion, making accreditation more complicated for representative entities and, therefore, the functioning of the representative actions less efficient and effective.

Among the entities qualified to bring representative actions in Italy, Art 140-*quater* Consumer Code listed the '*qualified entities*' registered with the competent local and European authorities according to Art 140-*ter*, para 2, Consumer Code.[54]

Finally, Arts 140-*ter* and 140-*quater* Consumer Code extend the legal standing needed to bring domestic and cross-border representative actions to public authorities at the national, regional or local levels designated as responsible for enforcing EU laws that protect consumer interests.[55] In Italy, several sectoral public authorities (eg, telecommunications, privacy and competition) that include consumer protection among their institutional goals have public enforcement powers in their specific field of competence. Even though the inclusion of public bodies among the QEs ensures – from the perspective of *consumer* protection – a greater recourse to private enforcement, some doubts have arisen as to the compatibility of this extension with the 'equality of arms principle'.[56] Under their

[54] According to Art 5, para 1, RAD.

[55] Art 3, no 6, European Parliament and Council Regulation (EU) 2017/2394 of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 [2017] OJ L345/1.

[56] Recital no 68 RAD.

public enforcement powers, several public agencies in Italy play a crucial role at the macro level by monitoring the markets and ensuring professionals and businesses abide by the rules, imposing sanctions (fines) and rendering binding orders to cease unlawful practices. Even if the optimal relationship between public and private enforcement is still largely debated, making such Italian public entities an avenue for collective redress risks the creation of overlap (instead of complementarity) between public and private enforcement mechanisms. For example, the Italian Antitrust Authority, which has competence over unfair terms in consumer contracts and, of course, in competition areas, has the power once it has ascertained unlawful conduct by a trader and issued a fine to enforce some of the rights granted to consumers to directly jump into the private realm through follow-up action claiming damages on behalf of consumers. The public agency is in a privileged position compared to the traders to present the case, including evidence, considering its unique access to all the information required to establish the infringement that was gathered within the public enforcement proceeding.

However, as previously mentioned, the new Italian rules do not extend standing to a single consumer (as is the case for the general collective action) but strictly rely on the representative model pursued through the RAD. This does not imply that individual consumers are left defenceless when their rights are violated by traders; they still retain their independent standing to bring an individual action, the right to later join the consumer representative action through the opt-in mechanism and the option to directly seek collective redress, albeit exclusively through the general class action. The last of these may lead to a duplication of collective action in response to the same unlawful conduct: one action brought by a QE according to the Consumer Code rules[57] and a second filed by individual consumers following provisions of the Civil Procedural Code Without measures for coordination between the two regimes, the risk of overlap of these procedures may result in inefficient outcomes.

Moreover, the Italian rules do not go beyond the minimum requirements of the RAD in adopting the possibility provided for in Art 4, para 6, RAD and, thus, recognising 'entities on an *ad hoc basis*' as QEs entitled to pursue specific domestic representative actions in the interests of consumers.[58] This last choice is consistent with the 2019 general class action, which favours the stability and continuity of registered associations to an *ad hoc* constitution. Even if this disposition replicates the general discipline of Italian collective action and perfectly fits with the European approach to collective proceedings and representative action, it appears to underestimate the national experience gained under the application

[57] Art 140-*ter*, para 2, Consumer Code provides that in a similar situation (unlawful conduct carried out by a trader harming the collective interest of consumers in one of the matters listed in Annex II-*septies* Consumer Code), if the plaintiff is a QE, it is obliged to seek protection through the consumer representative action and cannot bring a collective action under the Civil Procedural Code rules.

[58] See recital no 28 and art 4, para 6, RAD.

of the former consumer class action. In fact, there has been no shortage of consumer class actions brought directly by consumers[59] or by entities on an *ad hoc* basis[60] instead of by the most national representative consumer associations, especially in cases with a local impact.[61]Based on this national experience, the choice of restricting the pool of possible claimants by not including ad hoc entities among those qualified to bring domestic representative actions is not convincing on a rational basis. But it should not be forgotten that the requirement imposed by Art 4, para 6, RAD, according to which the *ad hoc* entities must meet the requirements for national QEs, would naturally have drastically restricted the circle of entities on an *ad hoc* basis entitled to propose representative actions, frustrating in practice the benefits of a normative extension of the scope of application to *ad hoc* entities.

Domestic and cross-border representative actions can be brought by QEs against 'traders', encompassing any natural or legal person, public or private, acting (including through another entity) for purposes related to their trade, business, craft or profession.[62] While this aligns with RAD provisions, it introduces a disparity with general collective actions, which are more restrictive as applicable only to companies and entities overseeing public services or utilities.[63] Interestingly, the scope of collective action regulated by the Civil Procedural Code is broader than that of representative actions in the sense that it is open to non-consumers (irrespective of subject matter, see *infra*), yet it is more restrictive concerning potential wrongdoers.

Concerning subject matter of the new rules, the consumer representative action aims to protect the collective interests of consumers against traders' unlawful practices in specific areas of the law as listed in Annex II *septies*, which faithfully references Annex I of the RAD encompassing various domains, including liability for defective products, unfair terms in consumer contracts, air carrier liability, consumer protection in the indication of prices, sales of consumer goods and associated guarantees, e-commerce, electronic communications, distance marketing of financial services, data protection, product safety, unfair commercial practices, misleading comparative advertising, travel, tourism and package tours, electronic money, energy, foods, cosmetics, labels and packaging, consumer rights, alternative dispute resolution, payment services, insurance, roaming, geo-blocking and the

[59] Eg, among the most recent cases: Tribunale di Genova 2 April 2023, fonte?; Tribunale di Venezia 21 October 2021, available at https://tinyurl.com/39az9avs; Tribunale di Cagliari 8 February 2017, available at https://tinyurl.com/mvwbb8cr.

[60] Eg,Tribunale di Roma 20 June 2018, available at https://tinyurl.com/3dzhyt8b.

[61] F. De Dominicis has estimated that 20 per cent of the consumer class action brought between 2010 and 2023 has been filled by single consumers or ad hoc entities: F. De Dominicis, 'La nuova "class action europea": tratti fondamentali e criticità del d.lgs. 10 marzo 2023, n. 28 che recepisce la Direttiva 2020/1828 (UE)', available at https://tinyurl.com/5x4nrwyu (last visisted 25 September 2024).

[62] Art 140-*ter*, para 1, *letter b)* Consumer Code.

[63]Art 840-*bis*, para 3, Code of Civil Procedure.

supply of digital content and digital services.

Despite the leeway granted to MSs by the RAD, Italy opted not to extend the mechanism of representative actions in all areas of law.[64] This approach appears unjustified on a rational basis in that it deviates from the prior rules on consumer class action which covered infringements of the collective interests of consumers, as referred to in Art 2 and 140-*bis* Consumer Code, as well as from the current rule for general class actions (which applies regardless of the legal matter at stake), without offering any clear benefits. It is also not consistent with the rapid evolution of markets and consumer protection needs; to cope with this constant progress, it would have been more efficient to adopt a flexible approach allowing representative actions to be brought in the presence of any infringement of collective consumer interests. Finally, limiting the subject matter of the representative action legal framework results in significant fragmentation of private collective enforcement mechanisms. While collective consumer rights are at stake, in the event of a breach of consumer rights listed in Annex I-*septies*, the rules of the Consumer Code apply; for infringed rights outside the list, the route becomes the general one of the Civil Procedural Code.

2. The Proceeding

The consumer representative action proceeding follows the rules provided in the Civil Procedural Code regarding the general class action to the extent that they are compatible.

First, the jurisdiction granted to the Commercial Division of the court where the defendant is located is confirmed. While intended to provide ad hoc specialisation and expertise for complex proceedings, concerns about the efficiency of this solution arise due to the Division's existing significant workload. Currently, it does not appear that such Divisions have been staffed and equipped to adequately deal with collective claims.[65]

Concerning the proceeding, the two-stage process with which the former consumer class action experimented is confirmed. It includes a preliminary ruling for certification to assess whether the class action is admissible,[66] and then a second

[64] In particular, the Italian Annex I-*septies* lists the same provisions of EU law included in Annex I RAD. Additionally, it incorporates two extra provisions explicitly referring to European Parliament and Council Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1 and European Parliament and the Council Regulation (EU) 2022/2065 of the of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

[65] E. Silvestri, n 5 above, 207; C. Consolo, 'L'azione di classe di terza generazione', in V. Barsotti et al eds, n 48 above,19 -21.

[66] According to Art 140-*septies*, para 8, Consumer Code, the representative action is considered inadmissible when: a) the claim is manifestly unfounded; b)it lacks the necessary elements to identify the group of consumers affected by the representative action; c) the claims lack homogeneity; d) the QE lacks the requirements necessary for standing to sue; e) there is a conflict of interests

phase in the case of declaration of admissibility in which the Court rules on the merits of the case following a summary procedure. As introduced in 2019 for the general collective action, a third phase is designed to collect and oversee the assessment of individual consumer requests to join in the representative action. In relation to this final stage of liquidation of damages suffered by individual consumers, the regulatory framework provides for two different figures: the delegated judge in charge of the opt-in procedure and the consumer representative.

To render the procedure on the merit more claimant-friendly – making it easier for the claimant to collect evidence and fulfil the burden of proof – some related rules introduced in 2019 have been transposed in the representative action proceeding: the court possess a good degree of discretion to handle the procedure, and its powers in the field of evidence have been expanded. In particular, courts are entitled to appoint expert witnesses (unless there are particular reasons to the contrary; the costs of any technical expertise shall be advanced by the defendant), to use statistics and presumptions to assess the defendant's liability and to order the defendant to disclose relevant evidence, with the power to impose fines in case of non-compliance or destruction of evidence or to consider a fact proven if the evidence has been destroyed.

Similar to the general collective action,[67] the rules of the consumer representative action favour settlements and voluntary resolutions. Not only can settlement agreements between the parties be struck at different stages of the process but also an active role is given to different actors in the procedure. Until the hearing of the case, the court is entitled to formulate settlement or conciliation agreement proposals. A similar power is given to the class representative, who in the interest of the adherents, can prepare a draft settlement agreement with the defendant, which must finally be approved by the delegated judge. This approach is particularly appreciated in a legal tradition, such as the Italian one, that has historically been resistant to incorporating conciliatory practices into its procedures given its enduring preference for an adversarial approach to legal issues and for the maintenance of a courtroom-centric model, but that is undergoing a slight cultural shift towards embracing consensual dispute resolution.

To safeguard the collective interests of consumers, QEs have the authority to seek either individually or in combination both compensatory and injunctive measures (even interim injunctions). Concerning the latter, within the Italian legal framework, a noteworthy development is the expansion of available remedies. In addition to the traditional redress measures, such as compensation and restitution, that are currently covered by the general class action (Art 840-*bis*,

towards the defendant, including when the entity financing the action is a competitor of the defendant or depends on the defendant; and f) the statutory purpose of the QE that filed the application does not justify the exercise of the action.

[67] A. Giussani, 'Le composizioni amichevoli della lite nella nuova disciplina dell'azione di classe', in B. Sassani ed, *Class action. Commento sistematico alla l. 12 aprile 2019, n. 31* (Pisa: Pacini Editore, 2019), 149.

para 2, Civil Procedural Code) and were already part of the former consumer class action (Art 140-*bis* Consumer Code), the new rules introduce a broader spectrum of remedies. This includes options like reparation, product replacement, price reduction and contract termination.

3. The Opt-In Mechanism

The former Italian consumer class action was based on an opt-in system; once the class action was admitted and the class itself was defined, all potential members of the group were informed of the proceeding by means of an appropriate public notice, and they had the possibility to expressly join the group before the expiry of a fixed term (Art 140-*bis*, para 9, Consumer Code). Once the term had expired, the court would assess the case on its merits. Only consumers who had opted-in could avail themselves of the decision. The opt-in system was deemed more in line with the European procedural mindset and the most consistent with the civil law tradition's legal and constitutional principles, including the need to preserve private autonomy, that is, the individual right to decide whether or not to enforce a claim and how to act, avoiding 'representation without authorisation'. Even if the opt-in system does not appear to give rise to abuses, it remains a controversial feature of the Italian class action. It is obvious that collective litigation is primarily about redress, but it can also directly affect the conduct of the traders: the threat of costly litigation can deter them from infringing the law,[68] and standards of behaviours set by the courts may help to remove bad practices and corporate wrongdoing from the market.[69] Some doubts have arisen as to whether the opt-in mechanism is capable of not only providing consumers with effective redress but also of ensuring an efficient level of deterrence, fulfilling both the compensatory and deterrent functions of the action. In fact, the capacity of an opt-in system to achieve these strictly intertwined goals essentially depends on how many class members will join the collective proceeding. In Italy, the experience under the former consumer class action attested to an underuse of the opt-in mechanism by consumers due their rational apathy.[70]

To address the pitfalls of the previous consumer class action and maximise consumer adhesion, the opt-in mechanism was changed for the 2019 collective action regulation: the 'late opt-in' option was added to the traditional 'early opt-in', allowing individuals to opt in not only after the action has been admitted, but

[68] *Contra* see C. Hodges, 'Evaluating Collective Redress: Models, Evidence, Outcomes and Policy', in A. Uzelac and S. Voet, n 5 above, 19-22, who underlines that the classic economic theory according to which the 'enforcement of law through imposing financial consequences (fines or damages) and public shaming (be adjudged to be in the wrong) increases deterrence' is not supported by strong evidence, while 'extensive evidence now exists that "regulating through culture" offers the most effective way of affecting future behaviour (…)'.

[69] G. Howells, 'EU consumer access to justice and enforcement', in Id et al eds, *Rethinking EU Consumer Law* (London: Routledge, 2017), 290-294.

[70] G. Afferni, 'La nuova azione di classe' *Mercato concorrenza regole*, 437-439 (2021).

even after the decision of the case on its merits.

The RAD leaves it up to the MSs to choose between the opt-in mechanism, the opt-out system or a combination of both. Despite this freedom as well as the fact that today, the opt-out system is penetrating continental Europe, and in several MSs, it is possible to enforce pecuniary claims under an opt-out scheme,[71] in Italy, the blocking argument – according to which the individual whose rights are affected must have full control over the matter of the dispute and the proceedings – prevails.

Consequently, the solution adopted in 2019 for collective redress with early and late opt in has been extended to the new consumer class action without changes.

The 'late opt-in' mechanism has the undoubted merit of extending the timeframe for opting and, thus, the opportunity for consumers whose rights have been violated by the defendant's unlawful conduct to join the action; however, even if this solution may mitigate the risk associated with a low rate of adhesion, doubts remain about its ability to overcome the general apathy that traditionally characterises consumers. Furthermore, the 'late opt-in' option has been largely criticised by traders' associations that consider it as one of the main obstacles towards the success of the class action and a serious threat to traders. The fact that the defendants will be unable to predict and assess the potential exposure related to the amount of compensation will result in a strong disincentive for them to settle the case.[72]

Strictly linked to the opt-in system is publicity: visibility and information about a pending collective action is essential in order to enhance the adhesion of consumers in an opt-in mechanism.

In the former consumer class action, courts were used to imposing on the claimant the obligation to give notice of the class action through the national press publication or entry in the Municipal Register.[73] This means was extremely expensive and, at the same time, not always effective in reaching consumers, which hampered the effective functioning of the consumer class action. Law 12 April 2019 no 31 profoundly reformed this aspect with the aim of encouraging the use of collective proceedings by implementing an IT platform that is connected to the Ministry of Justice's Telematic Services Portal and is specifically dedicated to collective proceedings.[74] The platform provides wider visibility to pending cases,

[71] See C.I. Nagy, 'The European collective redress debate after the European Commission's recommendation. One step forward, two steps back?' 22 (4)*Maastricht Journal of European and Comparative Law*, 530, 541-542 (2015); A. Stöhr, 'The implementation of collective redress – A comparative approach' 21 *German Law Journal*, 1606 (2020), who underlined that 'In Europe, the opt-out principle is implemented by the United Kingdom and the Netherlands. Hybrid systemsof either opt-in or opt-out, depending on the type of action or the specifics of the case, can be found in Belgium, Bulgaria, Denmark, and competition cases in the United Kingdom'; British Institute of International and Comparative Law (BIICL), *State of Collective Redress in the EU* n 20 above.

[72] Confindustria, *Schema di decreto legislativo di recepimento della Direttiva Ue n. 1828/2020 sulle azioni rappresentative a tutela degli interessi collettivi dei consumatori – Osservazioni – Position Paper*, 6 (January 2023), available at https://tinyurl.com/h7ranub9 (last visited 30 September 2024).

[73] F. De Dominicis, n 48 above, 282.

[74] Available at https://tinyurl.com/2skwjhty (last visited 30 September 2024).

reducing the costs associated with publicity, and technically facilitates the adhesion of class members. The costs of giving public notice for the admissibility decision are no longer borne by the plaintiff as this information is published online. It is currently possible to access all the information about a pending class action, including documents and court files and orders through the portal. Moreover, the adherent is exempt from the burden of filling out the request at the clerk's office of the competent court: consumers are entitled to submit opt-in statements to join the class action directly through the IT Portal. This solution has also been applied to the new consumer representative action, allowing consumers online access to all the information, documents, court files and orders about ongoing representative actions as well as to submit an opt-in statement to join the representative action directly through the portal.

Based as well on the improvements in publicity, the introduction of new rules for consumer representative actions could have aimed for more ambitious changes, presenting themselves to the Italian legislature as a catalyst for reconsidering the opt-in system, with a shift towards an opt-out option.

The opt-out mechanism, a key feature of the US-style class action, enables consumers to automatically participate in collective litigation unless they expressly withdraw. While initially viewed with suspicion in continental Europe, there is a growing acceptance of this approach among civil law countries.[75] Individual procedural autonomy is not abolished but rather preserved, allowing the consumer to decide whether to participate or opt out of the collective action. This choice is ensured when there is an effective publicity system capable of reaching all consumers. As already highlighted, significant progress has been made in Italy through the implementation of the telematic services portal, which includes a section exclusively dedicated to collective actions. The opt-out mechanism proved to have the power to overcome the 'rational disinterest and apathy' of consumers in small claims cases.[76] By allowing consumers to be part of collective litigation by default, the opt-out mechanism has the potential to enhance access to justice. This not only benefits consumers but also exerts increased pressure on businesses involved in unlawful practices. Moreover, it contributes to levelling the playing field by eliminating any undue competitive advantages. Therefore, the opt-out scheme could have proven to be more effective in addressing the rational apathy among consumers that has historically characterised and hindered collective action in Italy.

4. Lawyers' Fees, Costs and Funding

The success of a representative action strongly relies on the presence of sufficient incentives to bring the legal action and its funding possibilities.

The Italian ban on contingency fee agreements ('*patto quota lite*') – which

[75] British Institute of International and Comparative Law (BIICL), n 20 above, 15-16.
[76] L. Visscher and M. Faure, n 33 above, 460.

prohibits lawyers from being paid a percentage of the damages awarded to the client in case of success – diminished the appeal of collective/representative actions for legal professionals because the effort of managing complex procedures lacked proportional rewards. The contingency fees mechanism constitutes a core trait of the US-style class action: Such a result-based fee offers claimants a way to pursue legal action without upfront costs, shifting the financial burden to lawyers who bear the costs and risks and who are encouraged to ensure a prior and accurate screening of the case's merits and, thereafter, a timely and effective collective litigation. Nevertheless, the US class action experience, in which lawyers act as entrepreneurs in the class action, making substantial investments in the hopes of gaining a generous fee if successful, has attested to an increased risk of abuses, including frivolous suits and early settlements.[77] Although the RAD no longer directly and explicitly disapproves of contingency fees, they are still perceived in most EU civil law countries, including Italy, as potentially promoting '*vexatious lawsuits*' and rewarding '*unscrupulous attorneys*'[78] and are thus prohibited. Therefore, the financing problem of the representative action cannot be tackled by this means.[79]

To encourage legal professionals to resort to collective actions and to overcome the consequences of the *patto quota lite*'s ban, the rules introduced by Italian law no 31/2019 provide for a reward fee in favour of the lawyer. Specifically, the sum awarded to the claimants' lawyers (as well as to the class representative) is calculated as a percentage of the amount owed by the defendant, which is closely and progressively linked to the number of participants in the class action. While this legal provision has a rewarding purpose, it also sets a cap on a lawyers' fees: the court has the power to reduce the award fee by up to 50 per cent but does not have the power to increase it.

Even the new representative actions' regime applies the same award mechanism introduced in 2019 within the representative action, seeking to offer suitable pecuniary incentives for lawyers to attract them and develop a specialised legal sector. If the representative action is successful, the defendant shall pay the plaintiff's lawyer a fee in addition to his/her ordinary fees – a 'success fee' – which is based on the total amount due to the members as compensation. This provision has faced opposition from the main trader associations, who highlighted the illegitimate financial burden that it imposes upon the trader-defendant; the reward mechanism also received critical comments due to the punitive nature of the measure, which

[77] R.J. Van den Bergh, n 32 above.

[78] H. L. Buxbaum, n 38 above, 590.

[79] See the opposition of the Commission to the contingency fee agreements, defined as one of the components of the 'toxic cocktail' represented by the U.S. Class Action (together with the punitive damages and the pre-trial discovery): E. Silvestri, 'Towards a common framework of collective redress in Europe? An update on the latest initiatives of the European Commission' *Russian Law Journal,* 46, 148-150 (2013); European Commission, *Green Paper on Consumer Collective Redress – Questions and Answers* MEMO/08/741, para 9.

is a significant exception in a legal system in which compensation and reparation are considered as the main function of the redress system.[80] In addition, according to authoritative comments, this rule could stimulate professionals to make use of the representative proceeding in a bolder but not necessarily always appropriate manner. A complete overview of the entire legal framework, however, relativises these concerns. Indeed, the economic attractiveness of the reward system, its punitive scope and the risk that it may encourage abusive behaviour and transform lawyers into '*bounty hunters*'[81] appear rather limited considering the caps placed on this economic increase and the power of the judge to reduce (but not to increase) up to half of this amount.[82] This legal fee regime appears rather insufficient to adequately motivate legal professionals, considering the resources (especially in terms of time and money) required to pursue a representative action compared to the potential economic benefits.

Thus, a primary challenge remains the funding obstacles linked to collective enforcement.

The allocation method for legal costs adopted in the consumer representative action is the 'loser pays principle': the losing party bears the cost of the proceeding (eg, costs and fees of courts, experts and lawyers). QEs bear the cost of the representative procedure, sparing consumers from financial obligations. In the event of an unsuccessful outcome, consumers are obligated to reimburse expenses to the respondent only in the case of bad faith or gross negligence.[83] To cover the costs of representative action for redress measures, the QEs are entitled, if necessary, to require consumers who have opted in to pay a modest charge.[84]While this might aid in providing economic support to the consumers association, it does not solve the funding problem as the modest membership fees are mostly insufficient to fully fund the entire action.[85]

In transposing the RAD, MSs ought to implement measures to guarantee that the expenses associated with representative actions do not impede QEs from effectively bringing forth these actions. Possible measures contemplated in the RAD encompass public funding, structural support for QEs, limitations on applicable court or administrative fees or access to legal aid.[86] Additionally, MSs may decide to allow representative action for redress measures to be funded by a third party.

Considering this last possibility, the question arises whether third-party

[80] *Contra* see C. Consolo, n 48 above, 28.

[81] J.C. Coffee Jr, 'Rescuing the private attorney general: Why the model of the lawyer as bounty hunter is not working' 42 *Maryland Law Review*215, 218 (1983).

[82] C. Consolo, n 48 above, 28 -29.

[83] Art 140-*nonies*, para 3, Consumer Code.

[84] Art 140-*nonies* Consumer Code; art 20, para 3, RAD.

[85] L. Visscher and M. Faure, n 33 above.

[86] Even the other suggested initiative, including the options to decrease court fees or rely on access to legal aid, appears insufficient in addressing the funding challenge of representative actions since court fees and lawyer fees constitute only a very small portion of the overall costs associated with representative actions.

litigation funding (TPLF) – expressly mentioned in the RAD – could be a solution to the financial sustainability problem of consumer representative actions in Italy. Under a TPLF agreement, the funder provides financial support for the litigation and assumes the associated risks in exchange for a portion of the damages awarded in the event of a successful outcome. Thus, TPLF has the potential to enhance access to justice, especially in a case in which the plaintiff lacks the appropriate financial resources to bring the action or, more generally, waives his/her rights due to the reluctance to bear the risk of covering the defendant's fees in the event of an unfavourable outcome (which is particularly relevant when small claims are at stake).[87]

In Italy, the phenomenon of litigation funders entering the national legal service market with reference to cases in which the costs as well as the related economic returns can be substantial remains unaddressed and unregulated. The Italian rules implementing the RAD officially open the door to the use of TPLF for consumer representative actions, imposing – in line with the RAD – only minor safeguards against conflicts of interest and a requirement for transparency (eg, funding disclosure and restrictions on funding sources, such as a competitor or an employee of the defendant). Although the TPLF may be a beneficial mechanism to enhance access to justice for consumers, some doubts arise about the attractiveness of the representative action for third-party funders: most of the wide spectrum of redress remedies provided by the RAD – including repair, replacement, price reduction, contract termination and reimbursement of the price paid – clash with the monetary relief sought by the funder.[88] Moreover, consumers might be dissuaded from entering into a contract with funders since they can join the action through an informal online procedure,[89] either through early or late opt in,[90] without having to pay any success fee at the end. At this stage, consumers who opt in are not obliged by law to accept the funding agreement to join the representative

[87] F. Bertelli, *Gli accordi di finanziamento della lite* (Napoli: Edizioni Scientifiche Italiane, 2024); M.C. Paglietti, 'Il mercato delle controversie. Il Third Party Litigation Funding come strumento di finanziamento responsabili dell'accesso alla giustizia' *Banca borsa titoli di credito*, 821 (2023); E. D'Alessandro and C. Poncibò, 'European Parliamentary Research Service, Responsible Private Funding of Litigation. European Added Value Assessment' *Rivista trimestrale di diritto e procedura civile*, 919 (2021); E. D'Alessandro, *Prospettive del Third Party Funding in Italia* (Milano: Le Edizioni, 2019); G.M. Solas, 'Alternative Litigation Funding and the Italian Perspective' *European Review of Private Law*, 253 (2016).

[88] A. Standler, 'Are class actions finally (re)conquering Europe? Some remarks on Directive 2020/1828' 30 *Juridica International*, 14 (2021).Moreover, it has been suggested that: 'It remains to be seen, however, whether in practice there will be much appetite on the part of qualified entities to seek external funding; indeed, the not-for-profit nature of these entities makes their seeking external funding somewhat unlikely (and frowned upon in some jurisdictions) and would probably require some elaborate financial engineering to achieve', D. Fairgrieve, n 6 above, 476.

[89] See *retro* para 3.

[90] On the relationship between the opt-out model and TPLF in the context of collective redress, see A. Piletta Massaro, n 26 above, 95.

action.[91] Thus, at the national level, the practical likelihood of third-party funders showing an interest in participating in this type of litigation appears extremely slim. Consequently, the issue of financing a representative action remains unresolved.

IV. Conclusion

The evolution of collective actions in Italy over the last 15 years has shown significant progress but hasn't reached a definitive milestone. The effectiveness of representative actions is crucial for enhancing private enforcement of consumer law, particularly for scattered low-value damages. Despite the transposition of the RAD into Italian law, the government's conservative approach has hindered significant advancements. Instead of implementing a uniform legal system, a dual-track system has been adopted: national and cross-border representative actions are regulated by the Consumer Code, while collective proceedings are outlined in the Civil Procedure Code.

While the two regimes have much in common, they do not entirely overlap, and they lack specific measures of coordination. This could create the risk of courts being tasked with deciding cases pertaining to identical legal issues but grounded indistinct frameworks, leading to the proliferation of separate litigations, undermining one of the advantages of collective action – the avoidance of repetitive litigation and the prevention of different judgments that can be partially or entirely contradictory. The missed opportunity to create a unified legal framework for all collective actions that aligns with the principles of the RAD[92] has also hindered the chance to reevaluate the general collective action and adopt more ambitious choices, including a switch from the opt-in to the opt-out system or some sort of hybrid between opt in and opt out for domestic representative and collective actions. As underlined, the opt-out mechanism, although initially sceptically viewed, has proved its potential to enhance access to justice by overcoming consumer apathy. Finally, financing the representative action emerges as one of the most challenging aspects of the consumer representative action: Neither the RAD nor its Italian implementation rules adequately address the funding issue. The prospect of TPLF as a means of financing seems destined to remain a speculative hypothesis: the practical likelihood of third-party funders showing an interest in participating in

[91] G. Afferni, 'Bundling of claims by way of assignment in Italy' 2 *Mass Claims*, 30 (2022).

[92] See R. Donzelli, 'Audizione informale dinanzi alle Commissioni riunite II e X' of 12 January 2023; *contra* G. De Cristofaro, 'Audizione informale dinanzi alle Commissioni riunite II e X' of 12 January 2023, available at https://tinyurl.com/4edvayjz (last visited 30 September 2024), who considered that the absence in the European delegation law (Law 127/2022) of specific criteria for transposition did not allow the Italian government any activity other than adhering in a plain manner to the text of the Directive, incorporating the regulations into the Consumer Code (without modifying the Civil Procedural Code) to avoid being challenged for excessive delegation, as this could be subject to Constitutional Court scrutiny.

this type of litigation appears extremely slim. Additionally, the fee awarded to lawyers does not seem compelling enough to attract legal professionals to engage in representative actions.

In conclusion, the conservative political approach, coupled with never-solved funding challenges and legal implications, raises some doubts about the practical significance of the new regulation for private enforcement of consumer collective rights in Italy.

The Assessment of Sustainability in Insurance Activity: Corporate and Products Governance.

The Perspective of the European Union and the Effects on Italian Insurance Regulations

Ciro G. Corvese*

Abstract

The Author examines the European legislation regulating sustainability risk, sustainability factors, and sustainability preferences; this legislation is embedded in the existing rules concerning the governance of insurance and reinsurance, the control and product governance requirements for insurance undertakings and distributors of insurance products and the rules of conduct and advice on insurance based-investment products. The main purpose of this research is to examine whether the legislator's choice to simply integrate the existing regulations rather than not to introduce an ad hoc regulation has effectively raised awareness of the importance of insurance and reinsurance undertakings.

I. Introduction: Purpose and Limits of the Research

In March 2018, the European Commission published its Action Plan 'Financing Sustainable Growth',[1] setting up an ambitious and comprehensive strategy on

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[1] European Commission, 'Communication - Action Plan: Financing Sustainable Growth' (COM (2018) 97 final, 8 March 2018) available at www.eur-lex.europa.eu. See, in doctrine, M. Siri and S. Zhu, 'Will the EU Commission Successfully Integrate Sustainability Risks and Factors in the Investor Protection Regime? A Research Agenda' 11(22) *Sustainability*, 1-23 (2019); available at https://tinyurl.com/3yxr5kv9 (last visited 30 September 2024); L. Alessi, B. Alemanni and G. Frati, 'Financial Regulation for Sustainable Finance in the European Landscape', in N. Linciano et al eds, *Information as a Driver of Sustainable Finance. Palgrave Studies in Impact Finance* (Cham: Palgrave Macmillan, 2022), 207-242, available at https://tinyurl.com/mr2xm8r5 (last visited 30 September 2024); L. Böffel and J. Schürger, 'Sustainability: A Current Driver in EU Banking and Insurance' Part of the EBI Studies in Banking and Capital Markets Law book series (ESBCML); D. Bush et al, 'The European Commission's Sustainable Finance Action Plan and Other International Initiative', in Ead eds, *Sustainable Finance in Europe*. EBI Studies in Banking and Capital Markets Law (Cham: Palgrave Macmillan, 2021), 19-59, available at https://tinyurl.com/yhf6bn76 (last visited 30 September 2024); M. Driessen, 'Sustainable Finance: An Overview of ESG in the Financial Markets', in D. Busch et al eds, *Sustainable Finance in Europe. EBI Studies in Banking and Capital Markets Law* (Cham: Palgrave Macmillan, 2021), 329-350, available at https://tinyurl.com/3cjtnnj6 (last visited 30 September 2024); A. Martini, 'Socially responsible investing: from the ethical origins to the sustainable development framework of the European Union' 23 *Environ Dev*

sustainable finance. One of the objectives in that Action Plan is to reorient capital flows towards sustainable investment to achieve sustainable and inclusive growth. The impact assessment underlying subsequent legislative initiatives published in May 2018 demonstrated the need to clarify that insurance and reinsurance undertakings should consider sustainability factors, risks, and preferences.

As we know, the regulatory framework on sustainable finance is very relevant for the insurance industry, which plays a key role in promoting the sustainable transition as an investor, protection provider, and risk manager.

Insurance and reinsurance undertakings should, therefore, assess not only all relevant financial risks on an ongoing basis but also all relevant sustainability risks as referred to in Regulation (EU) 2019/2088 (hereinafter SFDR) of the European Parliament and of the Council that, if they occur, could cause an actual or potential material negative impact on the value of an investment or a liability.[2]

Sustainability risk is now defined as

> 'an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment' (see SFDR, Art 2, point 22).[3]

With the adoption of SFDR, the European legislator has also introduced specific transparency measures in the disclosure of financial products (including

Sustain, 16874–16890 (2021), available at https://tinyurl.com/y3rzu5uy (last visited 30 September 2024); F.G. Nogueira et al, 'Sustainable insurance assessment: towards an integrative model' 43 (2) *Geneva Paper on Risk Insurance*, 275-299 (2018).

[2] See R. Cesari, 'Sustainability and Insurance', available at https://tinyurl.com/3rc4vh2b (last visited 30 September 2024). See also United Nations Environment Programme FI: The global state of sustainable insurance-understanding and integrating environmental, social and governance factors in insurance (2009). available at https://tinyurl.com/2p93kp5t (last visited 30 September 2024); United Nations Environment Programme FI: PSI-Principles for Sustainable Insurance-a global sustainability framework and initiative of the United Nations Environment Programme Finance Initiative (2012). available at https://tinyurl.com/yc5zvnju (last visited 30 September 2024) and United Nations Environment Programme (UNEP): Sustainable insurance-the emerging agenda for supervisors and regulators (2017), available at https://tinyurl.com/mrwxa9ck (last visited 30 September 2024). See IVASS, 'Rischi da catastrofi naturali e di sostenibilità: monitoraggio annuale', available at https://tinyurl.com/3mdbebxv last visited 30 September 2024), where we can read 'Most companies declare that they take sustainability risks into account, both in their investment policies and in their underwriting policies. However, there are numerous companies that have implemented sustainability strategies only as part of their investment policies. Two thirds of companies declare that they have adopted one or more international standards on the matter. The most cited standards are the United Nations Principles for Responsible Investments (UNPRI, adopted by 49% of companies), the United Nations Global Compact (33% of companies) and the United Nations Principles for Sustainable Insurance (UNPSI, 17% of companies). Other companies have explicitly declared that they align themselves with the objectives of the Paris Agreement, the United Nations Framework Convention on Climate Change at COP 27 and COP 26' (Author's translation).

[3] See EIOPA, 'Prudential Treatment of Sustainability Risks', discussion paper, EIOPA-bos-22-527, 29 November 2022 available at https://tinyurl.com/y237c8xc (last visited 30 September 2024).

insurance products with financial content, so-called IBIPs, [4] and social security products) to make the disclosures relating to the consideration of sustainability factors and risks in the products themselves comparable to end investors.

In addition, in this context, insurers are also particularly interested in Regulation (EU) 2020/852 (hereinafter Taxonomy), which establishes the criteria for determining whether an economic activity can be considered environmentally sustainable, both in their capacity as institutional investors and as risk underwriters. In this context, in fact – especially in certain branches of activity – they can be 'enablers'/enablers of (potentially) sustainable activities, substantially contributing to the objective of adaptation to climate change.[5]

Therefore, the adoption of the above-mentioned EU legislation on sustainable finance has also led to alignment with the European provisions of the Solvency II framework[6] and the regulations on the distribution of insurance products provided for by the EU Directive 2016/97' Insurance Distribution Directive' (hereinafter IDD).[7]

[4] P. Marano, 'The Product Oversight and Governance: Standards and Liabilities', in Id and I. Rokas eds, *Distribution of Insurance-Based Investment Products* (Cham: Springer, 2019) available at https://tinyurl.com/bddv5nwn (last visited 30 September 2024) and M. Siri, 'Insurance-Based Investment Products: Regulatory Responses and Policy Issues', in P. Marano and K. Noussia eds, *Insurance Distribution Directive. A Legal Analysis* (Cham: Springer, 2021).

[5] M. Scholer and L. Cuesta Barbera, 'The EU Sustainable Finance Taxonomy from the Perspective of the Insurance and Reinsurance Sector', available at (last visited 30 September 2024), 88-103 (2020). See also M. Kraft, 'Nachhaltigkeitsrisiken in Versicherungsunternehmen. Regulatorische Entwicklungen, Szenarioanalysen und Stress-Tests' 111 *ZVersWiss*, 89-125 (2022) available at https://tinyurl.com/33z6eh26 (last visited 30 September 2024).

[6] In the opinion of EIOPA 'Solvency II, as a forward-looking risk-based framework, can effectively enable insurers to manage sustainability risks alongside other prudential risks. Many of the existing prudential tools for risk measurement and mitigation can be applied to address sustainability risks as well. For instance, EIOPA's application guidance on climate change materiality assessments and climate change scenarios in the ORSA illustrates how climate-related materiality assessments and scenario analysis of climate risks can be incorporated in this existing prudential tool, not only in the short term, but also in the long-term.9 Moreover, EIOPA is currently evaluating the potential for a dedicated prudential treatment of sustainability risks, 10 and is initiating the re-assessment of the standard formula for natural catastrophe risk in Solvency II'. See EIOPA, 'Growing recognition of sustainability risks in the insurance and IORP sectors', 13 September 2023, available at last visited 30 September 2024). See, M. Siri, 'Corporate Governance of Insurance Firms after Solvency II (July 10, 2017)', in P. Marano and M. Siri eds, *Insurance Regulation in the European Union: Solvency II and Beyond*' (London: Palgrave Macmillan, 2017), available at https://tinyurl.com/4j24eajb (last visited 30 September 2024); M. Andenas et al eds, 'Solvency II: A Dynamic Challenge for the Insurance Market' (Bologna: il Mulino, 2017); T.J. Boonen, 'Solvency II Solvency Capital Requirement for Life Insurance Companies Based on Expected Shortfall' 7(2) European Actuarial Journal, 405-434 (2017), available at https://tinyurl.com/6j8cjfkr (last visited 30 September 2024); C. Brömmelmeyer, 'The Solvency II System of Governance - Minimum Requirements for Key Functions' 70 *Festschrift für Christine Windbichler zumGeburtstag am 8 December 2020*, available at https://tinyurl.com/3m8r4vya (last visited 30 September 2024); S. Dell'Atti et al, 'The effects of solvency II on corporate boards: a survey on Italian insurance companies' 16 (1) *Corporate Ownership & Control*, 1-134 (2018).

[7] See T. Köhne and C. Brömmelmeyer,'The New Insurance Distribution Regulation in the EU-A Critical Assessment from a Legal and Economic Perspective' 43 *Geneva Paper on Risk*

It is for this reason that Commission Delegated Regulation (EU) 2021/1256[8] amended Delegated Regulation (EU) 2015/35 as regards the integration of sustainability risks into the governance of insurance and reinsurance undertakings. Commission Delegated Regulation (EU) 2021/1257[9] amended Delegated Regulations (EU) 2017/2358[10] and (EU) 2017/2359 as regards the integration of sustainability factors respectively sustainability risks and sustainability preferences in the control and product governance requirements for insurance undertakings and distributors of insurance products and sustainability risks and sustainability preferences in the rules of conduct and advice on insurance investments.

Therefore, in this research study, when we talk about the assessment of ESG factors in insurance risks in the European Union legislation, we wish to refer to two different profiles: one is the corporate governance of insurance and reinsurance undertakings; the other concerns insurance products, and here, we can consider not only the product governance and oversight (also known as POG) but also the rules of conduct.[11]

Insurance, 704-739 (2018), available at https://tinyurl.com/yc4y37t2 (last visited 30 September 2024). See also P. Marano, 'Quale mercato per l'intermediazione assicurativa? Riflessioni sulle possibili modifiche all'IMD' *Assicurazioni*, 207 (2011) e Id, *L'intermediazione assicurativa. Mercato concorrenziale e disciplina dell'attività* (Torino: UTET Giuridica, 2013). More recently, see A. Candian, 'Il recepimento della IDD in Italia: primo commento al decreto di attuazione approvato in esame preliminare dal Governo', available at https://tinyurl.com/2t5cyk28 (last visited 30 September 2024); M. Hazan, 'L'assicurazione "responsabile" e la responsabilità dell'assicuratore: quali prospettive dopo IDD?' *Danno e responsabilità*, 630-640 (2017); S. Landini, 'Distribuzione assicurativa da IDD al decreto attuativo passando per EIOPA e IVASS' *Diritto del mercato assicurativo e finanziario*, 183-194 (2018) and V. Sanasi D'Arpe, 'Riflessioni sul governo e controllo del prodotto nel mercato assicurativo' *Diritto del mercato assicurativo e finanziario*, 59-75 (2018); C.G. Corvese, 'La tutela dell'investitore in prodotti finanziari assicurativi tra il ritorno alla vigilanza settoriale e la necessità di livellare il piano di gioco fra il mercato mobiliare ed il mercato assicurativo', in M. Mancini et al eds, *Regole e Mercato* (Torino: Giappichelli, 2016), 478-524; P. Marano, 'Customer protection and product oversight and governance of insurance products, in the EU', in *Reforms and New Challenges in Insurance Law* (Belgrado: AIDA Serbia, 2016), 260-266; Id, 'La Product Oversight Governance'*Il nuovo Regolamento IVASS sull'accesso agli atti - La distribuzione assicurativa,* Quaderno IVASS, 91-100 (2017); P. Corrias, 'La direttiva UE 2016/97 sulla distribuzione assicurativa: profili di tutela dell'assicurando' *Assicurazioni*, 9-24 (2017) and S. Landini, 'Appropriatezza, adeguatezza e meritevolezza dei contratti di assicurazione' *Assicurazioni*, 39-58 (2017).

[8] OJ L 277, 2.8.2021, 14.

[9] ibid 18.

[10] See M. Frigessi di Rattalma, 'Gli atti delegati nel diritto comunitario e nella direttiva IDD'*Assicurazioni*, 25-38 (2017).

[11] In relation to the insurance sector, on 28 November 2018, EIOPA launched a public consultation on the draft technical advice on the integration of sustainability risks and factors in the delegated acts under Solvency II and the Insurance Distribution Directive IDD, with specific reference to organisational requirements, operating conditions, risk management, and target market assessment for the IDD only. On 30 April 2019, EIOPA published its final technical advice EIOPA: *Technical Advice on the integration of sustainability risks and factors in the delegated acts under Solvency II and IDD*, EIOPA-BoS-19/172 30 (April 2019). Moreover, in August 2018, the EU Commission mandated EIOPA for the draft of an opinion on sustainability within Solvency II, with specific reference to climate change mitigation, to then be considered

II. The Integration of *Sustainability Risks* into the Corporate Governance of Insurance and Reinsurance Undertakings and the Prudent Person Principle

1. Premises

The changes made to Delegated Regulation (EU) 2015/35 by the Commission Delegated Regulation (EU) 2021/1256 have been necessary because the first Delegated Regulation did not explicitly refer to sustainability risks. For that reason and to ensure that the system of governance has been properly implemented and adhered to,

> 'it was necessary to clarify that the system of governance of insurance and reinsurance undertakings and the assessment of those undertakings' overall solvency needs should reflect sustainability risks' (see recital 3 of Commission Delegated Regulation (EU) 2021/1256)[12].

There are three profiles through which the EU intends to consider sustainability within corporate governance:

first, insurance undertakings that disclose principal adverse impacts on sustainability factors in accordance with SFDR should also adapt their processes, systems and internal controls with respect to those disclosures (recital 4);

second, given the ambitions of the Commission to ensure that climate and environmental risks are managed and integrated into the financial system and the importance of remuneration policies in ensuring that the staff of insurance and reinsurance undertakings effectively manage risks identified by the risk management system, the remuneration policies of insurance and reinsurance undertakings should contain information on how those policies take into account the integration of sustainability risks in the risk management system (recital 5);

third, the prudent person principle laid down in Art 132 of Solvency II requires that insurance and reinsurance undertakings only invest in assets the risks of which they can identify, measure, monitor, manage, control and report properly. To ensure that climate and environmental risks are effectively managed by insurance and reinsurance undertakings, the implementation of the prudent person principle should consider sustainability risks and insurance and reinsurance undertakings should reflect in their investment process the sustainability preferences of their customers as taken into account in the product approval process (recital 6).

for the preparation of the EU Commission's report on the Solvency II Directive *Letter from DG FISMA on sustainability within Solvency II* (28 August 2018) available at https://tinyurl.com/49xb3pr7 (last visited 30 September 2024).

[12] See P. Marano and M. Siri eds, *Insurance Regulation* n 6 above, *passim* and N. Gatzert and H. Wesker, 'A Comparative Assessment of Basel II/III and Solvency II' 37 *Geneva Paper on Risk Insurance*,539-570 (2012).

2. Definitions

To achieve the abovementioned goals, the changes made to Delegated Regulation (EU) 2015/35 concern briefly the introduction of the definitions of 'sustainability risk', sustainability factors and sustainability preferences Art 1(55); sustainability risks, which are integrated into the risk management policies (Art 260); the risk management function, which must identify and limit the sustainability risks (Art 269) necessary to assess the overall solvency needs of the company; the actuarial function, called upon to render an opinion in the context of the underwriting policy, also taking into account sustainability risks (Art 272); the remuneration policy, which includes information on the integration of sustainability risks into risk management (Art 275) and the integration of sustainability risks into the so-called 'prudent person' principle (Art 275-*bis*).

As regards the definitions of 'sustainability risk', 'sustainability factors' and 'sustainability preferences', the points 55c to 55e are inserted in Art 1 of Delegated Regulation (EU) 2015/35: 'sustainability risk' means an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential negative impact on the value of the investment or the value of the liability (55 c); 'sustainability factors' means sustainability factors as defined in Art 2, point (24), of SFDR id est 'sustainability factors' mean environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters (55 c).

Finally, 'sustainability preferences'[13] mean a customer's or potential customer's choice as to whether and, if so, to what extent one or more of the following financial instruments should be integrated into his or her investment: a financial instrument for which the customer or potential customer determines that a minimum proportion shall be invested in environmentally sustainable investments as defined in Art 2, point (1), of Taxonomy;[14] a financial instrument for which the customer or potential customer determines that a minimum proportion shall be invested in sustainable investments as defined in Art 2, point (17), of SFDR[15] and

[13] L. Della Tommasina, 'Insurance Industry and Sustainability Preferences: Contracts and Products', in L. Spataro et al eds, *ESG Integration and SRI Strategies in the EU*. Palgrave Studies in Impact Finance. (Cham: Palgrave Macmillan, 2023) available at https://tinyurl.com/ana5fuzn (last visited 30 September 2024).

[14] In particular, the Securities and Markets Stakeholder Group (SMSG) stated that 'the lack of agreed definitions and labels at the EU level is a substantial shortcoming and seriously hampers the implementation of a harmonized approach on sustainable finance. This should not prevent firms from making progress in order to incorporate sustainability risks and factors, but this should be taken into account by regulators and supervisors'. See Securities and Markets Stakeholder Group (SMSG). Advice to ESMA (ESMA Consultation Papers On integrating sustainability risks and factors in MIFID, the UCITS Directive and AIFMD) (6 March 2019). See also, recently ESMA, *Concepts of sustainable investments and environmentally sustainable activities in the EU Sustainable Finance framework*, November 2023 available at https://tinyurl.com/7s68mxj3 (last visited 30 September 2024).

[15] Sustainable investments are now defined as those *i*nvestments 'in an economic activity that contributes to an environmental objective, as measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on

a financial instrument that considers principal adverse impacts on sustainability factors where qualitative or quantitative elements demonstrating that consideration is determined by the customer or potential customer.[16]

3. The Changes in Corporate Functions and Remuneration Policy

The other important changes[17] concern corporate governance and, specifically, risk management areas and, inside them, the risk management function, the actual function and, finally, the remuneration policy.

We must remember that the Chapter IX of Delegated Regulation (EU) 2015/35 provides rules concerning the system of governance of insurance and reinsurance undertakings, and particularly Section 1, modified by the Commission Delegated Regulation (EU) 2021/1256, contains the rules regarding the elements of the system of governance.

Here, it is not possible to dwell *funditus* on the whole part that has been modified, but we can only limit our considerations to indicate the modifications and changes that take the form of the insertion of the 'sustainability risks' into the following parts: risk management function (Art 269), actuarial function (Art 272), remuneration policy (Art 275) and prudent person principle (Art 275a).

For the first three profiles, we consider, first of all, the changes concerning risk management areas 18, which have led to the changes of Art 260(1) in points (a), (i), (c), and (vi) and have allowed the introduction of para 1a.

In point (a), point (i) of Art 260(1) now the risk management areas, as referred to in Art 44(2) of Solvency II, shall include all of the following policies: (a) Underwriting and reserving: (i) actions to be taken by the insurance or reinsurance

the production of waste, and greenhouse gas emissions, or on its impact on biodiversity and the circular economy, or an investment in an economic activity that contributes to a social objective, in particular an investment that contributes to tackling inequality or that fosters social cohesion, social integration and labour relations, or an investment in human capital or economically or socially disadvantaged communities, provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance' (see SFDR, Art 2, point 17). See M.E. Salerno, 'Adding Sustainability Risks and Factors to the MiFID II - Suitability and Product Governance Requirements' 8 *The Italian Law Journal*, 807, 803-819 (2022). The connection with MiFID2 is so strong that the term 'mifidisation of insurance law' was coined see P. Marano, https://tinyurl.com/4zjk4czp (last visited 30 September 2024). See also A. Antonucci, 'Le regole del mercato finanziario: la tutela del risparmiatore tra passato, presente e futuro' *Janus* (2019); M.E. Salerno, 'L'enforcement della disciplina in materia di tutela del contraente debole nei mercati finanziari', available at https://tinyurl.com/ytd4s57j.

[16] See EIOPA, 'Guidance on the integration of the customer's sustainability preferences in the suitability assessment under IDD', EIOPA-BOS-22-391 available at https://tinyurl.com/4vprd664 (last visited 30 September 2024) and for first critical remarks on the directive, see T. Köhne and C. Brömmelmeyer, 'The New Insurance Distribution Regulation in the EU - A Critical Assessment from a Legal and Economic Perspective' 43 *Geneva Paper on Risk Insurance*, 704-739 (2018) available at https://tinyurl.com/yc4y37t2 (last visited 30 September 2024).

[17] See above para 2.

undertaking to assess and manage the risk of loss or of adverse change in the values of insurance and reinsurance liabilities, resulting from inadequate pricing and provisioning assumptions but also the assumptions due to internal or external factors, including sustainability risks.

In point (c), point (vi) of Art 260(1) is added: actions to be taken by the insurance or reinsurance undertaking to ensure that sustainability risks relating to the investment portfolio are properly identified, assessed and managed.

Para 1a is inserted into Art 260, on the basis of which the insurance and reinsurance undertakings shall integrate in their policies the areas referred to in points (a) and (c) of para 1 and, where relevant, policies on the other areas referred to in para 1, sustainability risks.

As regards the risk management function, the change concerns Art 269 and, specifically, (a) in para 1, point (e) is replaced by the following: '(e) identifying and assessing emerging risks and sustainability risks.'; the following paragraph 1a is inserted: '1a. Emerging risks and sustainability risks, as referred to in paragraph 1, point (e), and identified by the risk management function shall form part of the risks referred to in Art 262(1), point (a)'.

The change to actuarial function regards Art 272(6), that states regarding the underwriting policy, the opinion to be expressed by the actuarial function in accordance with Art 48(1)(g) of Solvency II shall at least include conclusions regarding some considerations listed from lett a) to lett c). The change concerns only the lett b) that now considers the sustainability risks and that letter is replaced by the following:

> '(b) the effect of inflation, legal risk, sustainability risks, change in the composition of the undertaking's portfolio, and of systems which adjust the premiums policy-holders pay upwards or downwards depending on their claims history (bonus-malus systems) or similar systems, implemented in specific homogeneous risk groups'.

Just a few considerations: no changes are provided for the compliance and internal audit functions! Are there no questions about the importance of sustainability and those functions? I do not think so! I think that the EU legislator considers only the functions that are more relevant to sustainability risks.[18]

Among the changes we are discussing, para 4, added to Art 275 (remuneration

[18] This is really important if we think it is EIOPA opinion that 'At least the four functions included in the system of governance, namely the risk management, the compliance, the actuarialand the internal audit function, are considered to be key functions and consequently also important or critical functions. Furthermore, persons with key functions are those who perform functions of specific importance for the undertaking in view of its business and organisation. These additionalkey functions, if any, are identified by the undertaking, but the determination of whether such functions should be considered key or not may be challenged by the supervisory authority' EIOPA, 'Guidelines on system of governance' at https://tinyurl.com/bdhnzvuh (last visited 30 September 2024), para 1.4, 2.

policy), deserves particular attention. The remuneration policy shall include information on how it considers the integration of sustainability risks in the risk management system.[19]

It is a general opinion in doctrine that remuneration policy is the most important topic for corporate governance not only for insurance undertakings and other financial intermediaries but for all companies. I think the EU legislators do not have a clear idea how to regulate the link between remuneration policy and sustainability[20].

4. The Prudent Person Principle

The last important change introduced by the Delegated Regulation (EU) 2021/1256 regards the 'prudent person principle'.

As we know Art 132 of Solvency II introduces the 'prudent person principle' which includes provisions on how undertakings should invest their assets. This is because the absence of regulatory limits on investments should not mean that undertakings can make investment decisions without any regard to prudence and the interests of policyholders.[21]

The requirements of Solvency II and of the Delegated Regulation (EU) 2015/35 specify in detail some of the key aspects of the prudent person principle, such as asset liability management, investment in derivatives, liquidity risk management and concentration risk management.

The Guidelines on the prudent person principle which are part of the EIOPA Guidelines on the System of Governance emphasise that

> 'Article 132 of Solvency II introduces the 'prudent person principle' which

[19] For legal implications coming along with it see L. Böffel, 'Group-wide Remuneration Structure and Governance' 111 *ZVersWiss*, 55-88 (2022), or Id, 'Remuneration Requirements in the Insurance Sector-An Example of EU Law Deficiency in the Practice of Adopting Delegated Acts' available at https://tinyurl.com/4cr7wffv (last visited 30 September 2024).

[20] This conclusion is supported by other EU rule related to the remuneration policy and we wish to refer to Art 15 'Combating climate change' of Corporate Sustainability Due Diligence (CSDDD) and, in particular, to the para 3 of that Art where we can read 'Member States shall ensure that companies duly take into account the fulfilment of the obligations referred to in paragraphs 1 and 2 (the transition to the sustainable economy and the action to combat climate change) when setting variable remuneration, if variable remuneration is linked to the contribution of a director to the company's business strategy and long-term interests and sustainability'.

[21] To understand better the meaning of prudent person principle, we may consider Bank of England, 'Supervisory Statement | SS1/20 Solvency II: Prudent Person Principle', May 2020 available at https://tinyurl.com/2ujhb9x4 (last visited 30 September 2024)'.Compliance with the PPP must be considered on a case-by-case basis, as what is prudent for one firm, based on its particular business strategy and risk profile, may not be prudent for a different firm. When applied to a particular firm's circumstances, the PPP's standards are likely to allow for a range of reasonable investment strategies. In line with the PRA's supervisory approach to insurance regulation, the PRA will exercise its independent judgement, and where it concludes that a firm is not meeting the PPP's standards it will expect the firm's senior managers responsible for investment to take action' (para1.4, 1).

includes provisions on how undertakings should invest their assets. The absence of regulatory limits on investments does not mean that undertakings can take investment decisions without regard to prudence and policyholders' interests. The requirements of Solvency II and of the Commission Delegated Regulation 2015/35 comprehensively cover some of the key aspects of the prudent person principle, such as asset-liability management, investment in derivatives, liquidity risk management and concentration risk management. Therefore, the intention of these Guidelines is not to further develop these aspects, but to focus on the remaining aspects of the prudent person principle'.[22]

The Delegated Regulation (EU) 2021/1256 provides an insertion into Delegated Regulation (EU) 2015/35, a new Section 6 named Investments into Chapter IX of Title I.

The new Art 275a Integrates sustainability risks in the prudent person principle and provides that when identifying, measuring, monitoring, managing, controlling, reporting and assessing risks arising from investments, as referred to in the first sub para of Art 132(2) of Solvency II, insurance and reinsurance undertakings shall take into account sustainability risks.[23]

To reach these purposes, insurance and reinsurance undertakings shall take into account the potential long-term impact of their investment strategy and decisions on sustainability factors[24] and, where relevant, that strategy and those decisions of an insurance undertaking shall reflect the sustainability preferences of its customers taken into account in the product approval process referred to in Art 4 of Delegated Regulation (EU) 2017/2358 which we will consider in the below paragraph.

III. The Integration of Sustainability Factors, Risks and Preferences into the Product Oversight and Governance Requirements for Insurance Undertakings and Insurance Distributors

1. Premises

In this paragraph we wish to consider another profile: the integration of sustainability factors, risks and preferences into the product oversight and governance requirements for insurance undertakings and insurance distributors as made by the Art 1 of the Commission Delegated Regulation (UE) 2021/1257.

Indeed, the proper implementation of the Action Plan encourages investors'

[22] See EIOPA, 'Guidelines on system of governance', EIOPA-BoS-14/253EN, para. 1.11, 3 and Section 5, 13, available at https://tinyurl.com/bdhnzvuh (last visited 30 September 2024).

[23] See EIOPA, 'Guidelines on system of governance' n 19 above, Section 5, Guideline 29 - Security, quality, liquidity and profitability of the investment portfolios, 13-14.

[24] OECD, 'Investment governance and the integration of environmental, social and governance factors' (2017), https://tinyurl.com/3zd82avd (last visited 30 September 2024).

demand for sustainable investments. Therefore, the EU legislator aimed to reach some objectives.

First, it is, therefore, necessary to clarify that sustainability factors and sustainability-related objectives should be considered within the product governance requirements set out in Commission Delegated Regulation (EU) 2017/2358 (recital 4).

Second, insurance undertakings and insurance intermediaries manufacturing insurance products should consider sustainability factors in the product approval process of each insurance product and in the other product governance and oversight arrangements for each insurance product that is intended to be distributed to customers seeking insurance products with a sustainability-related profile (recital 5).

Third, considering that the target market should be set at a sufficient granular level, a general statement that an insurance product has a sustainability-related profile should not be sufficient. It should rather be specified by the insurance undertaking or insurance intermediary manufacturing the insurance product to which group of customers with specific sustainability-related objectives the insurance product is supposed to be distributed (recital 6).

Fourth, to ensure that insurance products with sustainability factors remain easily available also for customers who do not have sustainability preferences, insurance undertakings and insurance intermediaries manufacturing insurance products should not be required to identify groups of customers with whose needs, characteristics and objectives an insurance product with sustainability factors is not compatible (recital 7).

Finally, the sustainability factors of an insurance product should be presented in a transparent manner to enable insurance distributors to provide the relevant information to their customers or potential customers (recital 8).

For all these reasons, the Commission found it necessary to amend the Commission Delegated Regulations (EU) 2017/2358 regulating:

the process of product creation and control – the changes concern: the design of insurance products, which must also consider, among customers' expectations, their objectives relating to sustainability (Art 4);

the definition of 'Target Market' (TM) which now considers sustainability factors. In particular, it is envisaged that customers or potential customers who do not have sustainability preferences should not be included in the negative TM identified, by subtraction, with respect to sustainable products (Art 5).

The integration of sustainability objectives within the framework of the rules relating to: product testing (Art 6); the monitoring and review process (Art 7); the scope of the information contained in the information flows between producer and distributor (Art 8); distribution mechanisms (Art 10) which must ensure, inter alia, that any sustainability-related objectives are duly taken into account and the information that the distributor must report to the manufacturer, if

the product is no longer in line, over time, with the sustainability objectives set out in the TM (Art 11).

2. The Insertion of 'Sustainability Factors' and 'Including Any Sustainability-Related Objectives'

If we wish to resume the changes in just one phrase, it would be 'including any sustainability-related objectives'; this expression has been introduced in some Arts of Delegated Regulation (EU) 2017/2358.

First, the new Art 4, point (3), point (a) provides that the product approval process shall ensure that the design of insurance products meets the following criteria '(i) it takes into account the objectives, interests and characteristics of customers, including any sustainability-related objectives'.

Second, in Art 5, dedicated to the 'Target market', it is provided, first, that the product approval process shall for each insurance product identify the target market and the group of compatible customers. The target market shall be identified at a sufficiently granular level, taking into account the characteristics, risk profile, complexity and nature of the insurance product, as well as its sustainability factors[25] as defined in Art 2, point (24), of SFDR Art 5(1).

The other important rules of Art 5 concern the obligation of manufactures that may, in particular with regard to insurance-based investment products (hereinafter IBIPs), identify groups of customers for whose needs, characteristics and objectives the insurance product is generally not compatible, except where insurance products consider sustainability factors as referred to in para 1 Art 5(2).

Manufacturers shall only design and market insurance products compatible with the needs, characteristics and objectives, including any sustainability-related objectives, of the customers belonging to the target market. When assessing whether an insurance product is compatible with a target market, manufacturers shall consider the level of information available to the customers belonging to that target market and their financial literacy Art 5(3).

Finally, manufacturers shall ensure that staff involved in designing and manufacturing insurance products has the necessary skills, knowledge and expertise to properly understand the insurance products sold and the interests, objectives, including any sustainability-related objectives, and characteristics of the customers belonging to the target market Art 5(4).

Third, also in Art 6 dedicated to 'Product testing' we may find important rules regarding manufactures that shall test their insurance products appropriately, including scenario analyses where relevant, before bringing that product to the market or significantly adapting it, or in case the target market has significantly changed. That product testing shall assess whether the insurance product over

[25] In the point quoted in the text, 'sustainability factors' mean environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters.

its lifetime meets the identified needs and objectives, including any sustainability-related objectives and characteristics of the customers belonging to the target market. Manufacturers shall test their insurance products in a qualitative manner and, depending on the type and nature of the insurance product and the related risk of detriment to customers, quantitative manner Art 6(1).

Moreover, manufacturers shall not bring insurance products to the market if the results of the product testing show that the products do not meet the identified needs, objectives, including any sustainability-related objectives, and characteristics of the target market Art 6(2).

Fourth, as provided by the new Art 7(1), manufacturers shall continuously monitor and regularly review insurance products they have brought to the market, to identify events that could materially affect the main features, the risk coverage or the guarantees of those products. They shall assess whether the insurance products remain consistent with the needs, characteristics and objectives, including any sustainability-related objectives, of the identified target market and whether those products are distributed to the target market or are reaching customers outside the target market.

Fifth, also the rules concerning the distribution channels have been changed. In particular Art 8(3) has been replaced and now it states that the information referred to in para 2 shall enable the insurance distributors to understand the insurance products; comprehend the identified target market for the insurance products; identify any customers for whom the insurance product is not compatible with their needs, characteristics and objectives, including any sustainability-related objectives; carry out distribution activities for the relevant insurance products in accordance with the best interests of their customers as prescribed in Art 17(1) of IDD.

Sixth, as regards the product distribution arrangements, Art 10(2) is replaced by the following:

> '2. The product distribution arrangements shall aim to prevent and mitigate customer detriment; support a proper management of conflicts of interest; and ensure that the objectives, interests and characteristics of customers, including any sustainability-related objectives, are duly taken into account'.

Last, regarding the relationship between manufacturers and distributors, Art 11 is replaced. Now, it states that insurance distributors becoming aware that an insurance product is not in line with the interests, objectives and characteristics of the customers belonging to its identified target market, including any sustainability-related objectives, or becoming aware of other product-related circumstances that may adversely affect the customer, shall promptly inform the manufacturer and, where appropriate, amend their distribution strategy for that insurance product.

IV. The Integration of '*Sustainability preferences*' into the Rules on Business Conduct and Investment Advice for IBIPs

1. The Reasons for the Changes

In this last para, we consider the modifications made by Art 2 of the Commission Delegated Regulation (EU) 2021/1257 to the Delegated Regulation (EU) 2017/2359.

To better understand the modifications, we must pay attention to some recitals of the Commission Delegated Regulation 2021/1257, especially recitals from 9 to 15.

The impact assessment underpinning subsequent legislative initiatives published in May 2018 also demonstrated the need to clarify that sustainability factors should be considered by insurance intermediaries and insurance undertakings distributing IBIPs as part of their duties toward their customers and potential customers (recital 9).

To maintain a high standard of investor protection, insurance intermediaries and insurance undertakings distributing IBIPs should, when identifying the types of conflicts of interest, the existence of which may be detrimental to the interests of a customer or potential customer, include those types of conflicts of interest arising from the integration of a customer's sustainability preferences. For existing customers, for whom a suitability assessment has already been undertaken, insurance intermediaries and insurance undertakings should have the possibility to identify the customer's individual sustainability preferences at the next regular update of the existing suitability assessment (recital 10).

Insurance intermediaries and insurance undertakings that provide advice on IBIPs should be able to recommend suitable IBIPs to their customers or potential customers and should, therefore, be able to ask questions to identify a customer's individual sustainability preferences. In line with the obligation to conduct distribution activities in accordance with the best interest of costumers, recommendations to customers or potential customers should reflect both the financial objectives and any sustainability preferences expressed by those customers. It is, therefore, necessary to clarify that the inclusion of sustainability factors in the advisory process should not lead to mis-spelling practices or to the misrepresentation of IBIPs as meeting sustainability preferences where they do not. To avoid such practices or misrepresentations, insurance intermediaries and insurance undertakings providing advice on IBIPs should first assess the other investment objectives and individual circumstances of a customer or potential customer, before asking about their potential sustainability preferences (recital 11).

To date, IBIPs have been developed with varying degrees of sustainability ambition. To enable customers or potential customers to understand the different levels of sustainability and to make informed investment decisions in relation to sustainability, insurance intermediaries and insurance undertakings that distribute IBIPs should explain the distinction between, on the one hand, IBIPs that pursue, in whole or in part, sustainable investments in economic activities that qualify as

environmentally sustainable according to the taxonomy, and, on the other hand, IBIPs that take into account significant adverse impacts on sustainability factors that may be eligible for investment, sustainable investments as defined in Art 2, point (17), of SFDR and IBIPs that take into account principal adverse impacts on sustainability factors that may be eligible for recommendation as meeting individual sustainability preferences of customers, and, on the other hand, other IBIPs without these specific features which should not be eligible for recommendation to customers or potential customers that have individual sustainability preferences (recital 12).

It is necessary to address concerns about 'greenwashing', ie the practice of gaining an unfair competitive advantage by recommending an IBIP as environmentally friendly or sustainable when, in fact, the IBIP does not meet basic environmental or other sustainability-related standards.

To prevent misselling and greenwashing, insurers and insurance intermediaries providing advice on IBIPs do not recommend IBIPs as meeting individual sustainability preferences where those products do not meet those preferences. Insurance intermediaries and insurance undertakings distributing IBIPs should explain to their customers or potential customers the reasons for not doing so and keep records of those reasons[26] (recital 13).

It is necessary to clarify that IBIPs that do not meet individual sustainability preferences can still be recommended by insurance intermediaries and insurance undertakings distributing IBIPs, but not as meeting individual sustainability preferences. To allow for further recommendations to customers or potential customers where IBIPs do not meet a customer's sustainability preferences, the customer should have the possibility to adjust the information on their sustainability preferences. In order to prevent mis-selling and greenwashing, insurance intermediaries and insurance undertakings distributing IBIPs should keep a record of the customer's decision together with the customer's explanation of the reasons for the adjustment (recital 14).

The provisions of this Regulation are closely linked with each other and with the provisions of SFDR, as they establish a comprehensive system of disclosure of sustainability aspects. To allow for a consistent interpretation and application of these provisions and ensure that they are fully understood and easily accessible by market participants, competent authorities and investors, it is desirable to incorporate them into a single legal act (recital 15).

2. The Importance of the Provision of '*Sustainability Preferences*'

The concept of 'sustainability preferences' is particularly relevant to the conduct of business and investment rules for IBIPs.

[26] See EIOPA, 'Consultation on the opinion on sustainability claims and greenwashing in the insurance and pensions sectors', available at https://tinyurl.com/2seya7pw (last visited 30 September 2024).

Indeed 'sustainability preferences' means the choice of a customer or potential customer choice as to whether, and if so, to what extent, one or more of the following financial products should be included in his or her investment for which the customer or potential customer specifies that a minimum proportion shall be invested in environmentally sustainable investments as defined in Art 2, point (1), of the Taxonomy; the customer or potential customer determines that a minimum proportion shall be invested in sustainable investments as defined in Art 2, point (17), of SFDR and that considers principal adverse impacts on sustainability factors where qualitative or quantitative elements demonstrating that consideration are determined by the customer or potential customer.

It is important to remember the new Art 3(1) that now states:

> '1. For the purposes of identifying, in accordance with Article 28 of IDD, the types of conflicts of interest that arise in the course of carrying out any insurance distribution activities related to insurance-based investment products and which entail a risk of damage to the interests of a customer, including his or her sustainability preferences, insurance intermediaries and insurance undertakings shall assess whether they, a relevant person or any person directly or indirectly linked to them by control, have an interest in the outcome of the insurance distribution activities, which meets the following criteria:
>
> (a) it is distinct from the customer's or potential customer's interest in the outcome of the insurance distribution activities;
>
> (b) it has the potential to influence the outcome of the distribution activities to the detriment of the customer.
>
> Insurance intermediaries and insurance undertakings shall proceed in the same way for the purposes of identifying conflicts of interest between one customer and another'.

As well as into the adequacy assessment required to place an IBIP, Arts 9 and 14, providing, *inter alia*, that: 1) an insurance intermediary or insurance company does not recommend IBIPs as meeting a customer's sustainability preferences if these products do not meet the actual preferences. The insurance intermediary or company must explain the reasons for this choice and keep the documentation; 2) If no IBIPS satisfy the customer's sustainability preferences and if the customer decides to adapt their sustainability preferences, the insurance intermediary or company keeps a record of this decision and the related reasons; 3) The periodic adequacy assessment also takes into account the sustainability preferences expressed.

As regards the information to be obtained for the purposes of the assessment of suitability, Art 9 is amended as follows: in para 2, point (a) is replaced by the following: '(a) it meets the investment objectives of the customer or potential customer

in question, including that person's risk tolerance and any sustainability preferences' Art 9(2)(a); para 4 is replaced by the following:

> '4. The information regarding the investment objectives of the customer or potential customer shall include, where relevant, information on the length of time for which the customer or potential customer wishes to hold the investment, his or her preferences regarding risk taking, the risk profile, the purposes of the investment and, in addition, his or her sustainability preferences. The level of information gathered shall be appropriate to the specific type of product or service being considered' Art 9(4);

(c) para 6 is replaced by the following:

> '6. When providing advice on an insurance-based investment product in accordance with Article 30(1) of IDD, an insurance intermediary or insurance undertaking shall not make a recommendation where none of the products are suitable for the customer or potential customer. An insurance intermediary or insurance undertaking shall not recommend insurance-based investment products as meeting a customer's or potential customer's sustainability preferences where those insurance-based investment products do not meet those preferences. The insurance intermediary or insurance undertaking shall explain to the customers or potential customers the reasons for not doing so and keep records of those reasons. Where no insurance-based investment product meets the sustainability preferences of the customer or potential customer, and the customer decides to adapt his or her sustainability preferences, the insurance intermediary or insurance undertaking shall keep records of the decision of the customer, including the reasons for that decision' Art 9(6).

About the suitability statement, Art 14 is amended as follows: Art 14(1)(b)(i) is replaced by the following:

> '(i) the customer's investment objectives, including that person's risk tolerance, and whether the customer's investment objectives are achieved by taking into account his or her sustainability preferences';

and in the Art14(4) the following subparagraph is added:

> 'The requirements to meet the sustainability preferences of customers or potential customers, where relevant, shall not alter the conditions laid down in the first subparagraph.'

To facilitate the correct interpretation and uniform application of the new provisions, EIOPA has published in July 2022 a Guidance that illustrates and specifies the contents of the new provisions, about the integration of sustainability

preferences in the context of the adequacy assessment.[27]

V. The Implementation of New European Rules in the Italian Legal System: The IVASS Provision no131/2023

The adoption and consequent entry into force of the European legislation on sustainable finance have made it appropriate to align and adapt the Italian Authority on insurance companies (hereinafter IVASS) regulatory provisions directly affected by the new rules.

This adjustment, made by IVASS Provision 10 May 2023 no131 (hereinafter IVASS Provision 131/2023), mainly concerns the IVASS regulatory provisions impacted by the amendments and additions made, at the sectoral level, to the Solvency II rules (Delegated Regulation 2015/35) and the IDD Delegated Acts (Delegated Regulation 2017/2358 and Delegated Regulation 2017/2359).

The adaptation of the IVASS Regulations affected by these new European provisions in the insurance sector adopted on sustainable finance aims to promote consistency in the application between the national regulatory rules currently in force and the new European regulations, to facilitate their implementation by market operators.

In brief, the measures, consisting of 5 Arts, regulate four areas, each dedicated to the introduction of amendments to the following Regulations.

First, IVASS Regulation no 24 of 6 June 2016 lays down provisions on investments and assets covering technical provisions, which is amended in order to align Arts 2, 4, 5, 18, and 24 with the amendments and additions made by Delegated Regulation (EU) 2021/1256 to Delegated Regulation (EU) 2015/35 on the integration of sustainability risks into the investment activities of insurance and reinsurance undertakings.

The second amended Regulation is IVASS Regulation no38 of 3 July 2018 laying down provisions on the corporate governance system, which is amended in order to align Arts 2, 4, 17, 19, 32, 38, 40, 56, 57, 80 and Annex 1 with the amendments and additions made by Delegated Regulation (EU) 2021/1256 to Delegated Regulation (EU) 2015/35 on the integration of sustainability risks into the risk management system and remuneration policies of companies insurance and reinsurance undertakings;

The third amended regulation is IVASS Regulation no 40 of 2 August 2018 laying down provisions on insurance and reinsurance distribution, which is amended in order to align Arts 2, 55, 68-*ter*, 68-*novies*, 68-*decies*, 68-*terdecies* with the amendments and additions made by Delegated Regulation (EU) 2021/1257 to Delegated Regulation (EU) 2017/2359 on conflicts of interest and rules of conduct relating to investment advice for the 7 placement IBIPs that

[27] See EIPOA, 'Guidance' n 16 above, 19-23.

complement policy holders' sustainability preferences, with particular regard to the suitability assessment;

The last amended regulation, IVASS Regulation no 45 of 4 August 2020 laying down provisions on governance and control requirements for insurance products,[28] which is amended in order to align Arts 2, 6, 8, 11, 12, 13, 14 and Annex 1 with the amendments and additions made by Delegated Regulation (EU)2021/1257 to Delegated Regulation (EU) 2017/2358 – with regard to products that take into account customers' sustainability objectives – with regard to the identification of the target market, including the negative market, as well as in terms of product testing, monitoring and review and information flows between manufacturer and distributor.

Overall, the main changes include the need to collect the customer's sustainability preferences; the need to compare products with sustainability requirements; the assessment of the adequacy of the product with respect to the sustainability objectives expressed by the customer and in the monitoring of the characteristics of the product in order to verify its consistency with these objectives; the acquisition of new professional skills by the distribution network aimed at understanding the sustainability factors and sustainability objectives of the reference market.

Considering the regulatory sources covered by Provision 131/2023, the amendments' impacts affect the activities of insurance product manufacturers and/or distributors. Having said that, I will briefly discuss the substance of the amendments under discussion.

Focusing on the changes that have an impact on insurance companies, first of all, the amendments to IVASS Regulation 24/2016 are substantiated, in addition to the introduction of the definitions of preferences, risks and sustainability factors, also in the need to review investment policies, so that they take into account sustainability risks, potential long-term impacts on the sustainability factors of investment strategies and decisions, as well as customers' sustainability preferences.

In addition, the management policies for assets and liabilities, liquidity risk and concentration risk will also be revised to give relevance, where relevant, to sustainability risks.

Finally, it is planned to amend how investment decisions are made, the methodology for assessing and verifying investments and the investment risk management system to include the assessment and verification of their impact on sustainability factors.

In addition, IVASS Provision 131/2023 has a far-reaching amending impact concerning IVASS Regulation 38/2018, impacting the corporate governance and risk management system (including at group level, when the ultimate parent company is an Italian company) so that sustainability risks are covered, where

[28] See C.G. Corvese, 'La disciplina del 'governo e controllo' dei prodotti assicurativi ed i suoi riflessi sul governo societario di imprese di assicurazione e di intermediari' 34 *Diritto della banca e del mercato finanziario*, II, 146-181 (2020).

relevant, in the development of the related objectives and strategies, processes and procedures and are included in the cataloguing of all risks.

Changes are also made that impact various internal regulations and operational safeguards of insurance companies. Underwriting, reserving, reinsurance policies, and risk mitigation techniques must also cover sustainability risks, where relevant.

Remuneration policies must be integrated with information on the inclusion of sustainability risks in the risk management system. In addition, such policies must require companies to ensure that compensation and incentives, including with regard to the remuneration policies of outsourced service providers, are also consistent with the integration of sustainability risks into the risk management system.[29]

Guidance policies must identify how the company takes sustainability risks into account in the process of designing a new insurance product and calculating its premium. On this point, IVASS specified, during the results of the public consultation, that the consideration of sustainability risks in the development of new insurance products does not differ according to the type of product.

Finally, the amendments to Regulation 38/2018 entail the integration of the scope of competence of the risk management and actuarial functions which, in particular, must consider first, sustainability risks, where relevant, in the definition of the risk management policy and in the criteria and methodologies for measuring the risks themselves; second, the possible impact of sustainability risks in the opinion issued on the global underwriting policy.[30]

[29] Art 2, para 7, of the IVASS Provision 131/2023 amends Art 40 of the Regulation no 38 of 3 July 2018 Regulation, concerning the general principles of remuneration policies, with the introduction of para 1-*bis*. Specifically, it is envisaged that, for the purposes of Art 5 of the SFDR and Art 275(4) of Delegated Regulation (EU) 2015/35, remuneration policies shall contain information on how it considers the integration of sustainability risks into the risk management system.

Art 2, para 8, of the IVASS Provision 131/2023 amends Art 56, para 1, of the Regulation, about the remuneration policies of insurance and reinsurance intermediaries, providing that companies take care to ensure that compensation and incentives are also consistent with the integration of sustainability risks into the risk management system. The integration is necessary to ensure systematic consistency with the amendments made to Art 40 of the same Regulation and is in line with the additions provided for in Arts 260 and 275 of Delegated Regulation (EU) 2015/35 by EU Reg 2021/1256, so as to ensure that companies pay intermediaries consistent fees and incentives, as well as with the principles of sound and prudent management, with the integration of sustainability risks into the risk management system.

Art 2(9) of the Measure amends Art 57(1) of the Regulation on outsourced service providers, providing that the company must adopt remuneration policies that are also consistent with the integration of sustainability risks into the risk management system. This integration is consistent with the provisions of Art 275(1)(c) of Delegated Regulation (EU) 2015/35.

[30] Art 2, para 11, of the Provision 131/2023 makes amendments to Annex 1 of Regulation no 38 of 2018, containing the provisions on the minimum content of the policy policies defined by the administrative body. Specifically: - letter a) provides that in the section 'For aspects related to underwriting and reservation risks' in Annex 1, after letter e), a new letter e-bis is inserted, which provides that the policy identifies the ways in which the company takes into account, in the process of designing a new insurance product and calculating the related premium, sustainability risks; - letter b) provides that in the section 'For aspects related to the operational risk management

As regards the impacts on insurance distribution, Art 3, para 5, of the Provision131/2023 amends Art 68-decies of the IVASS Regulation 40/2018, which regulates declarations of compliance with requests and needs and adequacy in the field of IBIPs.

First of all, it should be noted that on the basis of the division of competencies established by Art 5(1)(b)(1) of Law no 163/2017, Consob is competent to supervise the distribution of IBIPs by entities registered in section D of the Single Register of Insurance and Reinsurance Intermediaries, while IVASS is competent to supervise the distribution of IBIPs carried out directly by insurance companies or other insurance intermediaries (such as insurance agents and brokers). In this context, Regulation 40/2018 therefore regulates the distribution of IBIPs by this second category of entities as well as the distribution of insurance products by all categories of distributors.

Given that, Provision 131/2023 provided for substantial additions to Regulation 40/2018 after similar amendments had been made to Regulation no 20307 of 15 February 2018 ('Intermediaries Regulation') with regard to the distribution of IBIPs by the aforementioned entities supervised by Consob.

The amendments made by Provision 131/2023, in addition to the introduction of new definitions such as risks, preferences and sustainability factors, consist of the indication in the pre-contractual disclosure of the sustainability risks associated with the IBIP and, where relevant, the information required by Regulation (EU) 2019/2088 on sustainability-related disclosures (SFDR) and Regulation (EU) 2020/852 (Taxonomy).

With regard to the rules on conflicts of interest, the amendments provide that distributors must take into account any sustainability preferences of customers. On this point, it should be noted that the integration of the client's sustainability preferences in the context of the identification of conflicts of interest is necessary when offering IBIPs, while it is only possible in the case of non-life insurance products.

With regard to the suitability assessment, any sustainability preferences of the client are included in the disclosure of IBIPs and the related policies and procedures must be integrated to ensure that the IBIP's sustainability factors, if any, are effectively understood. In this regard, it should be noted that IVASS has specified, in the results of the public consultation, that this integration does not affect current contracts, but rather the policies and procedures aimed at ensuring that distributors are able to understand any factors of sustainability of the product.

Finally, the adequacy statements must include information on the correspondence between the IBIP and any sustainability preferences of the client. If no product meets the customer's sustainability preferences, the customer may adapt its sustainability preferences for the purpose of concluding the contract

policy' referred to in Annex 1, letter a) is supplemented by providing that any sustainability risks are also taken into account in the context of operational risks.

and the adaptation must be indicated in the declaration of adequacy.

Changes in the governance and control of insurance products.

Due to their relevance, the amendments to IVASS Regulation 45/2020 impact insurance companies and/or their distributors of insurance products.

First, the Regulation now provides that the definition of the reference market must indicate the sustainability objectives and factors.

The identification of the negative reference market is exempted only in relation to regard only to sustainability factors. In this respect, IVASS has specified in the results of the public consultation that the customer who has no sustainability preferences does not belong to the negative reference market of a product that takes into account sustainability factors, simply because they do not have such preferences, but must be considered neutral with regard to them; therefore, for products that include sustainability factors, selling to customers who have not expressed sustainability preferences is possible. Conversely, if the customer does not adjust their sustainability preferences, a product that does not have the required sustainability elements cannot be recommended.

Regarding the POG, the interventions carried out concern: the assessment, during the testing phase of insurance products, also of the compatibility of their costs with sustainability objectives; the need for the product approval process to ensure the functionality of product sustainability factors; and finally, the monitoring activity, which must also take into account any market sustainability objectives.

As for the distribution mechanisms, it is expected that they will also consider any sustainability objectives and the compliance of the product with them, as well as the (if any) objectives related to the sustainability of the reference market. In addition, these distribution mechanisms must include safeguards aimed at ensuring the compliance of products marketed by insurance companies with registered office in the European Union operating under the regime of establishment or freedom to provide services in Italy, with any sustainability objectives of the identified actual reference market.

In addition, the exchange of information between distributors and producers must include information on any sustainability objectives of the target market.

Finally, in terms of staff training, the acquisition of skills regarding the sustainability factors and objectives of the products and reference markets is envisaged.

In conclusion, we can say that sustainability, understood in a broad sense, has been a major focus of the EU and the European Union's financial regulators over the last six years. As we can see before, ESG factors and sustainable finance impact all business processes of insurance undertakings, with the most significant effect being on corporate governance about risk management, investment activity, product management especially in case of insurance based-investment products.

These policies already affect the activities of the insurance and reinsurance undertakings in the EU especially because customer preferences include ESG

principles and the adoption of those ESG principles in the business processes of insurers is necessary.

With regard to the importance of sustainability preferences, it is relevant to remember the recital 14 of the Commission Delegated Regulation (EU) 2021/1257 amended Delegated Regulation (EU) 2017/2359 that states

> 'It is necessary to clarify that insurance-based investment products that are not eligible for individual sustainability preferences can still be recommended by insurance intermediaries and insurance undertakings distributing insurance-based investment products, but not as meeting individual sustainability preferences. In order to allow for further recommendations to customers or potential customers, where insurance-based investment products do not meet a customer's sustainability preferences, the customer should have the possibility to adapt information on his or her sustainability preferences. In order to prevent mis-selling and greenwashing, insurance intermediaries and insurance undertakings distributing insurance-based investment products should keep records of the customer's decision along with the customer's explanation supporting the adaptation'.

At this stage it is difficult to assess the effectiveness of the changes introduced by European legislators regarding sustainability in the insurance business and for insurance products. This is just a first step that had to be taken because it is no longer possible to postpone the introduction of sustainability both in the corporate governance of insurance companies and in the design of insurance products and in the rules of conduct that insurance companies and intermediaries must respect.

Insights & Analyses

The Implementation of New Technologies in Anti-corruption Policies

Federica De Simone*

Abstract

The text examines the impact of new technologies in the field of criminal law, focusing on the prevention and repression of corruption. It explores the advantages derived from the use of tools such as artificial intelligence and advanced algorithms, highlighting the opportunities to improve investigation efficiency and increase transparency. However, it also examines the risks associated with the automation of judicial decisions, including the potential increase in inequality and the threat to fair justice. Finally, it emphasizes the importance of a balanced and mindful approach in adopting such technologies, with particular attention to protecting fundamental rights and the need for adequate regulations to mitigate emerging risks.

I. Preface about the Relationship Between Technological Development and the Legal System

With a view to introducing the topic of the relationship between new technologies and criminal law, two basic premises are indispensable.[1]

The first consideration is of a general nature and relates to technological progress and the speed with which new tools are becoming part of our lives, sometimes even without us becoming aware thereof. It is there for all to see that mankind is going through the most innovative period ever seen, in which scenarios that were unimaginable only a short time ago are coming to fruition and offering remarkable opportunities. The Marxist conception of progress considers the latter (which is of a technological nature) to be the rule that underpins evolution,[2] with the result that any attempt to block or even delay development would be impossible (and futile). History has, in fact, taught us that the fear of apocalyptic scenarios following the introduction of new scientific discoveries have often vanished, making way for positive epoch-making changes. This was the case with writing, which, according to the Greek philosophers, would lead to a loss in the ability to

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[1] The topic seems to be altogether new. Attempts to implement computational calculations in judicial decisions go back, however, as far as Leibniz. Cf P. Moro and C. Sarra, *Tecnodiritto* (Milano: Franco Angeli, 2017), 32. For a general overview, see L. Picotti, 'Diritto penale e tecnologie informatiche: una visione d'insieme', in A. Cadoppi et al eds, *Cybercrime* (Torino: UTET, 2019), 35.

[2] K. Marx, 'Das Kapital, Hamburg 1867-1894', III, in A. Macchioro and B. Maffi eds, *Il capitale* (Torino: UTET, 2017), 3.

remember by heart, narrate and use one's own imagination. The same was the case with the advent of the printing press, which - according to its detractors - would, by making knowledge available to everyone, have led to a serious crisis in humanity, as well as television, which was accused of negatively affecting man's ability to socialize with his fellow human beings.[3]

The idea that artificial intelligence could play a role in improving the timeframe within which justice is served, rather than just being a system of neural networks to be used in the fight against corruption is to be welcomed, albeit with an adequate degree of caution.

The second premise is of a technical nature and concerns the need - which can no longer be postponed - for legislation to be introduced that regulates the use of new technologies on the basis of legal principles. This is a need felt by many and also clearly transpires from the numerous documents generated at both supranational and national level, starting from the Ethical Charter on Artificial Intelligence[4] of 2018 and the European Commission's White Paper[5] of 2020 and going so far as the Proposal for a Regulation on a European Approach for Artificial Intelligence presented by the European Parliament and the European Council in 2021.[6]

The European Union is, in fact, of the opinion that the risks generated by the massive use of these technologies may, regardless of their field of application, be too high, especially when compared to the need to protect human rights. The most obvious risks arise from privacy and personal data infringements and discriminatory behavior, as well as the denial of access to justice. However, this list is for illustrative purposes only and there may be many other rights that are infringed or endangered.[7]

Internationally, the European position is not shared by everyone. Diametrically opposed - for example - is the American position, which favours a liberal approach (in the same vein of the free marketplace of ideas espoused by John Milton).[8]

One could theoretically agree with such a position if it were posited as being the basis for freedom of the press alone. The full and unconditional guarantee of the right to freedom of speech in all its forms could, in fact, lead to truth being affirmed in the same way as goods impose themselves in a free marketplace.

[3] W. Schmitz, *Oltre Benjamin. «La riproducibilità tecnica della scrittura» e la diffidenza verso la stampa tipografica nell'Europa del Quattrocento* (Bologna: TECA, 2021), 7, 11.

[4] Available at https://tinyurl.com/yus24dwf (last visited 30 September 2024).

[5] Available at https://tinyurl.com/4kzf394h (last visited 30 September 2024).

[6] The regulation proposal, presented by the European Commission on April 21, 2021, named the Artificial Intelligence Act, is in the final stages of adoption by the European Parliament and the Council (the approval of the final text occurred on 2 February 2024), according to the ordinary legislative procedure. Available at https://tinyurl.com/ydsdr8ea (last visited 30 September 2024).

[7] Available at https://tinyurl.com/pke4bfdd (last visited 30 September 2024).

[8] John Milton conceived the metaphor of the free market applied to ideas when he wrote the essay 'Areopagitica' in 1644. See M. Gatti and H. Gatti, (for the Italian version thereof), *Discorso per la libertà di stampa* (Milano: Bompiani, 2002). See how the marketplace of ideas theory is explained by, among others, G. Pitruzzella et al, *Parole e potere. Libertà di espressione, hate speech, fake news* (Milano: Egea, 2017).

Nonetheless, the idea of specifically applying the principle of competition to the circulation of ideas seems somewhat inappropriate and, in fact, encounters a first limitation when dealing with the problem of fake news.[9]

Currently, there is an uncontrolled dissemination of fake news through the Internet that can in no way be circumscribed. Several studies have, in fact, emphasized the risks that this may entail in terms of the resilience of democratic systems, so much so that lawmakers have been called to intervene on several levels.[10]

The American approach that has been adopted appears even less acceptable if it is also applied to the use of new technologies such as artificial intelligence, algorithms and neural networks. It is hard to see how the approach of leaving the free market to decide which technologies may - for example - solve the problem of bias, let alone the so-called *black box*, could be successful. Indeed, rather than responding to a need to provide safeguards and protections, this approach seems to conceal far less noble aims, such as those of a predominantly commercial and consumerist nature. We need only mention the policies of giants such as *Facebook* or *Amazon,* which employ in the US discriminatory or tracking algorithms that would not be allowed in Europe precisely because of the soft law and hard law rules that already in force.

Lastly, the Chinese approach does not attempt to disguise the objectives of exercising full control over society and explicitly intends, with a view to maintaining the *status quo*, to exploit precisely those aspects that are, for us Europeans, of vital importance for our fundamental rights.

The unstoppable nature of progress and the need that is felt at the same time to regulate it seem an essential pre-condition for acknowledging that the law has a central role and is called - as always happens in moments of epoch-making change - to perform the immunizing and stabilizing role theorized by Luhmann.[11] This is particularly significant when using artificial intelligence systems, which find themselves playing very different roles within society and having implications of both a legal and ethical nature.

[9] See on this topic T. Guerini, *Fake news e diritto penale* (Torino: Giappichelli, 2020).

[10] At European level, the last relevant measure on this subject has been the Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC of 15 December 2020, on which agreement was reached on 23 April 2022. Unfortunately, the measure was rejected by the Parliament on 13 June 2022 on account of the fact that the text was deemed not to be in line with the contents of the agreement. It is, nevertheless, an important legislative point of reference and it will most likely see the light of day once an agreement is reached. The debate in the Italian Parliament has given rise to some legislative proposals, which have - however - not been followed up. We take the liberty of referring to F. De Simone, ' "Fake news", "post truth", "hate speech": nuovi fenomeni sociali alla prova del diritto penale' *Archivio Penale web*, 1, 1-49 (2018).

[11] N. Luhmann, 'Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie, Frankfurt 1981', in R. De Giorgi ed, *La differenziazione del diritto: contributi alla sociologia e alla teoria del diritto* (Bologna: il Mulino, 1990), 1-397.

II. Some Possible Classifications

The legitimate and illegitimate uses of new tools also hold relevance for criminal law, prompting reflections on cases where there is a need to counter new criminal phenomena, as well as those where new technologies prove to be effective tools against ordinary crime. This is why, in the absence of specific regulations capable of providing adequate responses to the new challenges posed by artificial intelligence, it may be useful to briefly review the various roles that new technologies can assume in the field of criminal law.[12] This not only allows for the identification of possible existing and future scenarios but also highlights any regulatory gaps that lawmakers may be called upon to fil.

New technologies could be classified in a number of ways for the purpose of categorizing the legislation that is applicable to the topic that is being dealt with here (with particular regard to criminal law).

A first category could lead to distinguishing new instruments on the basis of whether they are actively or passively involved in the criminal offence and whether they take on the role of perpetrator or victim of the offence.

The situations in which artificial intelligence behaves in the same way as an offender are part of a fairly well-known and wide-ranging case history that is not without its critical aspects. First of all, a distinction must be made between situations in which the system in question has been created for the purpose of committing a criminal offence and situations in which, on the other hand, the criminally relevant fact stems from a mistake made by the machine itself. Non-exhaustive examples of the first type of scenario are software designed to disseminate false information and/or injure the reputation of others, systems designed to destroy other IT facilities, autonomous weapons that engage in conduct that is punishable under the wartime military criminal codes. On the other hand, all those situations in which new technologies negligently cause injury to protected legal assets come within the scope of the second scenario, even though the use thereof is legal.

Cybersecurity encompasses most of the cases in which new systems can be considered victims of crime, since they are victims of cyberattacks that lead to data being lost, and systems being altered and even destroyed.[13] What appears to be a first and obvious distinction stemming from the classic categories of the

[12] For a more in depth exploration of this point, please refer to the following resources, F. Basile, 'Intelligenza artificiale e diritto penale: quattro possibili percorsi di indagine' *Diritto penale e uomo*, 29 September 2019, 9; for an analysis of the ethical issues raised by the use of new systems, please see G. Tamburrini, *Etica delle macchine. Dilemmi morali per robotica e intelligenza artificiale* (Roma: Carocci, 2020); P. Benanti, *Oracoli. Tra algoretica e algocrazia* (Roma: Luca Sossella editore, 2018).

[13] Denial of service attacks are the most commonly used tool for damaging IT systems in general and, in such cases, there are many different victims. Not only can artificial intelligence, in fact, be damaged, but the loss of data, for instance, can lead to a violation of data protection rules. Reference is made to F. De Simone, 'La rilevanza dei delitti contro l'integrità dei dati dei programmi e dei sistemi informatici al tempo della guerra russo-ucraina' *Giurisprudenza Penale Web*, 6 July 2022, 7-8, 125.

theory of crime encounters a significant limitation in the consideration that the use of the terms *perpetrator* and *victim* in the case of artificial intelligence cannot be used in the technical sense of the term, since no form of legal personality has yet been recognized that could justify such a *status*.[14] Under current legislation, the role played by AI in both cases should be taken up by the system's owner, and even then the identification thereof is not easy, since there are many players involved.[15] It would, therefore, be more appropriate to consider the new systems as an instrument or as a material object of the crime, at least until the issue of the recognition of so-called *electronic personality*[16] is not dealt with.

The introduction of a third category alongside physical and legal liability could have far-reaching consequences and require the system to be rethought, especially with regard to the issue of punishment and the list of penalties to be imposed.

A second category could be identified by taking into account the functions performed by artificial intelligence when preventing crime and when ascertaining criminal offences at trial. In particular, reference is made to cases in which the new systems are used as if they were a technical expert. This is a role that can be played in support of the criminal investigation police while predicting, preventing and detecting crime, or assisting the courts to assess the social dangerousness of an individual or even decide the fate of a case.[17] Tools such as *XLaw*[18] that are used at the Naples police headquarters for the purpose of preventing crime, or algorithmic

[14] S. Riondato, 'Robot: talune implicazioni di diritto penale', in P. Moro and C. Sarra eds, n 1 above, 1, 85.

[15] The parties affected by the way in which artificial intelligence works are the owner of the system, the operator and his programmer. It is debated which of these should be legally liable and to what extent. On this point see C. Piergallini, 'Intelligenza artificiale: da 'mezzo' ad 'autore' del reato?' *Rivista Italiana di Diritto e Procedura penale*, 4, 1745 (2020).

[16] Art 59(f) of the European Parliament's Resolution of 16 February 2017 containing recommendations to the Commission about civil law rules on robotics (2015/2103(INL), states that account must be taken of the impact of creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently. Available at https://tinyurl.com/ypsejyw9 (last visited 30 September 2024). The field in question is that of civil liability and has raised many criticisms and dissenting opinions. The possibility of introducing a third category of personality that also has criminal law implications has already been examined in depth by legal scholars. See G. Hallevy, 'The Basic Models of Criminal Liability of AI Systems and Outer Circles' *SSRN*, 11 June 2019; U. Ruffolo, 'The Problem of Electronic Personhood' *Journal of Ethics and Legal Technologies*, 2 April 2020, 2(1), 75.

[17] V. Manes, 'L'oracolo algoritmico e la giustizia penale: al bivio tra tecnologia e tecnocrazia', in U. Ruffolo ed, *Intelligenza Artificiale. Il diritto, i diritti, l'etica* (Milano: Giuffrè 2020), 547.

[18] G. Di Gennaro and E. Lombardo, 'Intelligenza artificiale e politiche di sicurezza urbana: verso quali modelli?', in G. Riccio et al eds, *Intelligenza artificiale tra etica e diritti* (Bari: Cacucci editore, 2020); M. Iaselli, 'X-LaW: la polizia predittiva è realtà' *Altalex*, 28 novembre 2018; E. Lombardo, *Sicurezza 4P - Lo studio alla base di XLAW per prevedere e prevenire i crimini predatori* (Venezia: Mazzanti libri, 2019).

systems such as *Compass*[19] in the USA and *Hart* [20] in England used to assess the risk of recidivism when deciding whether to apply an alternative measure, have already been successfully used for some time now by the police or the courts, even though there are a few critical issues arising therefrom that will be discussed below.

The use of algorithmic consultants in legal proceedings should be less perplexing than the use of artificial intelligence for predictive purposes. Indeed, codes of procedure already envisage the possibility of an expert assisting the judge in his or her work and, in this specific case, the expert would put a much greater quantity of data at the justice's system disposal than would be the case if a human expert were involved. What raises doubts in jurists is the use of AI for predictive purposes, even though they (and in particular criminal lawyers) should be accustomed to probabilities and percentages, given that they are the norm when having to establish the causal link between an event and conduct.

Indeed, as far as predictiveness is concerned, a distinction must be made between prediction, predictability and probability, also on account of the fact that the term predictive in Italian does not have an unequivocal meaning. The common feeling is, in fact, that predicting a given event is tantamount to guessing the future as if one were an oracle.[21] For its part, the notion of probability refers to a statistical inference, that is to say the process of inferring a result from a given percentage, which, even though it does not mean certainty from a scientific point of view, gives a precise idea of the uncertainty thereof (which, when looking at predictability, is in turn a dystopian idea that instead recalls in a certain sense certainty).

It sounds like a tongue twister but it is not because - as mentioned earlier - these are concepts that are particularly close to criminal lawyers' hearts. Probability is at the basis of the causal link[22] that connects the event to the perpetrator's conduct. Predictability is the basis of the principle of legality enshrined in Art 25, para 2 of the Italian Constitution, but we also find it, for example, in the assessment of the subjective element, whereas predictability seems to be placed, for example, in the context of the assessment of the risk of recidivism. On the other hand, the assessment of dangerousness and so-called risk assessment are concepts created at the beginning of the 20th century by criminological science. When a judge makes an assessment of the dangerousness of an offender while deciding whether an

[19] S. Carrer, 'Se l'amicus curiae è un algoritmo: il chiacchierato caso Loomis alla Corte Suprema del Wisconsin' *Giurisprudenza Penale Web*, 24 April 2019, 4; Han-Wei Liu et al, 'Beyond State v Loomis: artificial intelligence, government algorithmization and accountability' *International Journal of Law and Information Technology*, 12 February 2019, 27, 2, 122–141.

[20] M. Oswald at al, 'Algorithmic risk assessment policing models: lessons from the Durham HART model and 'Experimental' proportionality' *Information & Communications Technology Law*, 27, 2, 223-250 (2018).

[21] R. Berk, *Machine learning risk. Assessment in criminal justice settings* (Switzerland: Springer, 2019).

[22] Legal scholars argue that causal models - as well as the subsumption thereof under the scientific laws covering them - can be combined with predictive models, provided that these are accurate and can be interpreted; R. Berk, n 21 above, 155.

alternative measure should be granted, no one asks whether he is predicting the future or applying a statistical probability.[23]

Artificial intelligence encapsulates, through the machine-learning process on which it is built, all of these characteristics and should not cause alarm *per se*, since these processes are analogous to those developed by humans, with the difference that new technologies achieve better results with respect to the purposes for which they are programmed. This is only possible thanks to the enormous amount of extra data that artificial intelligence is capable of processing in comparison to the human mind (and nothing else).[24]

III. Problematic Aspects

Even before circumscribing this issue's scope with respect to the matters dealt with in criminal law, we must spend some time on the problems - that do not seem easy to solve - posed by the introduction of new technologies, starting with the definition thereof.

Machine learning and deep learning, weak and strong artificial intelligence, neural networks, algorithms, chatbots and blockchains are not terms to be used in the alternative as synonyms, but indicate different technologies that have their own peculiarities, to which different regulations should be partly addressed.

At the same time, it is probably wrong, in light of the speed at which they are being updated, to pretend to hamper new technologies with precise technical definitions that could force lawmakers to continuously adapt legislation thereto. The difficulty of introducing precise definitions in this area is currently such that even the European Parliament advises against doing so,[25] especially avoiding the risk of provisions of law that do not keep up with the speed at which technologies are updated.

Having posed the question of definitions in this manner, a contradiction becomes evident that seems insurmountable, insofar as the decision not to adopt flexible definitions meets the need to update new systems in real time, but cannot be reconciled with the respect of certain principles, first and foremost that of crafting definitions without fail. This could be satisfied if lawmakers were to adopt a legislative technique that proceeded by cases and hypotheses. Such choice would, however, give rise to many difficulties, starting with the risk of legislative overkill.

[23] The assessment of criminal risk in terms of anti-social behaviour is based on probability and the identification of risk factors. See S. Quattrocolo, *Artificial Intelligence, Computational Modelling and Criminal Proceedings. A Framework for A European Legal Discussion* (Switzerland: Springer, 2020), 147.

[24] B. Occhiuzzi, 'Algoritmi predittivi: alcune premesse metodologiche' *Diritto Penale Contemporaneo*, 21 May 2019, 2, 393.

[25] The European Parliament promoted, in its 2015 motion for a resolution on robotics, the search for a common yet flexible notion that had precisely this in mind. Available at https://tinyurl.com/3pcn9nt9 (last visited 30 September 2024).

Great weight must, therefore, be given to the problems posed by the so-called *black box*, that is to say the protection of data used for machine learning, and the quality thereof. These are all issues for which lawmakers, even though they have envisaged specific rules therefor, do not seem to offer effective solutions.[26]

An obvious example of this is the fourth principle of the Ethical Charter,[27] which, in introducing technical transparency and knowability, refers to the possibility of reconstructing the machine's decision-making process.[28] This principle is, in fact, difficult to implement, insofar as the self-learning system rules out, by its very structure, such a possibility. The legal claim cannot, in fact, even be satisfied by the machine's programmer, who maintains control exclusively over the initial data packet with which he commenced the learning process.

The complexity of this issue transpires, even before constituting a legal problem, from the scientific validation thereof: if a method cannot be proven, the result cannot be validated. This is Galilei's dogma of reproducibility[29] that can be extended well beyond strictly scientific confines: just think of the impact that such systems can have when used to present the prosecution's case in criminal proceedings. What is the law to be applied, when a piece of evidence is indicated and the path that led to it cannot be identified precisely on account of the problem of the *black box*? This question has arisen, for instance, with reference to the *Zero Trust* algorithm that is employed for the purpose of the prevention and prosecution of corruption in China discussed below.

The impossibility of scientific validation is also inferred from the seventh of the Asilomar 23 principles[30] drawn up in 2017, in the drafting of which some of the most influential scientists took part. This provision states that, should an artificial intelligence system cause harm, it *should* be possible to ascertain why (with the use of the verb in the conditional tense suggesting the real possibility of it being implemented).

As far as the problem of data and its quality is concerned, the myth of the neutrality of machines is no longer believed by experts, even though the belief that artificial intelligence is more objective than human beings and is, as such, preferable,[31] persists in the public at large. It is, by now, a well-known fact that new

[26] See C. Casonato, 'Intelligenza artificiale e giustizia: potenzialità e rischi' *Diritto Penale Contemporaneo online*, 16 October 2020, 3, 3369-3389; B. Occhiuzzi, n 24 above, 393.

[27] See European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment adopted by the CEPEJ at its 31st Plenary Meeting (Strasbourg, 3-4 December, 2018), available at https://tinyurl.com/yus24dwf (last visited 30 September 2024).

[28] M. Annany and K. Crawford, 'Seeing without Knowing: Limitations of the Transparency Ideal and its Application to Algorithmic Accountability' *New Media and Society*, 13 December 2016, 20, 3, 973.

[29] G. Galilei, *Le idee filosofiche, il metodo scientifico* (Brescia: Scholé – Editrice Morcelliana, 2021).

[30] Available at https://tinyurl.com/2vy7v355 (last visited 30 September 2024).

[31] A. Garapon and J. Lassegue, *La giustizia digitale. Determinismo tecnologico e libertà* (Bologna: il Mulino, 2021), 241, underline the risks of the myth of delegating to machines.

tools suffer - like humans - from so-called biases, (ie the prejudices that condition the programmers' thinking and that, inexorably, spill over into the data fed into systems). This problem is even more acutely felt in the case of artificial intelligence, since systems learn and evolve precisely thanks to the packages of initial data entered by programmers that initiate machine learning, with the result that biases have an impact not only on the initial phase, but also on the entire learning process.

The threats posed to fundamental rights and legal assets by biases are, in fact, increasing in an exponential manner. Examples include *Amazon's algorithm*,[32] which for a time preferred men to women when they were being recruited because the data used for machine learning was based on the recruitment of male staff in previous years, or *Deliveroo's Frank system*[33] that discriminated against riders on the basis of performance. There are also all those cases in which biased data is being used that we are completely unaware of, such as, for example, the case of mortgage lending practices, which are very often conditioned by data such as postcodes.

This issue of data is, therefore, is of primary importance. On the one hand, if there were no big data and open data to feed the new technologies, their very potential would be lost; on the other hand, ensuring the quality of data is essential for preventing a system error from becoming the system itself.[34]

IV. Corruption and Artificial Intelligence, an Effective Combination?

In light of the problematic aspects reported thus far, the benefits of employing new tools emerge, particularly in the prevention and counteraction of criminal phenomena connected not only to predatory and serial offenses, for which the likelihood of positive are rather high,[35] but also to corruption crimes, for which the use of both neural networks and artificial intelligence systems has been experimented with.

The theme of corruption specifically is of great interest, since the annual cost of corruption worldwide is estimated at USD 1 trillion[36] and in the European

[32] G. Gaudio, 'Le discriminazioni algoritmiche' *Lavoro Diritti Europa. Rivista nuova di Diritto del lavoro*, I, 1-26 (2024); F. Meta, 'All'intelligenza artificiale di Amazon non piacciono le donne, scartati i cv femminili' *Corriere comunicazioni*, available at https://tinyurl.com/2p8yfjue (last visited 30 September 2024).

[33] L. Fassina, 'L'algoritmo Franck, cieco ma non troppo' *Lavoro Diritti Europa. Rivista nuovadi Diritto del lavoro*, I, 1 (2021). The discriminatory nature of the algorithm used by Deliveroo wasalso established by Tribunale di Bologna 31 December 2020, available at https://tinyurl.com/bdasjv2s (last visited 30 September 2024).

[34] C. Buchard, 'L'intelligenza artificiale come fine del diritto penale? Sulla trasformazione algoritmica della società' *Rivista Italiana di Diritto e Procedura Penale*, IV, 1909, (2019).

[35] Empirical results can be found, for example, in the assessments of the functioning of systems like *XLaw* used by the Police Headquarters in Naples. See E. Lombardo, n 18 above, 1-190. See also R. Pelliccia, 'Polizia predittiva: il futuro della prevenzione criminale?' *Cyberlaws*, 9 May 2019; G. Di Gennaro and E. Lombardo, n 18 above.

[36] See International Monetary Fund Report, *Fiscal Monitor. Curbing Corrupting*, 2019, available at https://tinyurl.com/3tpjmynv (last visited 30 September 2024).

Union alone it is worth EUR 5 trillion per year. Moreover, in Italy, the centrality of crimes against public administration in criminal policies is evidenced by the continuous reform interventions by the legislature,[37] rendered necessary by the circumstance that corruption accounts for 13% of the GDP.[38]

The purpose of this contribution is, therefore, to analyze the application of new technologies in combating corruption, with a focus on Chinese and Spanish experiences. Indeed, the aim is to explore how these technologies have been used for the prevention and repression of acts of corruption and to highlight their criticalities in terms of respect for fundamental principles, so that their use can be evaluated even in the Italian context, characterized - as mentioned - by a high pervasiveness of this phenomenon.

Using a distinction borrowed from common law countries, the IMF's value of corruption includes both so-called *Grand corruption* and *Petty corruption*. The distinction refers to the two most widespread forms of corruption, namely the payment of a bribe by a private individual to a public official in order to obtain a service due from the public authorities, and the misuse of high offices and institutional practices for the purpose of obtaining benefits for individuals or a small social group.

It is precisely for this reason that the European Union considers the fight against corruption of vital importance for the rule of law. It played, in fact, an important role in the adoption of the Resolution on the fight against corruption adopted by the UN General Assembly in June 2020, which then led to the UN General Assembly Special Session on Challenges and measures to prevent and combat corruption and enhance international cooperation held in June 2021.[39]

Corruption has reached such levels that it is no longer possible, in most cases, to make a distinction between the public and private spheres. Indeed, it not only pollutes institutions by undermining democracy, but has a strong impact on businesses. In this regard, the European Commission has repeatedly emphasized

[37] The reforms that have affected crimes against public administration are numerous, and it is not possible to provide a comprehensive overview here; the most recent ones are those that have partially revisited the provisions of legge 6 November 2012 no 190, with particular reference to legge 9 Juanary 2019 no 3. Finally, parliamentary proceedings are underway for the approval of the so-called Nordio bill (disegno di legge 19 July 2023 no 808): a new legislative intervention in this area, mainly focused on the repeal of the crime of abuse of office and, therefore, subject to extensive criticism. The bibliography on the subject is vast, covering all aspects: AAVV, *Diritto penale* (Milano: Giuffrè, 2022), I; V. Mongillo et al, *I delitti contro la personalità dello stato e i delitti contro la pubblica amministrazione, artt. 241-360,* III (Milano: Giuffrè, 2022), 377-412; M. Catenacci, *Delitti dei pubblici ufficiali contro la pubblica amministrazione*, *Trattato teorico-pratico di diritto penale Reati contro la pubblica amministrazione* (Torino: Giappichelli, 2022); M.C. Ubiali, *Attività politica e corruzione: sull'opportunità di uno statuto penale differenziato* (Milano: Giuffrè, 2020).

[38] Available at https://tinyurl.com/bdfvk56u (last visited 30 September 2024). The RAND Research Center has estimated that corruption in Italy costs around 237 billion euros.

[39] Available at https://tinyurl.com/u8phath7 (last visited 30 September 2024) and at https://tinyurl.com/4xry52pu (last visited 30 September 2024).

the need to monitor the effect corruption has on the business environment, which is why anti-corruption actions are considered to be one of the most important components of Recovery and Resilience Plans.

Up until now, experiential data about the awareness of corruption has revealed how corruption is, more than anything else, perceived. In this regard, the international non-governmental organization *Transparency International* provides every year data from the *Corruption Perception Index*, which since 1995 has been the main statistical indicator of the level of corruption perceived in the public sector and politics in numerous countries around the world. We are, however, talking about a perception,[40] whereas real data is, on account of offshore jurisdictions, not known. Many governments are, in fact, reluctant to monitor corruption, for which there is no data.

This scenario is rapidly changing thanks to new technologies: the digitization of procurement procedures and the creation of online portals, has - by making a large amount of data on public tenders, contracts and suppliers public - provided a more detailed view of corruption and its causal relationships.[41] Big data and open data give automated monitoring tools unprecedented power, so much so that this has prompted the European Commission to adopt a number of operational tools, such as the *open contracting data standard*[42] (which is a guide that has been developed with a view to alerting governments about data to be published that detects cases of corruption), and the *open tender* platform,[43] which uses algorithms to scan data provided by programmers and which is cross-referenced with data from other sites for the purpose of obtaining information about open tenders, as well as the history and positions of the companies taking part in such tenders and any possible connections they may have with politicians. The interpretation of this data generates corruption risk indicators, which can, with a view to an in-depth investigations being conducted that could lead to

[40] F.M. Romano et al, 'La misurazione della corruzione attraverso le sentenze: una proposta metodologica con strumenti di text mining' *Federalismi.it*, 2 December 2020, 169-170, who underline the ontological imprecision of indicators built on perceptions. This may give rise to the paradox that 'a greater level of enforcement of (repressive or preventive) anti-corruption policies leads to an increase in the degree of collective and individual perception of this criminal phenomenon, given that it becomes much more visible (or to be more precise, there is a much greater 'level of noise of the marketplace' ('strepitus fori')'. This is the so-called *Trocadero paradox*, which G. Tartaglia Polcini, has written about in 'Il paradosso di Trocadero' *Diritto penale della globalizzazione*, 22.10.2017, 1.

[41] L. Nannipieri, 'Il nuovo casellario informatico dei contratti pubblici di lavori, servizi e forniture', in M. Trapani ed, *La prevenzione della corruzione. Quadro normativo e strumenti di un sistema in evoluzione. Atti del convegno, Pisa 5 October 2018* (Torino: Giappichelli, 2019), 187; E. Belisario, 'Open Government e Open Data: la trasparenza e le nuove tecnologie come strategia per la lotta alla corruzione', in M. Trapani ed, ibid 197.

[42] See A. Pheteram at al, 'The next generation of anticorruption tools: big data, open data and AI' *Oxford Insight Research Report*, available at https://tinyurl.com/4u25cf3t (last visited 30 September 2024).

[43] A. Pheteram et al, n 42 above.

further information being requested, be used to suspend a suspicious tender.[44]

Therefore, data mining can be considered the main anti-corruption weapon on account of the fact that it has proactive risk-analysis features, is repeatable and can, as a result thereof, be justified even when it is subjected to post-facto scrutiny. Having a large amount of data at one's disposal is, however, not enough. One must, in fact, have a good knowledge of analysis methods and decision-making models, as well as a thorough understanding of the business to which the data refers. Indeed, it is not an easy task to extract the right indicators from such data. The analysis of data that measures, for instance, the extent to which corruption and organized crime are intertwined, often only reveals, in fact, mere risk correlations.[45]

So far, data has been used for the purpose of analyzing the extent of corruption and interpreted for the purpose of understanding it. The next step forward is that of programmers using this data as a basis for commencing and feeding artificial intelligence machine learning processes, as well as for using artificial neural networks, which, in imitating the human brain in its ability to establish connections, are capable of detecting relationships, links and anomalies.

Oxford Insights, which is a London-based governmental organization, supports research on new technologies precisely on account of the fact that they are seen as the next anti-corruption frontier. Its partners believe that the availability of data is not a problem, since there is an abundance of huge data sets coming from both government sources (such as tax systems, in those situations in which such systems are transparent) and from open public procurement systems and public registers and other sources. Apart from digitized money transactions and services, there are 300 million legal entities in the world whose data could be cross-referenced, harmonized and shared for the purpose of uncovering cases of fraud, corruption and scams.

If anything, the real problems at the moment are twofold: the inability to harmonies data and the fact that data is not standardized and shared, on the one hand, and the fact that the applicable legislation is fragmented and complex, which affects the quality of data and information and risks jeopardizing the AI self-learning process, on the other hand.

This is what needs to be addressed in the near future before this type of technology can be used in anti-corruption policies.

There is, moreover, a further aspect that has to be assessed, namely the ability of new technologies to stimulate legislation. Artificial intelligence can, by analyzing different data sets, bring to light aspects of corruption that have so far escaped lawmakers, thus directing the criminal policy choices that are to be made by them. This is, however, not all. By being able to link all the relevant legislation together, AI can correct it and make it more effective by also identifying any gaps in such legislation.

[44] With regard to the role played by big data in measuring corruption, see M. Gnaldi et al, *Misurare la corruzione oggi. Obiettivi, metodi, esperienze* (Milano: Franco Angeli, 2018), 90.

[45] See, on this point, M.F. Romano et al, n 40 above, 168.

The case history of artificial intelligence systems and neural networks used in the fight against corruption is so far not very extensive and mostly concerns money laundering and tax evasion. However, some uses or experiments that have so far been carried out by several countries can already be studied.

They have so far dealt with three different scenarios: Artificial intelligence systems can be used as a public policy tool in cases of corrupt behavior engaged in by public officials or private individuals to the detriment of government authorities, where such acts have already been committed. Neural network systems can then be used as predictive tools that are capable of identifying a specific geographical area that finds itself at a greater risk of corruption. Lastly, they can be used, with a view to preventing risks of corruption, by private individuals in corporate compliance procedures, especially with a view to verifying whether corporate models comply with the applicable laws and regulations.

The latter scenario has, so far not occurred in connection with legal persons and we must, therefore, await future developments that can give us a better understanding of the effectiveness thereof and the critical issues arising therefrom.

Some artificial intelligence tools that discover and ascertain corruption harming public authorities have, on the other hand, been successfully experimented in various parts of the world, even though critical issues have, in some cases, arisen that cannot be overcome as things stand.[46]

This was the case in Ukraine, which is a country that was considered to have the highest level of corruption in Europe until the 2015 scandals involving many members of the government occurred. On that occasion, two different types of tools were introduced: the *Prozorro* platform[47] and the *Dozorro* software.[48]The first tool was designed by a group of activists and international NGOs and all public tenders totaling 1.67 million and worth 50 billion were published there. The second tool is, on the other hand, software that was able, in its first version, to reveal ongoing

[46] See P. Aarvik, 'AI – a promising anticorruption tool in development settings?', available at https://tinyurl.com/28hj4u8e (last visited 30 September 2024). The author provides a broad overview of current experiments around the world that have an anti-corruption objective. In Mexico, for instance, the Open up Guides project monitors public procurement procedures through artificial intelligence, whereas the Project Insight system identifies, in India, high-value transactions, firstly comparing them with spending patterns and then comparing them with citizens' statements. These are only a few examples, but the problematic issue for all of them is the ability to react once the risk of corruption has been identified.

[47] The open-source model is the result of collaboration between the Ukrainian government, the business sector, and civil society, enabling collaboration between the central database and an infinite number of commercial markets through a graphical interface accessible directly to users. Upon completion of a tender procedure, through Prozorro's online analysis module, all data can be accessed, including the list of all participants, their offers, the decisions of the tender committee, and all qualification documents. Available at https://tinyurl.com/yc3dnxup (last visited 30 September 2024); https://tinyurl.com/2wtnup4h (last visited 30 September 2024); https://tinyurl.com/3jw2aue6 (last visited 30 September 2024).

[48] See also A. Pheteram et al, n 43 above, 11. For a better understanding of the *Dozorro system*, please refer to https://tinyurl.com/yw5dd7s7 (last visited 30 September 2024).

corruption by analyzing 35 risk indicators, with the limitation that the publication of such indicators allowed criminal organizations to adjust their corrupt conduct accordingly, nullifying the system as a result thereof. A new version was then adopted, which was not tied to pre-established indicators or formulas and which had a 90% accuracy rate in detecting corruption, leading to a significant increase in the efficiency of corruption-related investigations. As a result of these technologies being introduced, the country has seen a great decrease in corruption, thus climbing several positions in Transparency International's rankings.

1. The Chinese Zero Trust System

The system par excellence in the fight against corruption is undoubtedly the one developed in China that goes by the name of *Zero Trust*,[49] whose very high rate of efficiency is directly proportional to the critical issues it raises. Put into place in 2012 and tested in only 30 counties and cities covering 1% of the country's total administrative area, it has uncovered 8,721 cases of public employees involved in corruption, embezzlement, abuse of power, and misappropriation of public funds.[50]

This sophisticated artificial intelligence system makes use of one hundred and fifty government databases for the purpose of monitoring the actions of public officials, flagging cases where a pre-determined threshold of probability of corruption is reached. The data that is being used is very heterogeneous, ranging from banking data to land registry data, from movable goods to information collected with satellite images.[51] It is able to detect any discrepancy between a person's lifestyle and his or her earnings that raises a suspicion of probable corruption. The results are analyzed by officials wielding disciplinary power who make the final decision as to whether to investigate or not the public official in question.

It sounds like the perfect anti-corruption tool, but clearly it is not, so much so that it has been suspended. Even if it succeeds in preventing government corruption

[49] Z. Sun et al, 'How Does Anti-Corruption Information Affect Public Perceptions of Corruption in China?' 22 *China Review*, 113-143 (2022); E. Consiglio and G. Sartor, 'Il sistema di credito sociale cinese: una «nuova» regolazione sociotecnica mediante sorveglianza, valutazione e sanzione' *Rivista di Scienze della Comunicazione e di Argomentazione Giuridica*, 2, 139 (2021); V. Brigante, 'Corruzione e Appalti Pubblici in Estremo Oriente: moduli di contrasto nella Repubblica Popolare Cinese e in Giappone' *Diritto Pubblico comparato ed europeo* online, 1, 225 (2019); M.C. Leone, 'Detection & Prevention Anticorruzione e Artificial Intelligence (A.I.)' *safetysecurity magazine,* 28 February 2019, available at https://tinyurl.com/pcj9wewd (last visited 30 September 2024); S. Chen, 'Is China's corruption-busting AI system 'Zero Trust' being turned off for being too efficient?', available at https://tinyurl.com/4n3k567e, 04.02.2019 (last visited 30 September 2024); B. Zhu; Mncs, 'Rents, and corruption: Evidence from China' 61 *American Journal of Political Science*, 84 (2017); Y. Samson, 'Disciplining the Party: XI Jinping's anti-corruption campaign and its limits' *China perspectives*, 3, 41-47 (2014); K. Kilkon and W. Cuifen, 'Structural Changes in Chinese Corruption' 211 *The China Quaterly*, 718 (2012).

[50] C. Burchard, n 34 above.

[51] The use of satellite imagery serves not only the purpose of verifying the area of residence of the person in question, but also ensures that public money has actually been used to build a planned public work.

and has a 72% probability of success, no-one (neither the programmers nor the investigators) is, in fact, able to trace the manner in which the evidence is gathered, making it inadmissible at trial. This is not just a *black box* problem (like the one that arises in general for all artificial intelligence systems), but is an additional problem that concerns the enormous amount of data that is being used and the complexity of the relationships and connections analyzed by such system. This would force investigators to do additional investigative work for the purpose of proving what has been established by the machine and there is no certainty that a result can be achieved (with a significant expenditure of resources).

This is not all. Public officials have suffered greatly from the psychological pressure of feeling constantly monitored even in their life choices, despite the government's assurances that the purpose of the project is not to punish officials, but rather to intervene before corrupt conduct is engaged in. In most of the cases reported by artificial intelligence, the suspected civil servant kept his or her job and received a warning or, in the most serious cases, was subjected to disciplinary action. Resistance was, however, such that many officials refused to provide the necessary data.

One of the most significant reasons for ending the experiment and decommissioning the system was the violation of the principle of legality, since there are no *ad hoc* provisions in Chinese law that authorize such a technology to gain access to a sensitive database.

The quality of the data used in the training of artificial intelligence also posed many problems.

Those same officials monitoring suspect cases are called upon to support the programmers in the machine learning start-up phase, providing their experience from previous cases and participating in the training of datasets by manually reporting any events that turn out to be unusual. The risk of the data being heavily biased is, therefore, very high.

2. The Spanish Experience: So-called *Self-Organising Maps*

What still needs to be analyzed is the situation in which new technologies are used in a predictive manner in order to make a forecast about possible corruption. One example is to be found in so-called *self-organising maps*, which have been developed by researchers at the University of Valladolid in Spain and are valid for certain geographical areas that are more exposed to the risk of corruption.[52]

These are tools that exploit neural network and competitive training technology,[53] according to a mathematical model developed in the field of computational neuroscience that is based on the structure of the human brain,

[52] See A. Petheram, W. Pasquarelli and R. Stirling, n 43.

[53] The acronym is SOM (*Self-organising Maps*). For a technical analysis thereof, see M.G. Di Bono, 'Comparative analysis of self-organising neural networks', available at https://tinyurl.com/nhv8k9rh (last visited 30 September 2024).

which is organized through links between neurons.

Therefore, a linear combination of input data is organized in nodes or units connected to each other through links that take part in a process known as 'winner takes all',

> 'at the end of which the node having a vector of weights closest to a certain input is declared the winner, whereas the weights themselves are updated so as to bring them closer to the input vector. Each node has a number of adjacent nodes. When a node wins a competition, the weights of the adjacent nodes are also changed, according to the general rule that the further away a node is from the winning node, the less marked the change in its weights must be. The process is then repeated for each vector in the training set for a certain, usually large, number of cycles. It goes without saying that different inputs produce different winners. Operating in this way, the map eventually manages to associate output nodes with recurring groups or patterns in the input data set. If these patterns are recognizable, they can be associated with the corresponding nodes in the trained network'.[54]

The maps manage to extract in-depth patterns from an enormous amount of data and even do so when no logical connection can be identified. By converting non-linear relationships into more easily identifiable geometric connections, they manage to estimate the probability that corruption will occur. The system facilitates the detection of critical issues and targets monitoring and control actions, taking into account the characteristics of individual regions, whereas potential offenders play an entirely marginal role.

More specifically, with regard to the Spanish provinces in which system was tested, economic and political variables inducing public corruption were identified. The latter included property taxes and rising real estate prices, the same political party remaining in power for long periods of time and economic growth occurring too fast or a growing number of financial institutions. The data was contained in an archive that collected macroeconomic and political data from cases that occurred in Spain between 2000and 2012, which, when analyzed by the neural network, made it possible to predict public procurement corruption risks even 3 years in advance of them eventually being committed.

The model can also be applied to other countries or regions and can be tailored to the specific characteristics of each of them, with the result that governments could use such systems to identify vulnerabilities and target actions and checks in particular risk areas.

[54] https://tinyurl.com/3vjdp9wc (last visited 30 September 2024). See, also on this topic, S. Russell and P. Norvig, *Artificial intelligence. A modern approach* (Edinburgh: Global edition, 2016), 727.

V. Blockchain as a Tool

Another tool, which is generally associated with virtual currencies, can make a significant contribution and ensure that administrative activities are transparent and artificial intelligence is used in anti-corruption policies. This is blockchain, which is a highly innovative technology that guarantees transparency and traceability precisely on account of its ability to track data and trace the manner in which it has been acquired.

Until proven otherwise, the system can neither be modified nor corrupted in any way whatsoever, and it was first used in virtual currencies such as *Bitcoin*. Its use has been extended to many other uses, including(to name but a few) the protection of banks from invoice fraud or any other form of fraud, and the certification of any form of register that secures supply chains, including food supply chains.

Such a tool could contribute to overcoming the problem of the lack of transparency in government activities, which strongly affects the effectiveness of anti-corruption instruments. The *black box* dilemma has, with the due proportions, always afflicted administrative activities in Italy, insofar as the Italian government's relationship with its citizens has long been biased towards the state administration and is characterized by the opaque nature of the procedures involved. Even though the principle of impartiality and efficiency is enshrined in Art 97 of the Italian Constitution, it has only in more recent times been affirmed in practice: nevertheless, the opaqueness thereof continues to be an unresolved problem and contributes in a significant manner to pervasive corruption. To this effect, blockchain can play a dual role, both in public and private business compliance. The system contributes, in fact, to ensuring that Italian government data is increasingly transparent and verifiable, thus allowing Italian citizens to fully take part in the decision-making processes of public institutions. At the same time, it can be used in the internal processes of corporate organizations, certifying all of the actions that have been undertaken and establishing organizational models that can lead to best practices being applied.

The experience in some developing countries, whose democratic life has been strongly affected by corruption, electoral fraud, misappropriation of public funds and illicit party financing, is that blockchain has led to a breakthrough. Indeed, it has allowed a single register to be set up, in which all public transactions are tracked and stored, are shared by all of the public authorities and, above all, can be seen by everyone, guaranteeing further forms of control over the flow of public money.[55]

Blockchain could then be managed by an independent authority, which would guarantee the system's independence.

[55] See A.I. Sanka and R.C.C. Cheung, *Blockchain: Panacea for Corrupt Practices in Developing Countries, 2019 2nd International Conference of the IEEE Nigeria Computer Chapter* (Nigeria: Institute of Electrical and Electronics Engineers, 2019).

VI. The Difficult Balancing Act between Protection and Progress

In Italy, Raffaele Cantone, who is the former president of the National Anti-Corruption Authority (ANAC), has stated that the preparation of corruption maps in Italy should even be a priority for anti-corruption policies.[56] One could, therefore, resort to the neural networks used to build *self-organizing maps*, which act as real advanced topographic maps and offer, therefore, a broader perspective and are capable of detecting connections that are not always obvious.

Even though the debate on new technologies has reached a fairly advanced level,[57] there is still a lot of resistance in Italy to even testing them out as an anti-corruption tool.

The so-called *legge Severino* acknowledged the importance of data collection, on which the Three-Year Plan for Information Technology in Government Activities and Transparency envisaged under decreto legislativo 25 May 2019 no 97[58] heavily focused. There was, however, no trace of any reference to the use of new systems in the Anti-Corruption Authority's Three-Year Plan for the Prevention of Corruption and Transparency presented in May 2021.

Undoubtedly, the Italian authorities' caution is justified by the new technologies' ontological limits that have been mentioned above, namely a lack of transparency and explainability, as well as systems' interpretation of data and biases, which put certain fundamental rights at risk. One can agree with this position, which wants to protect civil liberties when fundamental rights are at stake. On closer inspection, however, some of these obstacles can be overcome, leading to an acceptance at least of forms of experimentation and assessments of the costs/benefits thereof.

It should be remembered, for instance, that the problem of bias not only arises with machines, but also affects the courts' decisions and lawmakers' regulatory powers.[59] The logical arguments underlying judgements handed down by an

[56] See G. De Blasio et al, 'Predicting Corruption Crimes with Machine Learning. A Study for the Italian Municipalities' *DiSSE Working Papers online*, 16, 7 October 2020.

[57] Several documents have been produced, including the Proposals for an Italian Strategy for Artificial Intelligence drawn up by the Italian Economic Development Ministry's Expert Group on Artificial Intelligence, which are to be found at https://tinyurl.com/2bn3h3z3 (last visited 30 September 2024). The White Paper for Artificial Intelligence is available at https://tinyurl.com/3beknwww (last visited 30 September 2024).

[58] This is the Legislative Decree that revised and simplified the provisions on the prevention of corruption, publicity and transparency and corrected legge 6 November 2012 no 190 and decreto legislativo 14 March 2013 no33, pursuant to Art 7 of legge 7 August 2015 no 124 about the reorganization of public offices.

[59] An observation has been made on this matter in M. Versiglioni, *Diritto matematico* (Milano: Pacini Giuridica, 2020), 233, to the effect that the set of rules that make up the legal system and all of the procedures that follow therefrom are the result of an algorithmic process, in which humans provide the initial input (ie the primordial nucleus of rules). The legal system builds all the rest on this, without the possibility of expunging the biases that are inherent in any human mind. See also L. Palazzani, *Tecnologie dell'informazione e intelligenza artificiale* (Roma: Edizioni Studium, 2020), 60.

Italian court are, in fact, the result of a self-learning process that is nurtured throughout a judge's professional life thanks to the latter's knowledge and experiential data. The fact that these, in turn, are inevitably conditioned by the biases that affect every human mind is known by everyone and often ends up on the front pages of the newspapers when verdicts are issued that are, on account of juries' biases, of an evidently discriminatory nature.

In modern societies, the antidote has been identified in the principle of democracy and pluralism of ideas, with the result that there is more than one level of jurisdiction and collegial bodies are preferred. Similarly, the same solution can be adopted for machines' self-learning processes, envisaging that programming is carried out by an heterogeneous group of people, rather than a single programmer, or even imagining that one system is to be used to control another. There remains, in both cases, a margin of error that cannot otherwise be eliminated and whose risk must be accepted for the benefit of human evolution.

On the other hand, the impossibility of retracing the machine's decision-making path appears to be difficult to solve and poses significant challenges in putting together evidence. This entails investigators expending a considerable amount of additional effort, which may not necessarily lead to results, but above all may lead to a selective investigative focus, which concentrates efforts on certain offenders, leaving out others. It also entails the risk of losing sight of the centrality of the facts, or looking on as the threshold of punish ability is brought forward too much.

What has been said above, however, should not lead to an attitude of distrust and refusal of the various uses to which technology can be put. It should rather lead to a position that is open to experimentation, testing the tools and verifying the costs/ benefits thereof. This could provide an important opportunity to fight corruption, which has such an impact on our legal system's resilience.

What transpires, therefore, is the close connection between new technologies and criminal law: the former can be of help, and give impetus, to the latter.[60] For its part, Italian criminal law is called upon to prevent artificial intelligence from becoming an instrument of power that poses a threat, even though it is a tool that is a last resort, fragmentary and of a subsidiary nature. What is still lacking, however, is a shared view as to whether traditional categories should adapt to the new reality or rather overcome them, favoring innovative scenarios in the Italian legal system.

Whatever choice is made, there is the need to regulate this situation either by enunciating principles that take into account the insurmountable limit of respecting fundamental rights and the importance of maintaining man's centrality or by resorting to a binding set of rules that, in light of the pervasive nature of these instruments, contributes to legal certainty. Empirical science must find a place in

[60] With all that this entails in terms of the risk of judgments becoming detached from reality and penal determinism holding sway, as shrewd legal scholars have pointed out. See V. Manes, n 17 above, 13. On this point, see also C. Buchard, n 34 above, 1909.

anti-corruption policies, constituting the 'precondition for an integrated criminal science'.[61]

VII.Summing Up

In today's world, there seem to be two different ways of approaching the relationship with new technologies. There is, on the one hand, the legal system that is of an understandably cautious nature and, as a result thereof, takes a long time to take decisions and there is, on the other hand, the great expectations of laymen who propose solutions, projects and experiments that increasingly change the real world. There are, to name but a few, the artificial intelligence tool called *Watson*, which has changed the face of government and business activities in South Africa and the Horizon 2020-funded *Digiwhist* project, which uses advanced algorithms to collect huge amounts of data aimed at improving the efficiency of public spending across Europe and increasing transparency and combating corruption, as well as the system commissioned by the World Bank from Microsoft that detects anomalies in public procurement procedures by combining heterogeneous data.

Indeed, it is not easy to sum up this debate. Sometimes it seems as if the issues raised with regard to the implementation, risks and governance of new technologies are to be treated only as augmented reality, for which it would be sufficient to apply the same categories and strengthen the existing tools.[62]

After all, we have always processed data and information has always been falsified and manipulated. This is, therefore, a quantitative issue. Perhaps the Data Protection Regulation, on the one hand, and certain (existing or newly introduced) criminal offences, on the other hand, can also protect the right of *habeas data* - which is now being compared with the right of *habeas corpus* – from such risks.

Just as we have introduced the concept of legal persons' liability, we can also introduce the concept of electronic persons' liability (perhaps not taking the same amount of time...).[63] Just as we accept sharing many aspects of our personal lives on social network sites, we can accept – albeit with a great deal of caution – facial recognition systems that control urban environments.[64]

Even the problem of the *black box* is, in part, surmountable if we also

[61] M.F. Romanoet al, n 40 above, 167.

[62] See XXI International Congress of Penal Law 2024, *'Artificial Intelligence and Criminal Justice*' available at https://www.penal.org/en/information (last visited 30 September 2024).

[63] Cf A. Celotto, 'I robot possono avere diritti?' *BioLaw Journal*, 28 February 2019, 1, 91-99.

[64] This issue is wide-ranging and the debate is intense. We are increasingly bearing witness to the fact that the concept of security is being used in a specious manner. In a situation in which there is a heightened risk of terrorist attacks, economic crises and pandemics, this concept is being increasingly used to stimulate the community's sense of fear and an ensuing demand for protection. This leads to an ever-increasing and unconscious compression of certain fundamental rights through new technologies, which leads to the introduction – for example – of facial recognition systems (of even an emotional nature) that are still hotly debated. See S. Zuboff, *Il capitalismo della sorveglianza* (Rome: Luiss, 2019).

consider the human mind to be such. When faced with the problem of ascertaining whether conduct is willful, reference is made to the so-called *probatio diabolica* (diabolical proof). This is also the case for biases: numerous studies have shown that job interviews are – as much as, and perhaps more than, machines – influenced by the biases of human recruiters.

Elsewhere, however, the belief prevails that the risks are not so low-impact and the repercussions that the massive use of new technologies can have on the protection of human rights may be such as to undermine the very resilience of the system.

It has been seen, for instance, how the manipulation and alteration of data and information can even influence political consensus, and how the capacity and speed of the dissemination thereof in respect of the enormous quantity of individuals who may get involved is in itself reason enough for considering the phenomenon to be different from those of the past: echo chambers are not really comparable to the trade unions of the past.

This is why it is important to recover the State's prerogative to issue rules on the governance of data. It is in fact, undesirable for private individuals to maintain any sort of regulatory power, let alone a monopoly. If it is true, in fact, that data, despite the volumes involved, does not necessarily imply having knowledge, it is also true that the indiscriminate use thereof without quality guarantees may give rise to the algorithmic risk that we all fear.

There are countless problems in the field of criminal law. These include delegating such a fundamental concept as social dangerousness to an assessment made by a robot, which in turn gives rise to the risk of moving from criminal law based on fact to criminal law based on the perpetrator (whose dangerousness is, however, assessed not on the basis of his personality, but on degrees of probability provided by statistics). Resorting to predictive tools once again affects the quality of the assessment made by criminal law on the basis of fact, which is brought forward to a moment in which the crime has not yet been committed, with ensuing risks of a self- fulfilling criminalization.

Nor should we underestimate the danger of discharging those in charge of their duties, which could be particularly evident in the field of justice. Should artificial intelligence, in fact, indicate - when the decision is being made as to whether to issue alternative measures – a high degree of risk (for example with regard to an assessment of social dangerousness), a judge is unlikely to reach a different decision. This is the so-called goat effect mentioned by legal scholars[65] that could lead to the judiciary deciding without judging the facts of the case (in the same way as has been the case for some time now in defensive medicine) or even lead to exact but not necessarily fair justice.[66] Likewise, someone might

[65] A. Garapon and J. Lassegue, n 31 above, 155.

[66] G. Canzio, 'IA, algoritmi e giustizia penale' *Sistema Penale*, 8 gennaio 2021, 1-7. See P. Moro and C. Sarra, n 1 above, 89. As an instrument of crime, IA could also be subject to confiscation

invoke, in the not-too-distant future, the performance of a duty under Art 51 of the Italian Criminal Code following the execution of an algorithmic decision and thus consider himself or herself not to be punishable.

Equally risky is the case where algorithms, instead of being used to fight crime, themselves become tools for the perpetration of crimes such as corruption, perhaps managing to conceal the very data and indicators that are subjected to the investigators' computational analysis.[67]

The robotic revolution that we are witnessing should lead – in my opinion – to favoring a neutral approach to the topic, so as to benefit from the enormous potential that these tools are in any case showing that they have. This implies the possibility of a change of point of view even with regard to issues that have so far been considered unchangeable. There might, for example, be a silver lining in accepting – with all the necessary precautions and guarantees – a legitimate form of predictive justice, provided that this could avoid right from the outset any legal asset being harmed[68] and at the same time reduce the need to resort to criminal law, which would once again fulfill its original purpose of being an instrument of last resort. Technology that supports the fight against corruption can only be welcomed. Suffice it to say that, in some countries (in which judicial corruption is particularly rife), recourse has been made to artificial intelligence with a view to verifying, examining and controlling the evidence used during trial, bringing to light any contradictions in the case made by the prosecution.[69] According to some legal scholars, artificial intelligence contributes to the realization of so-called *open* justice, which makes justice measurable and transparent, reducing the arbitrariness of judges.[70] It almost seems as if Beccaria's dream is being achieved, but there are many doubts about whether new systems are capable of doing so, precisely because in light of the foregoing.

Humanity is probably still in time to regulate 'onlife'[71] and avoid the

or seizure, as envisaged in the 2005 Council of Europe Convention on Corruption.

[67] See P. Moro and C. Sarra, n 1 above, 89. As a tool of crime, AI could also be subject to confiscation or seizure, as provided for in the Council of Europe's Convention on Corruption from 2005.

[68] C. Buchard, n 34 above, 1909, according to whom criminal law can only guarantee the protection of legal goods in a legislative and counterfactual manner, whereas artificial intelligence used in criminal law makes the injury impossible or minimizes it.

[69] On this point Cui Yadong, *AI and Judicial Modernization* (Singapore: Springer, 2020), 1-224. The author fully illustrates the functioning of the system in use in the courts of the city of Shanghai.

[70] ibid 38-40. Open justice is a fundamental principle of common law systems and there is already a trace thereof in the Magna Charta. In Australia, hearings can be viewed online and, when secrecy has to be invoked - for example, for acts of terrorism - this constitutes a reason for criticizing the system in terms of the violation of a fundamental principle that should know no exceptions. See, among many, H. Burkhard and A. Koprivica Harvey, *Open Justice. The Role of Courts in a Democratic Society* (Busto Arsizio: Nomos, 2019).

[71] L. Floridi, *The Onlife Manifesto: Being Human in a Hyperconnected Era* (Oxford: Springer, 2015), 1-264.

multiplication of risks that would lead to the imposition of unsatisfactory emergency legislation. The increasingly widespread suspicion that artificial intelligence is not so intelligent and that – at the moment – its dependence on human activity is far from negligible may also come to our aid. This also gives rise to another important assessment concerning the significant impact that such systems have in terms of sustainability and erosion of resources.[72] The use of these tools requires, in fact, large amounts of energy and also poses quite a few problems in terms of disposal. The issue is becoming increasingly pressing at a time when the climate crisis is showing the enormous risks that we are running and the fragility of the environment in which we live.

What will make the difference – in my opinion – will, therefore, be that of continuing to have an anthropocentric focus, respecting fundamental rights and applying principles such as the precautionary principle and the principles of strict necessity and proportionality.

These are three very important aspects that are closely intertwined.

Refuting procedures that are entirely automated and not subjected to any human control necessarily entails involving not only scientists, but also (and above all) those studying the humanities, who are, even more than computer scientists or mathematicians, called upon to play a fundamental role in the very process of data selection. Computational power and predictive capacity depend on the virtuous or unvirtuous management of data, with the ensuing need to guarantee the transparency of the data itself and, at the same time, the synergy between legal and algorithmic tools.

The introduction of a mandatory impact assessment prior to the implementation of new artificial intelligence systems can, irrespective of their scope of application, be a valuable tool for the protection of fundamental rights in both the public and private sectors. The use of monitoring tools and supervisory bodies can, therefore, help ensure a good level of protection, but also a greater sharing and awareness of the importance of such issue in the community.[73]

[72] K. Crawford, *Né intelligente né artificiale* (Bologna: il Mulino, 2021), 35.

[73] On this point, European Agency for Fundamental Rights, 'Preparare un giusto futuro l'intelligenza artificiale e i diritti fondamentali', available at https://tinyurl.com/y7sattje (last visited 30 September 2024).

Insights & Analyses

The 'Italian Way' to the Minimum Wage. Time for a Change?

Emanuele Menegatti*

Abstract

The Italian legal system is characterized by a unique way of ensuring minimum wage to employees, referred to as the 'Italian way' to the minimum wage. In the absence of a statutory minimum wage and collective agreements with universal coverage, it has fallen to the judge, through an original interpretative operation, to guarantee employees the minimum wage, identified in the minimums set by the collective agreements for the sector in which the employer operates. However, this operation has begun to show significant signs of failure in achieving its goal. This contribution aims to highlight the usefulness of legislative intervention on minimums, in light of scientific and political debate. Finally, it considers the possible impact that the implementation of Directive (EU) 2022/2041 could have in terms of moving towards the introduction of a legally guaranteed minimum wage.

I. Introduction

The Italian legal system has always been characterized by a reluctance to adopt legal mechanisms for setting minimum wages. When the issue first arose at the international level, despite Italy formally ratifying International Labour Organization Convention no 26 in 1928, the ideologists of the fascist regime hastened to assert that collective bargaining, being universally applicable, had long been ensuring workers a fair wage. Even though the reality was a bit different.[1]

With the advent of the Republican Constitution, the situation did not change. Art 36 provided for the recognition of the right of every employee

> 'to a remuneration proportional to the quantity and quality of their work and in any case sufficient to ensure for themselves and their families a free and dignified existence'.

Therefore, a right of workers to a minimum wage was clearly affirmed, to be quantified in accordance with the guiding principles of 'sufficiency' and 'proportionality.' The concrete determination was delegated, in the constitutional design, to collective

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[1] In this regard, refer to the comprehensive historical reconstruction by M. Roccella, *I salari* (Bologna: il Mulino, 1986), 47-49.

bargaining, which was intended to have, according to Art 39 of the Constitution, universal coverage. This does not preclude, as we will see later, intervention by the legislature on minimum wages.

Despite the clear intention of the constitutional legislator, however, neither an extension mechanism for extending collective agreements coverage nor legislation on minimum wages has ever been approved. Judges have thus taken it upon themselves, starting from the 1950s, to ensure minimum remuneration for workers where they were not already protected by the application of a collective agreement. The reasoning developed by the judges began with the recognition of a right to a fair minimum wage directly derived from Art 36 of the Constitution.[2] It has been identified by the judges, with few exceptions, by taking as reference the minimums provided for by collective agreements for the sector to which the activity carried out by the employer belongs. In this way, the judges have practically managed to attempt to generalize the guarantee of minimum wages provided for by the collective agreement, covering situations where a collective agreement was not applied by the employer. An undoubtedly peculiar way of guaranteeing the minimum wage, so much so that it has been called the 'Italian way' to the minimum wage.

II. The Limits of the 'Italian Way' to the Minimum Wage

While the judges have effectively managed to ensure a generalization of the minimum wages provided by collective bargaining, their intervention has begun to show increasingly significant limitations. The main issue has probably been the emergence of so-called 'pirate' collective bargaining, which has resulted in sectorial collective agreements signed by poorly representative trade unions, often with the aim of providing employers with lower wages compared to *mainstream* collective agreements. It should be noted that the National Council for Economics and Labour (CNEL) recently identified 946 sectorial collective agreements in the private sector, of which only one-fifth were signed by the most representative unions. Nonetheless, these agreements still cover the majority of workers.[3]

[2] Among the many decisions, see Corte di Cassazione 12 May 1951 no 1184, *Rivista Giuridica del Lavoro*, II, 253 (1951), and lately Corte di Cassazione, Sezioni Unite, 29 January 2001 no 38, *Orientamenti di Giurisprudenza del Lavoro*, 443 (2001); Corte di Cassazione 5 May 2004 no 8565, *Archivio Civile*, 1157 (2004). The prevailing legal scholarship similarly recognized an inalienable right to a minimum wage deriving directly from Art 36 of the Constitution. See for example, A. Cessari, 'L'invalidità del contratto di lavoro per violazione dell'art. 36 della Costituzione' *Il Diritto del Lavoro*, II, 197 (1951); G. Giugni 'Nullità dell'accordo tra datore e prestatore di lavoro per una retribuzione inadeguata alle mansioni esplicate' *Il Foro Padano*, I, 1009 (1951); S. Pugliatti 'Ancora sulla minima retribuzione sufficiente ai lavoratori' *Rivista Giuridica del Lavoro*, II, 175 (1951); U. Natoli 'Retribuzione sufficiente e autonomia sindacale' *Rivista Giuridica del Lavoro*, I, 255 (1951); R. Nicolò 'L'art. 36 della Costituzione e i contratti individuali di lavoro' *Rivista Giuridica del Lavoro*, II, 5 (1952); R. Scognamiglio, 'Sull'applicabilità dell'art. 36 della Costituzione in tema di retribuzione del lavoratore' *Il Foro Civile*, 352 (1951).

[3] CNEL, 'XXIV Rapporto sul Mercato del Lavoro e Contrattazione Collettiva 2022', available at

Although the application of 'pirate' agreements is not widespread, it has created difficulties for the judicial mechanism ensuring minimum wage guarantees. When an employment relationship is governed by a collective agreement that does not recognize decent wages, falling below those stipulated by the collective agreement signed by the most representative unions for the same sector, it becomes challenging for the judge to disapply the first agreement in favor of recognizing the wages prescribed by the second. The risk involved is, in fact, that of conflicting with the principle of trade union freedom of association, which nevertheless also protects smaller unions and the collective agreements they produce, as long as they do not take on the characteristics of 'yellow' unions.

A recent ruling by the Court of Cassation[4] appears to have overcome the issue, recognizing that although the judge must generally respect the choices made by collective bargaining regarding wages, it is also true that there is a limit in the Constitution beyond which wages cannot fall. Therefore, according to the Cassation, the judge is empowered to question the wage choices made by collective bargaining when they are so unfair as to conflict with the parameters of proportionality and sufficiency of wages dictated by Art 36 of the Constitution. In these cases, the judge may determine the wage by referring to the remuneration established in other collective agreements in similar sectors or even, if necessary, to economic and statistical indicators, as suggested by EU Directive 2022/2041 on adequate minimum wages in the European Union, Art 5, para 2.

Despite this new direction expressed by the Court of Cassation, seeming to allow the judge the discretion to question and therefore revise upward the wages provided by poorly remunerative collective agreements, doubts remain about a possible infringement on union freedom that such a judge's choice could entail. And it remains firm that to claim the right to adequate remuneration, the individual must expose themselves and bear the costs of legal action. The union could certainly offer to organize and manage the litigation and cover the related expenses. However, this opens up a second issue. In recent times, the inability of collective bargaining to reach marginalized and atypical areas of work has become evident.[5] And this is probably the area where low wages are most often an issue. An area where even the union often fails to reach. This situation leaves the individual worker, precariously employed and therefore potentially exposed to employer coercion, with the burden of individually asserting in court their right to constitutionally adequate remuneration. It is not a surprise that in practice this happens very rarely.

More generally, the jurisprudential guarantee of minimums has not managed to cope with the phenomenon of low incomes that has long affected economically and

https://www.cnel.it/Documenti/Rapporti.

[4] Corte di Cassazione 2 October 2023 no 27711, available at https://tinyurl.com/27ssz782 (last visited 30 September 2024).

[5] See T. Treu, 'Contratto di lavoro e corrispettività, Contratto di lavoro e corrispettività', in F. Carinci and M. Persiani eds, *Trattato di diritto del lavoro* (Padova: CEDAM, 2013), IV, 1364.

operationally dependent self-employed workers.[6] In this area, there is a traditional resistance from the judiciary,[7] supported by a dated ruling of the Constitutional Court,[8] to consider constitutional principles regarding adequate remuneration beyond subordinate work. In this field, only the legislator has recently attempted to address the issue concerning riders employed though a digital platform. Legge no 128 of 2019 has recognized the right to a minimum compensation, even for those classified as self-employed, to be established in ad hoc collective agreements negotiated by the most representative trade unions and employers' organizations; or, in their absence, deducible from national collective agreements in similar or equivalent sectors signed by the most representative trade unions and employers' organizations at the national level.

Lastly, but no less important, is the issue concerning the effectiveness of collective wage bargaining. As mentioned earlier, data confirms a consistent and uninterrupted growth in working poverty in Italy since 2008,[9] which has affected not only precarious and atypical jobs but also standard employment. This demonstrates an objective difficulty for collective bargaining to support wage dynamics.

III. Legitimacy and Opportunity of Legislation on Minimum Wages

There are increasingly voices in scientific and political discourse advocating for the introduction of a statutory minimum wage.[10] A solution that would fit well within the framework outlined by Art 36 of the Constitution. In this regard, the Constitutional Court has been clear since a landmark ruling of 1962, case no 106, in emphasizing the absence of a reservation in favor of unions for the regulation of employment relations.[11] If it is indeed true that collective bargaining plays a central role as a tool for determining wage standards within the framework outlined by the

[6] It has been certified by the National Institution for Statistics ISTAT, 'Condizioni di vita, reddito e carico fiscale delle famiglie' (17 December 2017), available at https://tinyurl.com/chdwyrdv (last visited 30 September 2024), according to which the average income from self-employment has consistently been below the average income from wage employment since 2003, with a gap that has been widening since 2009.

[7] Recently Corte di Cassazione 7 December 2017 no 29437, *Repertorio Foro Italiano* 2017, Lavoro (rapporto di) no 1038.

[8] Corte Costituzionale 7 July 1964 no 75, available at https://www.cortecostituzionale.it.

[9] ISTAT, 'Le statistiche dell'istat sulla povertà - anno 2022', available at https://tinyurl.com/28kydye2 (last visited 30 September 2024).

[10] In this regard see M. Delfino, *Salario legale, contrattazione collettiva e concorrenza* (Napoli: Editoriale Scientifica, 2019); R. Fabozzi, *Il salario minimo legale. Tra la dimensione europea e le compatibilità ordinamentali* (Bari: Cacucci, 2020); E. Menegatti, *Il salario minimo legale. Aspettative e prospettive* (Torino: Giappichelli, 2017); P. Pascucci, *Giusta retribuzione e contratti di lavoro. Verso un salario minimo legale?* (Milano: Franco Angeli, 2018).

[11] Corte Costituzionale 11 December 1962 no 106, available at www.cortecostituzionale.it, followed by many similar decisions, among which Corte Costituzionale 28 June 1963 no 120; Corte Costituzionale 16 July 1968 no 101; Corte Costituzionale 16 June 1970 no 99.

Constituent Assembly,[12] it is equally true that Art 36 of the Constitution primarily addresses the legislature, binding it to implement a socio-political direction aimed at ensuring the sufficiency of remuneration.[13] This is even more true considering the lack of universally applicable collective agreements. This situation increases the legislature's responsibility to define, possibly even correcting the choices of collective bargaining, some basic conditions of the worker's treatment, wages especially.[14]

Statutory law and collective bargaining are both therefore empowered to determine proportionate and sufficient wages. Regarding the internal division of their respective competencies, according to the Constitutional Court idea, supported by the most authoritative doctrine,[15] collective bargaining remains the main player in determining wages,[16] with adjustments that the legislature decides to introduce for the protection of the worker and/or to pursue the general interest, without, however, questioning the role of collective bargaining in autonomously determining the overall remuneration package for the worker.[17]

In other words, statutory law would be in charge of ensuring the adequacy of wages relative to the worker's living needs, guaranteeing a sufficient minimum. While collective bargaining would be responsible for ensuring its proportionality

[12] T. Treu, n 5 above, 1362.

[13] G. Perone, 'Retribuzione' E*nciclopedia del diritto* (Milano: Giuffré, 1989), vol XL, 34. The attribution by the Constitution of a central role to statutory law in determining minimum wages is also pointed out by M. Grandi, 'Prospettive in Italia per una legislazione sui minimi' *Politica Sindacale*, 1962, 111, who insists on the duty of the legislator to protect the right of the citizen, as a worker, to have adequate remuneration. In the same vein, the aforementioned ruling of the Corte Costituzionale 15 November 1962 no 106, expressed how Arts 3, 35, 36, 37 of the Constitution, in order to protect the personal dignity of the worker and work in any form and by anyone performed, and to ensure the worker a sufficient remuneration to guarantee a free and dignified life, not only allow, but also impose on the legislator to enact norms that, directly or indirectly, impact the field of labor relations.

[14] T. Treu, 'Art. 36', in G. Branca ed, *Commentario alla Costituzione. Rapporti Economici*, (Bologna-Roma: Zanichelli, 1979), I, 76-75, who highlights how such function is also confirmed by paras 2 and 3 of Art 36 of the Constitution, where legislative interventions are provided for in matters of primary competence of collective bargaining, such as the maximum duration of the working day and the right to paid annual leave for the worker.

[15] M. D'Antona, 'Appunti sulle fonti di determinazione della retribuzione' *Rivista Giuridica del Lavoro*, I, 7 (1986); L. Mengoni, 'Legge e autonomia collettiva' *Massimario di Giurisprudenza del Lavoro*, 693-695 (1980); M. Dell'Olio, 'Emergenza e costituzionalità (le sentenze sulla scala mobile e il "dopo")' *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 1-3 (1981). E. Ghera, 'Retribuzione, professionalità e costo del lavoro' *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 431 (1981); P. Tosi, 'La retribuzione nel diritto del lavoro dell'emergenza' *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 532-535 (1979).

[16] P. Ichino, 'La nozione di "giusta retribuzione" nell'articolo 36 della Costituzione' *Rivista Italiana di Diritto del Lavoro*, I, 746 (2010). Similarly, T. Treu, n 14 above, 98, who highlights in this regard the difference in content between legislation on minimums and the instruments of universal extension of collective agreements; the latter are precisely entrusted with wage differentials in relation to the different jobs performed, while statutory law addresses the universalistic aim to counteract low wages.

[17] See Corte Costituzionale 7 February 1984 no 34, available at www.cortecostituzionale.it, according to which what the legislator surely cannot do is to cancel or contradict, at will, the freedom of trade union choices and their contractual outcomes, unless this is instrumental to protecting the personal dignity of the worker and work, in any form and by anyone performed, and to guarantee the worker a sufficient remuneration to ensure a free and dignified life.

by negotiating wages above the statutory minimum, taking into account the characteristics of the job performed.[18]

Legislative intervention on minimum wages is therefore simply a matter of opportunity, weighing the costs and benefits. In this regard, there are several advantages that legislation on minimum wages would bring. Firstly, it would support wage dynamics, as the statutory minimum would push up the wages of the lowest-paid workers. Furthermore, the guarantee of minimum wages could be extended beyond subordinate work to include all those workers who economically and operationally depend on a main client. Last but not least, the presence of a legal minimum wage would significantly limit wage dumping practices by pirate collective agreements.

Concerns about legislative intervention on minimum wages are not lacking as well. In particular, an argument put forward by the unions in all European countries where there is no legal minimum wage,[19] including Italy, is that they see a danger of undermining unions' bargaining action, resulting in a substantial impoverishment of those who earned above the statutory minimum.

More specifically, the reasoning, contextualized within the Italian legal system, starts from the idea that if the legislature were to establish a minimum wage, it would become the new mandatory reference for the judge's intervention, instead of the higher wage stipulated by collective agreements.[20] This could occur when a collective agreement is not applied or, according to the latest orientation of the Court of Cassation, when a so-called pirate collective agreement with inadequate remuneration is applied.

Sectoral bargaining would suddenly find itself emptied of what has been its main function up to now: determining non-negotiable minimum wages.[21] This would immediately affect the scope of application of the sectoral collective agreement, the (almost) universal application of which has largely been guaranteed by the employer's inability to deviate from the compliance with the minimum wage rates, as otherwise the judge could intervene by imposing the application of the minimums set in the collective agreements. In other words, the employer would only need to ensure compliance with the legal minimum wage to comply with the Constitution and its Art 36.[22] To counteract this phenomenon, the social partners should, in turn,

[18] This opinion is shared by L. Zoppoli, *La corrispettività nel contratto di lavoro* (Napoli: Jovene, 1991) 207-209; T. Treu, n 14 above, 76; F. Guidotti, 'La retribuzione', in L. Riva Sanseverino and G. Mazzoni eds, *Nuovo trattato diritto del lavoro* (Padova: CEDAM, 1971), II, 314; G. Zilio Grandi, *La retribuzione. Fonti struttura funzioni* (Napoli: Jovene, 1996), 32-34.

[19] L. Eldring and K. Alsos, *European Minimum Wage: A nordic outlook* (2012), available at https://tinyurl.com/yz82dm8a (last visited 30 September 2024) and the update of the research by the same Authors, *European Minimum Wage. A Nordic Outlook – an update* (2014), available at https://www.fafo.no/images/pub/2014/10208.pdf.

[20] V. Bavaro, 'Il salario minimo legale fra Jobs Act e dottrina dell'austerità', *Quaderni di Rassegna Sindacale*, 4, 68 (2014).

[21] See again V. Bavaro, n 20 above, 70-71.

[22] See A. Vallebona, 'Sul c.d. salario minimo garantito' *Massimario di Giurisprudenza del Lavoro*, 326 (2008); G. Ricci, 'La retribuzione costituzionalmente adeguata e il dibattito sul salario minimo' *Lavoro e Diritto*, 655 (2011) and P. Ichino, 'Minimum wage: perché non piace ai sindacati'

try to negotiate lower wages closer to the legal minimum, in order to keep the collective agreement 'competitive.'[23]

The disruption caused by the minimum wage would then extend to involve the internal dynamics of collective wage negotiations under another aspect: the legal minimum rate would risk becoming a benchmark for the employer delegation, useful for containing union demands.[24] This situation would ultimately lead to damage to the image of the social partners, with an inevitable decline in the rate of union membership.

IV. Attempts at Legislation on Minimum Wages

Taking into account the advantages and concerns just outlined, there have been several attempts by policymakers to enact legislation on minimum wages in recent times. In particular, the bill that has garnered the most attention is the one proposed by the Five Star Movement in the previous legislature (Senate bill no 658 of 2018),[25] along with a recent draft law stemming from a joint proposal by opposition parties (House of Representatives bill no 1275 of 2023).[26]

Focusing on the latter proposal, as the former inevitably lapsed with the end of the previous legislative term, it is noteworthy how the proposal, similar to the previous one, emphasizes the role of collective bargaining in ensuring minimum wages. Employers are required to adhere to the minimums set by the collective agreements in force for the sector in which they operate, negotiated by the most representative national associations of employers and workers. In this way, concerns about a possible undermining of bargaining action are definitively dispelled by the primary role delegated to collective bargaining.

Additionally, the law establishes an unaidable statutory minimum wage applicable to all sectors, both private and public. Initially, the minimum would be set by the bill itself. It must then be periodically updated by a tripartite commission established by the law, consisting of representatives from relevant administrative bodies (in addition to the Ministry of Labour, the National Social Security Institute, the National Institute of Statistics, and the Labour Inspectorate) alongside representatives from the most representative social partners, employers, and unions, in equal numbers.

To address the issue of low wages beyond subordinate work, the guarantee of minimums is extended to commercial agents and representatives, as well as to relationships involving autonomous but continuous and coordinated collaboration with a principal. This category corresponds to quasi-subordinate workers, positioned

(2014), available at https://tinyurl.com/2vazvpf7 (last visited 30 September 2024), though he is in favour of statutory minimums.

[23] V. Bavaro, '*Jobs Act* – Il salario minimo e le relazioni industriali' *Il diario del lavoro*, available at https://tinyurl.com/mrxxn29y (last visited 30 September 2024).

[24] V. Speziale, 'Il salario minimo legale' *WP CSDLE "Massimo D'Antona"* 244, 4 (2015).

[25] The text is available at https://tinyurl.com/y53x6m45 (last visited 30 September 2024).

[26] The text is available at https://tinyurl.com/mrxkmayb (last visited 30 September 2024).

halfway between employees and independent contractors. The law goes as far as to include non-entrepreneurial self-employed workers, including professionals. For all these workers, the minimum wage is analogous to that established by the collective agreements negotiated by the most representative national associations of employers and employees for comparable tasks performed by employees, always respecting the minimum set by law.

The framework of the bill appears effectively designed to address current difficulties in ensuring minimum wages without undermining the role of unions and collective bargaining, but rather enhancing it. The only aspect that appears problematic is related to identifying the collective agreement to be used as a reference point for adequate remuneration. Even though only one-fifth of the over 900 collective agreements in force in Italy are signed by the most representative unions, it could be challenging in many cases to accurately identify these contracts, considering the lack of criteria for measuring representativeness in Italy.

Anyway, it is worth mentioning that the proposal was effectively blocked by the government majority, which approved a completely different draft bill on November 28, 2023.[27] In this latter, there is no longer any trace of a minimum wage set by statutory law. The 'minimum overall economic treatment' to be guaranteed to all workers is that provided for in the most applied collective agreement with reference to the number of companies and employees within each category covered by that collective agreement. The bill, if approved by parliament, would put in the hands of the Government the approval of a legislative decree aimed at providing the detailed rules for the functioning of the mechanism identified by parliament. However, this would be a technically and politically complex instrument to implement,[28] which risks never seeing the light of day.

V. The Directive (EU) 2022/2041 on Adequate Minimum Wages…

In a scenario that, despite signs of activity, does not foresee short-term signs of overcoming the Italian approach to the minimum wage, the only short-term novelty may be represented by the implementation of Directive No 2022/2041,[29] which is expected to be transposed by November 15, 2024. However, it is worth mentioning that its impact on the Italian legal system will necessarily be minimal. It is also worth noting that the Directive is currently threatened by the recourse for annulment filed by Denmark.[30]

[27] The text is available at https://tinyurl.com/56vzt6c8 (last visited 30 September 2024).

[28] See E. Massagli, 'Il nuovo criterio della maggiore applicazione: prime considerazioni sulla delega al Governo in materia di salario equo' *Lavoro Diritti Europa*, 1 (2024).

[29] For a commentary of the Directive see L. Ratti et al eds, *The EU Directive on Adequate Minimum Wages, Context, Commentary and Trajectories* (Bloomsbury: London, 2024).

[30] Action brought on 18 January 2023 — Kingdom of Denmark v European Parliament and Council of the European Union (Case C-19/23).

The obligations included in the directive require, in summary,[31] the 21 member countries where a salary 'established by law or other binding legal provisions' exists to introduce clear and stable criteria for setting, updating, and evaluating the adequacy of the measure of the legal minimum wage, following their own national practices for determining the minimum and involving the social partners (Arts 5-8).[32] However, these provisions do not apply to Italy, nor to the other 5 European countries where wages are exclusively set by collective agreement (Austria, Cyprus, Denmark, Finland, Sweden). Evidently, the underlying choice is not to interfere with the methods and criteria for determining the minimums and therefore their measure, in order to respect the autonomy of the social partners.[33]

Instead, all European Union countries are requested in principle to intervene in support of so-called multi-employer collective bargaining (sectoral and intersectoral), aimed at indirectly supporting wage levels. Starting from the empirically proven fact of the close connection between high levels of coverage of collective bargaining and wage standards, the Commission aims to increase the former in order to improve the latter.[34] Member states are thus tasked with adopting measures that include at least the promotion of the ability of social partners to undertake 'constructive' wage negotiations at the sectoral or intersectoral level (Art 4.1). In countries where the coverage of collective bargaining is less than 80%, they are required to develop, by law, following consultation with social partners, or through a tripartite agreement, an action plan to provide a framework for promoting collective bargaining (Art 4.2).

Regarding the initiatives that states can or may undertake more concretely, the directive does not add anything. The only measures mentioned in the proposal are, in the negative, those that member states are not obligated to adopt, namely the introduction of a legal minimum wage and mechanisms for extending the effectiveness of collective agreements *erga omnes*. These clarifications serve to reiterate, to avoid misunderstandings, that the directive does not intend to encroach upon the autonomy of member states and social partners in determining minimum

[31] For a more in-depth analysis, it is allowed to refer to E. Menegatti, 'Much ado about little: The Commission proposal for a Directive on adequate wages' *Italian Labour Law e-Journal*, 14, 21-32 (2021).

[32] These criteria must include at least the four indicated in the directive: the purchasing power of legal minimum wages; the general level of gross wages and their distribution; the rate of growth of gross wages; the trend of labor productivity (article 5.2). These are the 'classic' indicators used by economists in the study of wages, largely already considered by the member countries according to various combinations.

[33] The respect for collective autonomy and its choices is central to the framework of the directive, as also clarified by its preamble, in recital 16.

[34] As highlighted by S. Hayter and J. Visser, 'The application and extension of collective agreements: Enhancing the inclusiveness of labour protection', in Ead eds, *Collective Agreements: Extending Labour Protection* (Geneva: ILO, 2018), 26, following an extensive review of various collective bargaining systems, a higher coverage of collective bargaining, supported by sectoral bargaining, goes hand in hand with a reduction in the proportion of poorly paid jobs. More recently, the correlation is confirmed by an empirical study conducted by S. Marchal, 'An EU minimum wage target for adequate in-work incomes?' *European Journal of Social Security*, 22, 4, 452 (2020).

wages. They also aim to maintain the Directive proposal balanced on the fragile legal bases provided by the treaties regarding wages.[35]

Furthermore, ensuring adequate minimums involves a series of provisions defined as 'horizontal.' Among these, noteworthy for the potential impact it seems destined to have on Italy, is the mechanism for monitoring and collecting data on the trends and coverage of minimum wages, to be communicated annually to the Commission and then to Parliament and the Council. This is an essential requirement for implementing the directive, as it allows for identifying necessary interventions on wages and collective bargaining. The monitoring should also enable European institutions to oversee the wage situation in member states, ultimately leading to integrated guidelines for growth and employment channeled through the European Semester.

For legal systems without a statutory minimum wage, the situations to be monitored essentially concern the coverage rate of collective bargaining and wage levels for uncovered workers. Only a reliable measurement of the coverage and effectiveness of collective bargaining in terms of wage adequacy will enable the operationalization of the provisions supporting collective bargaining as outlined above.

1. … And Its Potential Impact on the Italian Legal System

In the current situation of the absence of a statutory minimum wage but high coverage of collective bargaining, estimated to be close a bit 100% according to unofficial data from CNEL,[36] Italy is not currently required to transpose measures regarding wage adequacy or to introduce particular measures to support collective bargaining. In particular, there will be no need to implement measures to promote the development and strengthening of the capacity of social partners to engage in genuine and effective wage negotiations; a capacity which, looking at the past and present of Italian industrial relations, is not in question. It will also not be necessary, in order to comply with the Directive, to introduce mechanisms to extend the effectiveness of collective bargaining or to establish a statutory minimum wage; obligations explicitly excluded by the Directive itself.

The Italian legal system appears to be already aligned with the horizontal provisions of the Directive, except for the monitoring system, which is practically absent in all member states of the Union. Establishing an official and reliable

[35] Art 153.5 of the Treaty on the Functioning of the European Union excludes from the broad competence of EU law in the field of labor law and social security precisely the issue of wages. On the meaning to be attributed to the exclusion of competence and its implications for the proposed directive under discussion, please refer to G. Di Federico, 'The Minimum Wages Directive Proposal and the External Limits of Art. 153 TFEU' *Italian Labour Law e-Journal*, 13(2), 107-111 (2020); A. Lo Faro, 'L'iniziativa della Commissione per il salario minimo europeo tra coraggio e temerarietà' *Lavoro e Diritto*, 3, 543 (2020).

[36] See CNEL, 'Documento relativo agli esiti della prima fase istruttoria tecnica sul lavoro poveroe il salario minimo' (2023), available at https://tinyurl.com/5jd4ww72 (last visited 30 September 2024).

monitoring system for the coverage of collective bargaining and wage distribution will certainly be laborious, considering that failed attempts, except in the public sector, are now too numerous to count. In any case, this time, unless facing infringement proceedings, the result must be achieved. The establishment of the monitoring mechanism will not only help understand the exact coverage of collective bargaining but also comprehend the specific coverage of various collective agreements within the same sector. From here to the approval of a law on union representativeness, another historically incomplete process in the Italian legal system, the step should be short. Such a law, in turn, would pave the way for legislative intervention on the minimum wage that emphasizes, in the sense of the aforementioned proposed law, the economic treatment of contracts covering the majority of workers as generalized tariff minima.

However, we are in the realm of hypotheses, and the current government majority's aversion to a law on minimum wages does not make it as straightforward as it could be to arrive at both a law on representativeness and a minimum wage.

Insights & Analyses

Protecting Cultural Heritage Through Criminal Law: The Italian Experience

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Abstract

Being characterized by an immense cultural heritage, Italy started to deal with its preservation centuries before the country's unification, progressively building one of the most developed legal frameworks on the safeguarding of cultural property, whose peculiarities and complexities are analyzed in this paper.

Following the ratification of the 2017 Nicosia Convention, in 2022 Italy introduced in its Criminal Code a new section expressively dedicated to 'Crimes against cultural heritage', providing for new offences, increased penalties, and an extension of corporate liability for legal entities working in the cultural sector. Being the 2022 reform quite ambitious compared to the attempts previously made by other countries, the paper highlights the main contents, strengths and weaknesses of the new section. The paper also reflects on whether the Italian experience might represent a successful model in preventing and mitigating the enduring phenomenon of illicit trafficking of cultural goods.

I. Introduction

In times of armed conflict or political instability, cultural heritage has constantly been under threat of being damaged or looted. The persistence of organized networks,[1] which facilitate the trafficking of artworks and antiquities, especially in ongoing war zones,[2] is still significant, requiring increased interest in developing new and improved criminal policies and market-targeted measures aimed at safeguarding cultural property.

An increasing number of international and national legal provisions are devoted

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[1] On the role of organized networks and intermediaries in facilitating trafficking of artworks and antiquities, see L. Natali, 'Patrimonio culturale e immaginazione criminologica', in Centro Nazionale di Prevenzione e Difesa Sociale ed, *Circolazione dei beni culturali mobili e tutela penale: un'analisi di diritto interno, comparato e internazionale* (Milano: Giuffrè, 2015), 57-60; V. Manes, 'La circolazione illecita dei beni artistici e archeologici', ibid 87-92; A. Visconti, *Problemi e prospettive della tutela penale del patrimonio culturale* (Torino: Giappichelli, 2023), 145-148.

[2] For a historical overview of looting during war, see E. Tijhuis, *Transnational Art Crime* (Italia: ARCA Publications, 2020), 230-234; A. Thompkins, 'Art in War', in Id ed, *Art Crime and its Prevention* (London: Lund Humphries, 2016), 325-327; N. Charney, 'Introduction to Part IV', in Id ed, *Art Crime: Terrorists, Tomb Raiders, Forgers and Thieves* (London: Palgrave Macmillan, 2016), 264-279.

to the protection of cultural property. The aim of this paper is to analyse some recent developments, particularly in the criminal protection of cultural property. After a brief summary of the general international framework for the protection of cultural property (section II), the paper will focus on the 2017 Council of Europe Convention on Offences relating to Cultural Property (so-called Nicosia Convention) (section III). The paper will then delve into the effects that the ratification of the Nicosia Convention has implied for Italy, by comparing the Italian legal framework on the protection of cultural property before and after the enactment of legge 9 March 2022 no 22 that implemented the Nicosia Convention (sections IV and V). Conclusions will follow (section VI).

II. Cultural Property in International Law

Historically speaking, cultural property has developed into a specific branch of law sometime ago. It was not until the second half of the 19th century that the expression became part of the lexicon of international law.[3] The Brussels Declaration of 1874[4] and the two Hague Conventions of 1899[5] and 1907,[6] introduced to mitigate the disruptive effects of armed conflicts, enforced some innovative provisions related to safeguarding historic monuments and works of art in general. However, those instruments did not establish a unified concept of cultural property, inasmuch as they only provided a heterogeneous list of protected items that included sites unrelated to culture, such as hospitals and charity institutions.[7]

The unprecedented and systematic looting of cultural goods during the Second World War highlighted the inadequacy of the Hague Conventions, sparking interest in improving the legal response to contrast the devastation and loss of cultural items during political instability. The establishment of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1945provided the impetus to finally consider cultural property as a distinct object of international protection, emphasizing the inherent connection between cultural heritage and individual fundamental rights.[8] This vision resulted in the 1954 Hague Convention for the

[3] On this topic, see A. F. Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage', in M. Orlando and T. Bergin eds, *Forging a Socio-Legal Approach to Environmental Harm: Global Perspectives* (London: Routledge, 2016), 3-4.

[4] Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874.

[5] See Arts 28, 47 and 56 of the Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.

[6] See Arts 27 and 56 of the Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[7] See Art 8 of the Brussels Declaration, Art 56 of the Hague Convention (II), and Arts 27 and 56 of the Hague Convention (IV).

[8] On this topic, see S. Manacorda, 'Criminal Law Protection of Cultural Heritage: An

Protection of Cultural Property in the Event of Armed Conflict[9] ('1954 Hague Convention') and, in time, its two (1954[10] and 1999[11]) Protocols, all adopted under the auspices of UNESCO. Under the Convention and its First Protocol, state parties undertake to safeguard and preserve cultural property situated within their territories during peacetime, armed conflict, or belligerent occupation.[12]

The 1954 Hague Convention introduced for the very first time a comprehensive normative definition of cultural property,[13] subsequently adopted in many soft law provisions and case law. However, several deficiencies and shortcomings quickly became evident, especially after the armed conflicts that took place between the late 1980s and the early 1990s in Cambodia,[14] the Middle East,[15] and the former Yugoslavia.[16] It remains for instance uncertain whether the Convention applies directly to 'non-state actors' – a somewhat flexible description intended to encompass active and organised participants in armed conflicts who, even if not formally nation-states,[17] systematically perpetrate acts of looting, extensive destruction, and vandalism against cultural property.[18] Moreover, the effectiveness of the 1954 Convention has frequently been undermined by the lack of a mandatory criminal sanction regime. The only provision that deals with sanctions is Art 28, which introduces a general commitment for state parties

> 'to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed

International Perspective', in Id and D. Chappell eds, *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property* (New York: Springer, 2011), 24.

[9] Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954, 249 UNTS 240.

[10] Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, 249 UNTS 358.

[11] Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999, 2253 UNTS 21.

[12] See Arts 3 and 5 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict. On this topic, see A.F. Vrdoljak, n 3 above, 6-7.

[13] Art 1 of the 1954 Hague Convention, on which see A. Visconti, *Problemi* n 1 above, 22-23; S. Manacorda, 'Criminal Law' n 8 above, 26; A. Thompkins, 'Art in War' n 2 above, 327-344.

[14] On looting and the trafficking networks that operate in Cambodia, see S. Mackenzie and T. Davis, 'Cambodian Statue Trafficking Networks: An Empirical Report from Regional Case Study Fieldwork', in S. Manacorda and A. Visconti eds, *Protecting Cultural Heritage as a Common Good of Humanity* (Milano: ISPAC, 2014), 149-164.

[15] On the conflicts that took place in Afghanistan, Iraq, and Libya, and their impact on the illicit trafficking of cultural property, see L.W. Rush, 'Looting of Antiquities: Tearing the Fabric of Civil Society', in N. Charney ed, *Art Crime* n 2 above 133-136. On the effects of the first Gulf War of 1990-1991 on Iraqi cultural heritage, see L.W. Rush, 'Looting and Antiquities', in A. Thompkins ed, *Art Crime* n 2 above, 373-374.

[16] On the impact of the conflict in former Yugoslavia, most regarding the case of the bombing of Dubrovnik, see A.F. Vrdoljak, n 3 above, 8-11; A. Thompkins, 'Art in War' n 2 above, 344-351.

[17] On the application of the 1954 Convention to non-state actors, see A. Thompkins, 'Art in War' n 2 above, 342-343.

[18] ibid

a breach of the present Convention'.

The vagueness of Art 28 entails too much room for interpretation, leaving each state free to determine the most appropriate way to enforce sanctions on their territories, therefore giving rise to uneven standards.

To mitigate these deficiencies, the First Protocol to the 1954 Convention strengthens the safeguarding duties of the state parties by introducing the notion of 'enhanced protection'[19] and by determining the conditions and the sanctions for individual criminal responsibility.[20] However, the adoption of these measures is left to each State Party, thus opening again the way to non-uniform and ineffective application.[21] The situation has not substantially improved with the adoption of the 1999 Second Protocol, which currently includes eighty-seven state parties.[22] As a result of this limited number of ratifications, for many years the Second Protocol has not been in force in countries, such as Iraq, Syria, and Yemen, in which a non-international armed conflict was underway,[23] and thus was not able to prevent the massive looting and illicit trafficking of local cultural goods.

Some of the weaknesses of the 1954 Hague Convention and its First Protocol were addressed by the 1998 Rome Statute, the founding instrument of the International Criminal Court (ICC). The Rome Statute recognises the importance of investigating and prosecuting crimes against or affecting cultural heritage, and highlights the importance of the preservation and protection of cultural heritage as a broad concept, which includes both tangible and intangible manifestations of human life and identities. In its Arts 8(2)(b)(ix) and 8(2)(e)(iv), the Rome Statute expressively includes in the list of war crimes attacks on cultural heritage perpetrated respectively during international and non-international armed conflicts, paving the way to persecute these offences internationally and raising awareness on their seriousness.[24]

[19] Art 10 of the Second Protocol to the 1954 Convention.

[20] On this topic, see A. Visconti, *Problemi e prospettive* n 1 above, 27-28.

[21] Art 15(2) of the First Protocol, on which see F. Caponigri and A. Pirri, 'Summary Report of Conference on "A new perspective on the protection of cultural property through criminal law" ' (2019), available at https://tinyurl.com/5hd6zhkc (last visited 30 September 2024).

[22] The full list of States Parties to the 1954 Conventions and its two Protocols is available at http://tinyurl.com/327t2wdc (last visited 30 September 2024).

[23] On 6 April 2022, Iraq deposited with the Director-General its instrument of accession to the Second Protocol. On 1 June 2023, Yemen deposited with the Director-General its instrument of ratification of the Second Protocol. Syria signed but did not ratify the Second Protocol; nonetheless, the signature indicates the intent to be bound by the Second Protocol's provisions.

[24] The Office first brought charges relating exclusively to cultural property in 2015 in the Al Mahdi case. On this topic, see *The Prosecutor* v *Ahmad Al Faqi Al Mahdi*, Judgement of 27 September 2016, available at http://tinyurl.com/y5k5bwaa (last visited 30 September 2024). See also A. Thompkins, 'Art in War' n 2 above, 352-354; V. Rainò, 'La distruzione del patrimonio culturale e religioso come crimine di guerra. La Corte Penale Internazionale conferma l'imputazione a carico di Ahmad Al Faqi Al Mahdi' (2016), available at https://tinyurl.com/(last visited 30 September 2024).

III. Setting out New Criminal Law Provisions in Europe: The Nicosia Convention

Before we deal with Italy's regulatory framework, we still have to clarify the major novelties introduced at the regional-international level by the Council of Europe Convention on Offences relating to Cultural Property ('2017 Nicosia Convention').[25]

Being the leading political organization dedicated to the protection of human rights and common European identity, the Council of Europe has a long history of co-operation in the field of the protection of cultural property, raising awareness of the social value of cultural heritage[26] through conventions, recommendations, resolutions, and guidelines.

In 1985 the Council of Europe adopted the European Convention on Offences relating to Cultural Property ('Delphi Convention').[27] The Delphi Convention remained as a 'dead letter' since so far it has been signed only by six States, none of which ratified it. Yet, the Delphi Convention represents the earliest attempt by the Council of Europe to deal with crimes against cultural heritage, extending the scope of criteria for the application of criminal law[28] and paving the way toward the adoption of the Nicosia Convention in May 2017.

The Nicosia Convention, which for the time being has been ratified by six countries,[29] is the first international treaty aimed specifically at unifying standards in the field of domestic prevention and criminalization of offences against cultural property. More specifically, the purposes of the Nicosia Convention are to

[25] Council of Europe, Convention of 15 May 2017 on offences relating to cultural property (CETS no 221).

[26] The Council of Europe uses both the notion of 'cultural heritage' and 'cultural property' in its legal framework. The first expression mainly refers to tangible cultural manifestations considered as artistically, archaeologically, ethnologically, or historically valuable, and does not specifically deal with property issues. Conversely, the term 'cultural property' puts more emphasis on the question of legal title and is usually connected to the tangible dimension of culture. Both terms may refer to the same objects, although seen from a different perspective. This kind of differentiation between the tangible and intangible dimensions does not appear in every legal instrument related to cultural items. For example, the 1954 Convention uses to the term 'cultural property' without explicitly referring to national ownership. On this topic, see M.M. Bieczyński, 'The Nicosia Convention 2017: A New International Instrument Regarding Criminal Offences against Cultural Property' 2 *Santander Art and Culture Law Review,* 259 (2017); A. Visconti, 'Esigenze di riforma alla luce degli impulsi internazionali', in Centro Nazionale di Prevenzione e Difesa Sociale ed, *Circolazione dei beni* n 1 above, 137-145; Id, *Problemi e prospettive* n 1 above, 90-98.

[27] Council of Europe, Convention of 23 June 1985 on offences relating to cultural property (CETS no 119).

[28] On the specific provisions set out in the Delphi Convention, see S. Manacorda, 'Criminal Law' n 8 above, 37-38; M.M. Bieczyński, n 26 above, 260-261; A. Visconti, 'Esigenze di riforma' n 26 above, 165-167.

[29] These countries are Cyprus, Greece, Hungary, Italy, Latvia, and Mexico. As of now, the Convention has been signed, but not ratified, by Armenia, Montenegro, Portugal, San Marino, Slovenia, Ukraine and the Russian Federation.

> 'prevent and combat the intentional destruction of, damage to, and trafficking of cultural property by providing for the criminalisation of certain acts' (Art 1(1)(a)); 'strengthen crime prevention and the criminal justice response to all criminal offences relating to cultural property' (Art 1(1)(b)); 'promote national and international co-operation in combating criminal offences' (Art 1(1)(c))

across nations, disciplines and sectors, favoring co-operation with and between international bodies such as INTERPOL, EUROPOL, the EU, UNESCO, and UNIDROIT. The last objective has further been encouraged by extending the possibility to any non-Council of Europe Members to become a Party to the Convention. The ratification by Mexico and the signature by the Russian Federation, which both took place in 2018, proved that this plan of action can be successful.[30]

The Convention gives new impetus to criminal law as a tool in the fight against offences against cultural property by establishing new criminal offences, as well as preventive and administrative measures designed to fill in the gaps within the existing international law system. By doing so, the Convention provides a direct response to the transnational trafficking of artworks and antiquities both on the black market and the official sales channels. In this regard, the new instrument is intended to complement and enhance the system of global protection of cultural property by bringing national legislation up to a uniform protection standard. For this reason, its regime safeguards cultural property – both movable (Art 2(2)(a)) and immovable (Art 2(2)(b)) – that has been 'classified, defined or specifically designated' not only by any State Party to the Convention but also by any State that is Party to the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, thus resulting in a much wider scope than previous treaties.[31]

Chapter II represents the core of the Convention, dealing with 'Substantive criminal law'. The Chapter provides a catalogue of crimes against cultural property that constitute a criminal offence under each Party's domestic law. The drafters concentrated on introducing common standards and legislative measures to address the most common and serious offences related to cultural property, also in the context of action against transnational organized crime and terrorism. Their work was based on a comprehensive review of the national legislation in force, carried out between 2016 and 2017 by the European Committee of Crime Problems (CDPC) in close co-operation with the Steering Committee for Culture, Heritage and Landscape (CDCPP), which led to the introduction of the following offences: theft and other forms of unlawful appropriation of cultural property (Art 3); its unlawful excavation and removal (Art 4); illegal importation (Art 5),

[30] On this topic, see M.M. Bieczyński, n 26 above, 266.

[31] On the updated definition of cultural property introduced by the Nicosia Convention, see F.D. Iacopino et al, *La tutela penale dei beni culturali e del patrimonio artistico* (Milano: Key Editore, 2022), 20-22.

illegal exportation (Art 6), acquisition (Art 7) and placing on the market (Art 8) of movable cultural property with unlawful provenance; falsification of documents (Art 9); destruction and damage of cultural property (Art 10).[32]

Two other provisions that are worth mentioning are Art 11 and Art 13. Art 11 establishes that 'the intentional aiding or abetting the commission of a criminal offence referred to in (this) Convention' constitutes a criminal offence under each Party's domestic law. Art 13, acknowledging the frequent connections between the licit and illicit art market, introduces corporate liability for crimes against cultural property,[33] therefore holding auction houses and companies that operate in the art trade responsible for their wrongdoings.[34]

As far as sanctions and measures are concerned, according to Art 14(1);

> '(e)ach Party shall ensure that criminal offences (…) when committed by natural persons, are punishable by effective, proportionate and dissuasive sanctions, which take into account the seriousness of the offence'. The same principle also applies to 'legal persons held liable in accordance with Article 13' (Art 14(2)).

At first glance, these obligations seem to penetrate the domain traditionally reserved for sovereign states much more strongly than previous international instruments. It should however be considered that the Nicosia Convention recognizes states' freedom to establish their own sanctions too, respecting national differences in the development of cultural policies.[35]

IV. The Italian Framework: From the Rosadi Act of 1909 to the 2022 Reform Implementing the Nicosia Convention

In order to appreciate the way in which Italy implemented the obligations set forth by the Nicosia Convention, it is necessary to clarify how Italy has historically tackled the problem of protecting its immense cultural heritage. Legal protection of cultural heritage in Italy dates back centuries before the country's unification.[36] The proclamation of the Kingdom of Italy in 1861 fostered a complex

[32] M.M. Bieczyński, n 26 above, 265.

[33] A. Oriolo, 'The Nicosia Convention: A Global Treaty to Fight Cultural Property Crimes' (2022), available at https://tinyurl.com/4vp3w6h6 (last visited 30 September 2024).

[34] S. von Schorlemer, 'Fighting Terrorist Attacks Against World Heritage – An Integrated Approach', in M.T. Albert et al eds, *50 Years World Heritage Convention: Shared Responsibility – Conflict & Reconciliation* (Cham: Springer Nature, 2022), 207.

[35] M.M. Bieczyński, n 26 above, 270.

[36] Before the unification, many states located on the Italian Peninsula had introduced some provisions aimed at safeguarding cultural property from spoliation and intentional destruction. Several scholars believe that the first legislation related to Italian cultural property is the Decision enforced on 24 October 1602 by Ferdinando I de' Medici, Grand Duke of Tuscany, which established a control system on the circulation of artworks based on export licenses granted by the Academy

and long process of coordination and rationalization of the existing framework that culminated in the adoption in 1909 of legge Rosadi,[37] the first comprehensive statute on 'movable or immovable things with an historical, archaeological, ethnographic, (…) or artistic interest' (Art 1).

During the fascist regime, considering the prominent role assumed by cultural heritage as an emblem of excellence and national identity,[38] the legal framework became more detailed and stricter. The 1930 Italian Criminal Code (ICC) introduced three offences concerning crimes against cultural heritage.[39] Further, legge Bottai[40] of 1939 improved the safeguards for cultural items,[41] regulating, among other things, their preservation (Chapter II); transfer (Chapter III); exportation (Chapter IV, Section I), and importation (Chapter IV, Section II). Legge Bottai also introduced new criminal provisions (Chapter VIII).[42]

Following the downfall of the fascist regime in 1943, the Constitution of the newborn Italian Republic of 1948 introduced an explicit duty to safeguard the 'natural landscape and the historical and artistic heritage of the Nation', as well as to promote 'the development of culture and of scientific and technical research' (Art 9).[43] Among its ramifications, the newly established constitutional rank of

of the Arts of Drawing. Nevertheless, the most remarkable contribution before Italy's unification was Editto Pacca, introduced by the Papal States in 1820, which inspired the adoption of the national legislation almost a century later. On the historical development of cultural property legislation in Italy, see F.D. Iacopino et al, *La tutela penale* n 31 above, 12-14; F. Lemme, 'Prefazione', in G.N. Carugno et al eds, *Codice dei beni culturali. Annotato con la giurisprudenza* (Milano: Giuffrè, 2006), V-VII; A. Visconti, *Problemi e prospettive* n 1 above, 8-10, 14.

[37] Legge 20 June 1909 no 364.

[38] On this topic, see M. Ainis and M. Fiorillo, *L'ordinamento della cultura. Manuale di legislazione dei beni culturali* (Milano: Giuffrè, 2022), 25-30.

[39] See Art 733 of the Italian Criminal Code; cf also Arts 635(2)(1) and 639(2) also dealt with 'things of an historical or artistic interest'. For uniformity purposes, Arts 635(2)(1) and 639(2) have been repealed by the 2022 Reform. On this topic, see C. Perini, 'Itinerari di riforma per la tutela penale del patrimonio culturale', 17-19 (2018), available at https://tinyurl.com/46373txn (last visited 30 September 2024).

[40] Legge 1 June 1939 no 1089.

[41] Like the other legal instruments enforced before the 1954 Hague Convention, both the Rosadi and Bottai Acts did not use the notions of 'cultural heritage' or 'cultural property', rather opting for a list of heterogeneous items with cultural, historical, and archeological interest, subsequently limiting the scope of protection.

[42] On the main contents of the Bottai Act, see F. Coccolo, 'Law no 1089 of 1 June 1939. The Origin and Consequences of Italian Legislation on the Protection of the National Cultural Heritage in the Twentieth Century', in S. Pinton and L. Zagato eds, *Cultural Heritage. Scenarios 2015-2017* (Venezia: Edizioni Ca' Foscari, 2017), 195-209; A. Visconti, 'The Reform of Italian Law on Cultural Property Export and Its Implications for the "Definitional Debate": Closing the Gap with the European Union Approach or Cosmetics? Some Systemic Considerations from a Criminal Law Perspective' 2 *Santander Art and Culture Law Review*, 161 (2019).

[43] Even after the promulgation of the Italian Constitution, a statutory duty to enhance cultural heritage was established only in 1998, and later codified by the 2004 'Code of the Cultural and Landscape Heritage' (CHC). On this topic, see S. Manacorda, 'Introduzione', in Centro Nazionale di Prevenzione e Difesa Sociale ed, n 1 above, 10-11; F.D. Iacopino et al, *La tutela penale* n 31 above, 19; F. Florian, 'Il diritto dei beni culturali tra tutela e valorizzazione', in A. Negri-Clementi ed, *Economia dell'arte. Mercato, diritto e trasformazione digitale* (Milano: Egea, 2023), 187; L.

cultural heritage paved the way for a progressive increase in the use of criminal offences, as Art 9 of the Constitution came to legitimize the enforcement of criminal provisions for the protection of cultural heritage.[44]

The existing body of national laws was first rationalized in a single text in 1999, when Italy adopted the 'Consolidated Act on Cultural and Landscape Assets'.[45] Fifteen years later, the Consolidated Act was replaced by the 2004 'Code of the Cultural and Landscape Heritage' (CHC).[46] Made of 184 Articles, the CHC is divided into five parts, which deal respectively with: general provisions; cultural property protection, conservation, circulation, and enhancement; landscape assets; sanctions (both administrative and penal); interim provisions and abrogation. The Code harmonized several existing legal instruments, and provided for a broader scope of cultural items, together with a more refined regime for their circulation.

In particular, Art 2(1) CHC defines cultural heritage as 'consist[ing] of cultural property and landscape assets'. Art 2(2) adds that cultural property

> 'consists of immovable and movable things which, under Arts 10 and 11, present artistic, historical, archaeological, ethnoanthropological, archival and bibliographical interest, and of any other thing identified by law or in accordance with the law as testifying to the values of civilisation'.[47]

The CHC thus combines a broad definition of cultural heritage which includes even the most recent contemporary art expressions with a list of more specific items that are textually made subject to protection.

Casini, *Ereditare il futuro* (Bologna: il Mulino, 2016), 50-52; L. Casini, 'Oltre la mitologia giuridica dei beni culturali'(2012), available at https://tinyurl.com/bddcjy5r (last visited 30 September 2024); N. Recchia, 'Una prima lettura della recente riforma della tutela penalistica dei beni culturali', 92 (2022), available at https://tinyurl.com/3e8kep52 (last visited 30 September 2024); A. Visconti, 'The Reform of Italian Law' n 42 above, 161-162.

[44] On this tendency, see A. Visconti, 'The Reform of Italian Law' n 42 above, 166; C. Perini, n 39 above, 5-8, 11-10 (2018); G.P. Demuro, *Beni culturali e tecniche di tutela penale* (Milano: Giuffrè, 2002), 45-49.

[45] Decreto legislativo 29 October 1999 no 490. The Consolidated Act also transposed the EU legislation enacted in the meantime.

[46] Decreto legislativo 22 January 2004 no 42. The English version of the CHC is available on the UNESCO website at http://tinyurl.com/43zt8vjk (last visited 30 September 2024)..

[47] In 1964, the Franceschini Commission, which had been designated to carry out a study on the state of conservation of cultural goods situated in Italy, introduced into the Italian political and legal debate the notions of 'cultural property' (*beni culturali*) and 'cultural heritage' (*patrimonio culturale*). Taking into consideration the international soft law instruments and conventions, the Commission promoted a broader and more dynamic notion of cultural property, claiming that cultural goods are represented by any item that testifies to the values of civilization (*testimonianza avente valore di civiltà*). This expression, introduced in the Declaration I of the Franceschini Commission, persisted, with small changes, in Art 2(2) of the 2004 Code of the Cultural and Landscape Heritage. On this topic, see R. Mazzocca, 'La nozione di bene culturale dalla commissione Franceschini al nuovo Codice', available athttp://tinyurl.com/zz43hbkk (last visited 30 September 2024); A. Visconti, 'The Reform of Italian Law' n 42 above, 167.

The CHC also provides for new criminal sanctions.[48] Many of these provisions aim to complement and support the enforcement of the administrative processes established by the CHC itself, therefore lacking in incisiveness.[49] Furthermore, the CHC criminal offences condemn behavior in violation of the law that endangers, but not necessarily damages, cultural heritage, called *reati di pericolo*). The most relevant consequence of this statutory choice is that these provisions can only apply to formally declared cultural property, mainly identified under Art 10 CHC.[50]

Conversely, the approach changes in reference to the ICC offences, which do not provide for a definition of cultural property, even after the 2022 reform. For this reason, whenever the asset was not already identified as 'cultural' by sectorial laws, many scholars maintained that it was up to the penal judge, when applying criminal offences, to ascertain the cultural relevance of the affected object.[51] Criminal courts were thus expected to ascertain on a case-by-case basis whether the affected item had an 'artistic, historical, archaeological, ethnoanthropological, archival and bibliographical interest' or, more broadly, whether it 'testify[ing] to the values of civilisation', as established by the CHC.[52] More specifically, several courts started to follow an a principle known as *concezione sostanzialistica*, according to which any good characterized by an intrinsic cultural value fits in the notion of cultural heritage, regardless of the prior and formal recognition of their value by the competent authorities. While this approach increases the protection of cultural assets, especially the most recent ones and those that are owned by private citizens, it also provides judges with a wider margin of interpretation, which can result in a risk of incoherence among case law.

Considering this context, for a long time, many scholars tried to explore and suggest possible reform scenarios for the protection of cultural property through criminal provisions.[53] However, it was not until the recent ratification of the 2017 Nicosia Convention that Italy took the opportunity to enhance its legal framework, introducing a new section (Section VIII-*bis*) in its Criminal Code expressively

[48] See Arts 169-180 of the 2004 CHC. On this topic, see N. Asini and G. Cordini, *I beni culturali e paesaggistici. Diritto interno, comunitario comparato e internazionale* (Padova: CEDAM, 2006), 174-177.

[49] A. Visconti, *Problemi* n 1 above, 69; A. Massaro, 'Diritto penale e beni culturali: aporie e prospettive', in E. Battelli et al eds, *Patrimonio culturale. Profili giuridici e tecniche di tutela* (Roma: RomaTre Press, 2017), 187-188.

[50] A. Visconti, 'The Reform of Italian Law' n 42 above, 171; Id, *Problemi e prospettive* n 1 above, 66-68; G.P. Demuro, 'I delitti contro il patrimonio culturale nel Codice penale: prime riflessioni sul nuovo titolo VIII-bis' *sistemapenale.it*,5-6 (2022).

[51] On this topic, see A. Massaro, 'Illecita esportazione di cose di interesse artistico: la nozione sostanziale di bene culturale e le modifiche introdotte dalla legge n. 124 del 2017' *dirittopenaleuomo.org*, 118-122 (2017).

[52] N. Recchia, n 43 above, 92; A. Visconti, 'The Reform of Italian Law'n 42 above, 170; C. Perini n 39 above, 19-20.

[53] A. Massaro, n 51 above, 190-192; C. Perini, n 39 above, 21-22; L. Lupària, 'La tutela penale dei beni culturali nella dimensione processuale', in Centro Nazionale di Prevenzione e Difesa Sociale ed, n 1 above, 265-267.

dedicated to crimes against cultural heritage.

V. The Main Provisions of the 2022 Reform

As mentioned in section I, following the ratification in January 2022 of the Nicosia Convention, Italy adopted legge 9 March 2022 no 22, concerning 'Provisions on criminal offences against cultural heritage'.

The reform amended the Italian Criminal Code (ICC) in many aspects. First, the ICC consolidated some of the criminal offences that were introduced by the CHC, relocating them in the Criminal Code. Secondly, the ICC created new criminal provisions against cultural heritage and introduced new aggravating and mitigating circumstances applying to these crimes. Lastly, the reform extended the scope of application of corporate liability so as to cover most of the newly established crimes.

Before delving into the analysis of the offences introduced by legge no 22/2022, it is also necessary to clarify what the reform did not do. As discussed in section IV, since the introduction of the first crimes against cultural heritage in the 1930 ICC, doubts arose in the case law about the very definition of cultural heritage and cultural assets. These doubts persisted after the 2022 reform. Notwithstanding the fact that almost every provision included in the new Section VIII-*bis* of the ICC refers to these notions, legge no 22/2022 neglected to provide a definition of both cultural heritage and assets.

Luckily, such a gap has been already filled by courts. Shortly after the reform came into force, in September 2023, the Supreme Court of Cassation was called upon to apply the newly established crime of 'misappropriation of cultural assets' under ICC Art 518-*ter*.[54] Following the approach already embraced by courts before the 2022 reform, the judges demonstrated their adherence to the so-called *concezione sostanzialistica*, confirming that any good characterized by an intrinsic cultural value fits in the notion of cultural heritage protected by the provisions of Section VIII-*bis* of the Criminal Code.[55]

The opinion in question reflects a clear standpoint by the Supreme Court of Cassation in the longstanding and vibrant debate on how cultural goods should be identified from a criminal law perspective.

1. New Criminal Offences Introduced by Law no 22/2022

Before the adoption of legge no 22/2022, when cultural property was endangered or affected by any criminal conduct which was different from the ones that specifically refer to cultural property,[56] general ICC offences (such as,

[54] Corte di Cassazione-Sezione penale II 27 September 2023 no 41131, available at http://tinyurl.com/ms3x6hv8 (last visited 30 September 2024).

[55] On this topic, see D. Colombo, 'La 'culturalità' del bene nei reati contro il patrimonio culturale. Anche dopo la riforma la Cassazione accoglie la tesi 'sostanzialistica' *sistemapenale.it,* 1 (2023).

[56] See n 39 above.

eg, those on theft) applied. Now, since the new criminal provisions established in Section VIII-*bis* of the ICC specifically mention cultural assets, according to the '*lex specialis* doctrine' (*principio di specialità*),[57] their application overrides that of the traditional ICC offences.

More in particular, Art 1(1)(b) of legge no 22/2022 introduced the following offences in the newly created Section VIII-*bis* of the ICC:

- theft of cultural property (ICC Art 518-*bis*);
- misappropriation of cultural assets (ICC Art 518-*ter*);
- fencing of cultural assets (ICC Art 518-*quarter*);
- use of cultural assets from criminal origin (ICC Art 518-*quinquies*);
- laundering of cultural assets (ICC Art 518-*sexies*);
- self-laundering of cultural assets (ICC Art 518-*septies*);
- forgery of a private contract related to cultural assets (ICC Art 518-*octies*);
- violations regarding the sale of cultural assets (ICC Art 518-*novies*);
- unlawful importation of cultural assets (ICC Art 518-*decies*);
- unlawful exit or exportation of cultural assets (ICC Art 518-*undecies*);
- destruction, dispersion, deterioration, defacement, soiling, and unlawful use of cultural or landscape assets (ICC Art 518-*duodecies*);
- devastation and looting of cultural and landscape assets (ICC Art 518-*terdecies*);
- counterfeiting of works of art (ICC Art 518-*quaterdecies*).

While some of these crimes are new,[58] others are a reformulation of previous CHC norms,[59] and still others combine elements of the CHC with the ICC's general pre-existing norms.[60]

As far as prosecution is concerned, adopting the principle of universal jurisdiction, ICC Art 518-undevicies ('Offences committed abroad') states that the offences listed under Section VIII-bis '[…] apply also in case the crime is committed abroad to the detriment of the national cultural heritage'. Considering the transnational component that frequently characterizes heritage crimes,[61] the provision seeks to ensure the broad application of Italian law. However, this provision neglects to introduce means to facilitate cross-border enforcement and investigative cooperation with criminal authorities abroad.[62] Case law will soon

[57] See Art 15 of the Italian Criminal Code.

[58] This is the case, for instance, of the crimes under ICC Arts 518-*decies* and 518-*undevicies*, as well as the new offence introduced in ICC Art 707-*bis* (concerning 'Unjustified possession of ground scanners or metal detectors'), which has been included in a different Section of the ICC. On ICC Art 707-*bis*, see L. Mazza, 'Il Possesso ingiustificato di strumenti per il sondaggio del terreno o di apparecchiature per la rilevazione dei metalli', in Id ed, *Le disposizioni in materia di reati contro il patrimonio culturale* (Pisa: Pacini Giuridica, 2023), 195-206.

[59] This holds true for ICC Arts 518-*novies*, 518-*undecies*, and 518-*quaterdecies*, whose penalties were however increased by the 2022 reform.

[60] See for instance ICC Arts 518-*undecies* and 518-*duodecies*.

[61] See n 1 above.

[62] On this topic, see F. Mazza, 'Il "fatto commesso all'estero" ', in Id ed, *Le disposizioni* n 59

reveal whether foreign prosecutors, especially outside the European Union, will be willing to cooperate with the Italian courts, thus making Art 518-*undevicies* truly effective.

2. Aggravating and Mitigating Circumstances

Among the innovations of the 2022 reform lies the introduction of new aggravating (ICC Art 518-*sexiesdecies*) and mitigating circumstances (ICC Art 518-*septiesdecies*) applicable to every crime now included in Section VIII-*bis*.[63]

ICC Art 518-*sexiesdecies* is based – with some variations – on Art 15 of the Nicosia Convention. The latter includes a list of four aggravating circumstances that each Party shall take into consideration when 'determining the sanctions in relation to the criminal offences referred to in this Convention'. More specifically, the Convention establishes that penalties should be increased when the offence is 'committed by persons abusing the trust placed in them in their capacity as professionals.'[64] Trying to widen the scope of application of this circumstance, Art 518-*sexiesdecies* of the ICC does not mention the requirement of 'trust', but rather applies whenever the crime is committed 'in the scope of a professional, commercial, banking, or financial activity'. Sanctions are increased by one-third to one-half.

Furthermore, both Art 15 of the Nicosia Convention and Art 518-*sexiesdecies* of the ICC establish increased penalties when the crime is 'committed by a public official entrusted with the conservation or the protection of movable or immovable cultural property' or 'in the framework of a criminal organisation'.[65] Given the recurrent and close connection between some specialists working in the cultural sector and members of transnational organized crime, both circumstances reflect the Nicosia Convention's main purpose to prevent and fight the illicit trafficking of cultural property.

As far as mitigating circumstances are concerned, the Nicosia Convention omits this topic. Conversely, using quite broad wording, ICC Art 519-*septiesdecies* decreases penalties by one-third to two-thirds when the person involved in the crime helps with the identification of the accomplices, provides evidence of the committed crime, takes steps to ensure that the criminal activity did not lead to further consequences,

above, 189-194.

[63] Before the 2022 reform, Arts 177 and 178 of the Italian CHC dealt with the same topic. However, these provisions had a quite specific scope. According to Art 177 CHC, mitigating circumstances applied only in the case of unlawful exit and exportation and unlawful appropriation. Art 178(2) CHC provided for an aggravating circumstance only in reference to forgery of works of art. Anyway, both articles were repealed by legge no 22/2022.

[64] See Art 15(1)(a) of the 2017 Nicosia Convention.

[65] Art 518-*sexiesdecies* especially mentions Art 416 of the Italian Criminal Code which applies when 'three or more persons associate together in order to commit more than one crime'. On this topic, see F. Mazza, 'Il sistema delle circostanze aggravanti', in Id ed, *Le disposizioni* n 59 above, 202-203.

or has recovered – or has made someone – recover the cultural assets which were affected by the crime. Penalties are also reduced when the criminal behaviour is not particularly serious or does not produce dangerous consequences, thus creating the opportunity to commensurate sanctions with the seriousness of each specific crime.[66]

3. The Introduction of Corporate Liability for Legal Entities Operating in the Cultural Sector

As noted above in section III, one of the main novelties brought about by the 2017 Nicosia Convention concerns the rules on the liability of legal persons. More specifically, according to Art 13(1) of the Convention,

> '[e]ach Party shall ensure that legal persons can be held liable for criminal offences referred to in this Convention, when committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within that legal person'.

Art 13(2) also contemplates liability where someone in a leading position fails to supervise or check on an employee or agent, thus enabling them to commit any of the offences referred to in the Convention for the benefit of the legal person. As far as the kind of liability is concerned, Art 13(3) specifies that 'the liability of a legal person may be criminal, civil or administrative', according to the legal principles of each Party. It does not exclude individual liability (Art 13(4)). Lastly, Art 14 provides for a catalogue of sanctions, which include criminal or non-criminal monetary sanctions, temporary or permanent disqualification, or placing under judicial supervision.

Moving on to the Italian framework, it should be noted that the concept of corporate liability is well-known in the country. Under decreto legislativo 8 June 2001 no 231,[67] corporations and associations may incur administrative liability for crimes perpetuated in their interest or to their advantage.

Implementing Art 13 of the Nicosia Convention, legge no 22/2022 introduced two new provisions in decreto legislativo no 231/2001, thus expanding the list of crimes that may give rise to corporate liability under the latter. The newly inserted Art 25-septiesdecies of decreto legislativo no 231/2001, concerning 'Crimes against cultural heritage', now provides for the imposition of quota-based financial penalties and disqualification on legal entities which commit most of the crimes mentioned in Section VIII-*bis* of the ICC.[68] Similarly, Art 25-*duodevicies* of decreto legislativo no 231/2001, dealing specifically with the laundering of cultural assets[69] and the

[66] On the reasons that led to the introduction of mitigating circumstances in Section VIII-bis, see A. Visconti, *Problemi e prospettive* n 1 above, 206-209.

[67] Decreto legislativo 8 June 2001 no 231. On this topic, F.D. Iacopino et al, n 31 above, 147-162.

[68] Art 25-*septiesdecies* does not mention Art 518-quinquies of the ICC ('Employment of cultural property of criminal origin').

[69] Art 25-*duodevicies* of decreto legislative no 231/2001 however omits to mention the

devastation and looting of cultural and landscape assets, now imposes quota-based financial penalties and disqualification on the legal entities involved in, or benefitted by, this conduct.

Considering these amendments and according to Art 6 of decreto legislativo no 231/2001, companies and legal entities that operate in or in close connection with the art market and cultural sector will need to internalize appropriate compliance measures to avoid the risk of being held liable. After carefully carrying out a risk assessment on the new criminal offences against cultural heritage, the Italian art industry will presumably need to update its existing protocols or adopt enhanced organizational models based, among other things, on reporting, traceability, and digitalization procedures, in order to mitigate the risk of illicit behaviors.[70]

VI. Concluding Remarks: The Exceptionalism of Italian Criminal Law

With the variety of multilateral instruments surveyed in this paper, the international community has consistently confirmed, since the mid-nineteenth century, its commitment to fight the intentional destruction of cultural heritage. However, the implementation of international conventions and resolutions necessarily depends on their incorporation into national legislation. Even in cases in which implementation follows, the discretion left to each state inevitably leads to a substantial lack of harmonization.[71]

Among the countries with a distinctive set of criminal penalties dedicated exclusively to cultural heritage safeguarding, only a few – such as Spain[72] and the Russian Federation[73] – have inserted these provisions in their respective Criminal

crime of 'self-laundering' (punished under ICC Art 518-*septies*). On this controversial drafting choice, see I. Conti, 'La responsabilità delle persone in materia di delitti contro il patrimonio culturale', in L. Mazza ed, *Le disposizioni* n 59 above, 225-226.

[70] On this topic, see ibid 226-227; L. Ponzoni and F. Dimaggio, 'I reati contro il patrimonio culturale e l'aggiornamento dei Modelli 231' *giurisprudenzapenale.com*, 22-26 (2023); L. Troyer and M. Tettamanti, 'Reati contro il patrimonio culturale e responsabilità degli enti: questioni interpretative e suggerimenti pratici' *Diritto penale commerciale Opinioni*, 1179-1182 (2022).

[71] On this topic, see A.F. Vrdoljak, n 3 above, 26; F. Caponigri and A. Pirri, n 21 above.

[72] Art 46 of the Spanish Constitution promote the preservation and enrichment of the historic, cultural and artistic heritage of Spain, underlining that '(…) Offences committed against this heritage shall be punished under criminal law'. The Spanish Criminal Code from 1995 is based on a mixed safeguard system. On the one hand, Chapter II in Section XVI deals specifically with crimes against historical heritage. On the other hand, many traditional crimes like theft, fraud, and embezzlement provide increased penalties when they have been committed against items of 'artistic, historic, cultural or scientific value' (see Arts 235(1)(1)), 250(3)). On this topic, see D. Vozza, 'Prevenzione e contrasto al traffico illecito di beni culturali mobili', in Centro Nazionale di Prevenzione e Difesa Sociale ed, n 1 above, 192-202.

[73] The Russian Federation's Criminal Code does not provide a specific section dedicated to cultural heritage. However, Arts 164, 190, and 243 deal specifically with items of the artistic, historical, and archaeological heritage. On circulation of cultural objects in Russian law, see Y. Vertinskaya, 'Circulation of Cultural Objects in Russian Law – An Overview' 2 *Santander Art and Culture Law Review,* 159-184 (2018).

Codes, while others have opted to introduce the new rules in general acts on the protection of cultural property.[74] In this context, the Italian 2022 reform can be considered unique for at least two reasons. Firstly, the reform represents an unprecedented attempt to enforce in a criminal codification a comprehensive framework expressively dedicated to cultural heritage. Secondly, the reform carefully takes into account many of the peculiarities of the art market, including its frequent intersections with the illicit domain; for instance, it rightly provides for long-awaited rules on the liability of the legal entities operating in the cultural sector.

It can be stated that, following the enforcement of the 2022 reform, the Italian legal framework has become even more exhaustive, turning into a model that other countries interested in reforming their cultural heritage framework could take into consideration. However, since the reform chose not to repeal all the previous regulations, some coordination issues persist, making it difficult for lawyers and actors in the art market especially if not familiar with the Italian legal infrastructure to orientate themselves among different legal sources.

While the introduction of new criminal provisions and the increasing of penalties will presumably make criminals less inclined to endanger the Italian cultural heritage, at least in the short term, criminal networks are also well known for their ability to engage in forum shopping, to exploit legal loopholes and shortcomings to maximize profits, and to avoid prosecution in the jurisdictions that are known for the severity of their criminal responses.[75] This massive use of criminal law may therefore lead to an impoverishment of the Italian art market in favour of foreign cultural venues.

As of now, we can confirm that legge no 22/2022 has been positively approved by many Italian legal experts, and has drawn the attention of foreign scholars as well. What has been most appreciated is the fact that the reform emphasizes the prominent position of the penal instrument, clearly acknowledging the significant economic impact that is generated by criminal conducts against cultural heritage, whose seriousness has been underestimated for too long.[76]However, several art market operators have already complained about the increase in their risk assessment duties, which in their opinion will be burdensome to carry out due to an alleged lack of time and resources.[77] This kind of reaction, although foreseeable,

[74] Some examples are represented by France, the United Kingdom, and Malta, which have enforced criminal provisions respectively in the Code du patrimoine (France), the Dealing in Cultural Object (Offences) Act 2003 (UK), and the Cultural Heritage Act (Malta).

[75] S. Manacorda, 'Criminal Law' n 8 above, 23; on how jurisdictions can play the role of interfaces in facilitating the illegal importation and exportation of cultural goods, see E. Tijhuis, n 2 above, 121-123.

[76] On this topic, see G. Melillo, 'La cooperazione giudiziaria internazionale nei reati contro il patrimonio culturale' in S. Manacorda and A. Visconti eds, *Beni culturali e sistema penale* (Milano: Vita e Pensiero Editrice, 2013), 56-67; L. Natali, 'Patrimonio culturale e immaginazione criminologica' n 1 above, 74, 76-78; L. Lupària, n 53 above, 243-245.

[77] S. Reyburn, 'Britain Moves to Regulate Its Art Trade. Bring Your ID' *The New York Times*, available at http://tinyurl.com/stc429r6 (last visited 30 September 2024); J. Dalley, 'Can

could represent a huge obstacle in counteractions against cultural heritage crimes.

Time will tell whether the 2022 reform is effective in fighting crimes against the Italian cultural heritage. Criminologists have already confirmed that the fight against these conducts cannot be successful if it is not combined with the establishment and strengthening of preventive actions and operational mechanisms, both at a local level and at the international one, to reduce the presence of illicitly acquired items in the art market.[78] As long as art world professionals are unwilling to properly undertake their due diligence duties, any legal framework, as exhaustive as it may be, cannot be considered fully effective.

the Art World Clean Up Its Act?' *Financial Times* available at http://tinyurl.com/4cm2rwtn (last visited 30 September 2024).

[78] On the role preventive measures and operational mechanisms can play in contrasting the illicit trade, see L. Natali, n 1 above, 75-76; F. Shyllon, 'Intergovernmental and Non-governmental Organizations Grasping the Nettle of Illicit Trafficking in Cultural Property', in S. Manacorda and A. Visconti eds, *Protecting Cultural Heritage as a Common Good of Humanity*, (Milano: ISPAC, 2014), 75-76; D. Fincham, 'Two Ways of Policing Cultural Heritage', in S. Manacorda and A. Visconti eds, *Protecting Cultural Heritage as a Common Good of Humanity* (Milano: ISPAC, 2014), 91-92; A. Visconti, 'Strategie sanzionatorie e politico-criminali', in S. Manacorda and A. Visconti eds, *Beni culturali e sistema penale* n 77 above, 143-155.

Insights & Analyses

From Planned Obsolescence to the Right to Repair in the Prism of Sustainability

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Abstract

The work examines the phenomenon of planned obsolescence, now widespread in industrial societies, in relation to the problems it raises in terms of environmental protection requirements, using the parameter of sustainability as a lens through which to assess the merits of the interests involved.

I. Introduction. Spread of the Phenomenon of Planned (and Early) Obsolescence. Clarification of Terminology Necessary to Delimit the Field of Investigation.

Modern industrial society appears to be characterised by a consumer system in which the interval between one product and another is increasingly short.[1] Products, especially electronic products, are designed, from the outset, to have a limited lifespan, which is almost always slightly longer than the expiry of the period of the legal guarantee of conformity,[2] and after which product malfunctions begin and are accompanied by the impossibility of repair due to the absence or excessive cost of spare parts. The consumer is thus induced to replace the product with a new version available on the market.[3]

This phenomenon is known by the term 'planned obsolescence':[4] the lifespan

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[1] See, among numerous contributions, M. Franchi, *Il senso del consumo* (Milano: Mondadori, 2007); Z. Bauman, *Per tutti i gusti, la cultura nell'età dei consumi* (Rome-Bari: Laterza, 2016).

[2] The phenomenon is well explained by G. D'Amico, 'La compravendita',in P. Perlingieri, *Trattato di diritto civile CNN* (Napoli: Edizioni Scientifiche Italiane, 2013), 461. See A. Luminoso, *La compravendita* (Torino: Giappichelli, 2018), 350; G. Recinto et al, *Diritti e tutele dei consumatori* (Napoli: Edizioni Scientifiche Italiane, 2014), 163; R. Calvo, *Vendita e responsabilità per vizi materiali*, II, *Il regime delle garanzie nelle vendite di beni di consumo* (Napoli: Edizioni Scientifiche Italiane, 2007). On these aspects see also S. Cherti, *Le garanzie convenzionali nella vendita* (Padova: CEDAM, 2004), 1.

[3] F. Trubiani, 'I contratti di cloud computing: natura, contenuti e qualificazione giuridica' *Il diritto dell'informazione e dell'informatica*, II, 395 (2022).

[4] On the phenomenon of planned obsolescence, see, without any claim to exhaustiveness, the following contributions of the doctrine: S. Zolea, 'Verso un diritto dell'obsolescenza programmata: ipotesi legislative, novità giurisprudenziali e spunti comparativi' *GiustiziaCivile.com*, 35 (2021); G. D'Ippolito and A. Re, 'Obsolescenza programmata. The AGCM sanziona Apple e Samsung' *MediaLaw.eu*, 325 (2019); A. Giannaccari, 'Apple, obsolescenza tecnologica (programmata) e

of certain products is shortened at the design stage, ie the possibility of repairing or upgrading a programme or operating system is ruled out at the construction stage; the product assortment ages rapidly and requires cyclical and incessant replacement.[5]

It is easy to see how this practice is disadvantageous for consumers (due to the high costs they have to bear), but on the other hand extremely advantageous for manufacturers of consumer goods, who decide to shorten the life cycle of such goods with the primary intention of increasing their replacement rate.[6] It is not surprising, therefore, that so many products on the market today, although they can structurally and functionally last longer, are deliberately constructed and designed to have a limited lifespan.[7] This aim is pursued, in some cases, by using materials that wear down after a certain period of time (in this case we speak of physical obsolescence),[8] in others, through the inclusion in the product itself of

diritti dei consumatori' *Mercato concorrenza regole*, 149 (2019); S. Latouche, *Usa e getta. Le follie dell'obsolescenza programmata* (Torino: Bollati Boringhieri, 2015) (Italian translation edited by F. Grillenzoni), *passim*. In the foreign literature, see, among others, J. Bulow, 'An economic theory of planned obsolescence' *The Quarterly Journal of Economics*, IV, 729 (1986); G. Glade, *Made to break: technology and obsolescence in America* (Harvard: Harvard University Press, 2009). S. Rodotà, 'Diritto, scienza e tecnologia: modelli e scelte di regolamentazione', in G. Comandè and G. Ponzanelli eds, *Scienza e diritto nel prisma del diritto comparator* (Torino: Giappichelli, 2004), 397. Cf again with regard to the planned obsolescence of legal rules, R. Ferrara, '*L'incertezza delle regole tra indirizzo politico e "funzione definitoria" della giurisprudenza*' *Diritto amministrativo*, IV, 651 (2014). In the same vein, M.A. Sandulli, *Codificazione, semplificazione e qualità delle regole* (Milano: Giuffrè, 2005), *passim, who* speaks of '*sunset* rules', ie programmed obsolescence, in the sense that their cadenced revision is actually planned, in tune with scientific and technological evolution (the so-called B.A.T., *best technology available*) or, in any case, with the changing historical-environmental conditions or as a consequence of the evaluation and measurement of the performance rate (A.I.R. and V.I.R.).

[5] M. Cian, 'L'economia immaginaria: spigolature' *Giurisprudenza commentata*, II, 393 (2018).

[6] The first case of planned obsolescence in history dates back to 1924, when the world's first 'cartel' (it was called *Phoebus*) between incandescent bulb manufacturers was formed in Geneva. The aim was to control the production of light bulbs in all countries of the world (Europe, the United States, much of Asia and Africa) by exchanging patents. The following year, a special commission (the '1000 hours' commission) was set up with the aim of modifying the light bulbs to bring their life to the stipulated period. And so it was that the light bulbs, which until then had run for up to 2500 hours, began to run for up to 1000 hours. In 1940, a similar case concerned the chemical company *DuPont*, which was known for having invented nylon, a synthetic fibre, which was revolutionary for its characteristics at the time. Despite the fact that it was a particularly strong fibre, when it was used to make women's stockings, the *DuPont* engineers were ordered to make it less strong and resistant, so that the stockings would also have a limited lifespan.

[7] One thinks of the class action brought against Apple for having placed on the market millions of iPods that within eight to twelve months began to have battery problems that, however, could not be repaired or replaced, with the only solution being to buy a new iPod. For more details, see F. Passagnoli, 'La "sentenza Apple" nel processo europeo di contrasto alla pianificazione fiscale aggressiva' *Rivista giurisprudenza tributaria*, 207 (2021); F. Pepe, '"How to dismantle an atomic bomb": osservazioni sul caso "Apple" e sulla prima giurisprudenza europea in materia di "rulings" fiscali' *Rivista di diritto tributario*,329 (2021). See, in a broader perspective, R. Coco, 'Taiwan imposes compulsory patent licences on Philips: the European Commission investigates' *Rivista di diritto industriale*, I, 36 (2008).

[8] Think, for example, of the filament that is inserted in light bulbs.

components capable of inhibiting, after a certain period of time, the functioning of the good (in this case we speak of functional obsolescence).[9]

The fact is that, increasingly often, planned obsolescence concerns a minimal component of the product in terms of cost (essential, however, for its functioning) that could easily be replaced, but instead, due to a specific company choice, ceases to be produced, rendering the product itself unusable.[10]

The strategy of planned (or, to be more precise, accelerated) obsolescence of technological goods and/or services, increasingly prevalent in today's production system,[11] has ended up having a strong impact on the very concept of durability of goods.[12]

It should also be added that obsolescence is often psychological (so-called 'perceived' or 'symbolic' obsolescence), since it is linked to a mere mental aspect of the consumer, who is influenced by advertising messages, or by the presence on the market of ever newer and more desirable models, perceived as more modern and performing, even though they do not present significant improvements from a functional point of view. It may also happen that obsolescence is merely technological, in the sense that it derives from a supervening inadequacy caused

[9] Consider, again purely by way of example, *chips* that jam printer cartridges after a certain time despite the fact that they are still equipped with ink suitable for use. For other examples, see S. Dalla Casa, 'Fatto per non durare: il cartello Phoebus e l'obsolescenza programmata' *www.wired.it,* 2016.

[10] An example could be the dust bag that is essential for the operation of a hoover. The reference could, however, also be to *software* updates, if we think, for example, of a mobile phone or a computer: recent investigations have shown that often the goods, so to speak, digital, following an update, can present slowdowns and, sometimes, real malfunctions that give rise to the discipline provided for *under* Art 129 of the Italian Civil Code as the conformity of the goods to the contract is lacking. On the lack of conformity, see, for all, E. Capobianco, L. Mezzasoma and G. Perlingieri, *Codice del consumo annotato con la dottrina e la giurisprudenza* (Napoli: Edizioni Scientifiche Italiane, 2019), 675. On how updates can affect consumer protection in relation to the three hypotheses that can be configured (ie, that a) the consumer decides to update the product and this, following the update, slows down its performance while remaining usable, b) the consumer decides to update the product and this stops working, c) the consumer decides not to update the product and this no longer supports certain *software*, such as those relating to system security), see *amplius* G. Toscano, 'Nuove tecnologie e beni di consume: il problema dell'obsolescenza programmata' *Actualidad juridica iberoamericana*, XVI, 372 (2022).

[11] This is well explained by the well-known French economist and philosopher S. Latouche, *Usa e getta* n 4 above, who focuses on the fact that 'obsolescence is an attempt to remedy industrial overproduction', explaining how it is one of the many reasons why we should condemn both the consumer society and the productivist system.

[12] On the notion of 'durability' of the good, see F. Addis, 'Spunti esegetici sugli aspetti dei contratti di vendita di beni regolati dalla nuova Direttiva (UE) 2019/771', in *Scritti in onore di Antonio Flamini* (Napoli: Edizioni Scientifiche Italiane, 2020), I, 13. On the issues underlying the notion, see G. Simonini, 'Verso una nozione allargata di difetto di conformità: sarà rilevante anche la "durabilità" del bene?' *Danno e responsabilità*, 471 (2019); M. D'Onofrio, 'Obsolescenza programmata: qualificazione giuridica e rimedi alla luce della Direttiva 2019/771/UE e del diritto interno' *Nuove leggi civili commentate*, 518 (2022). On the different definitions of 'durability' of products, found in the literature, especially economic literature, see European Commission, 'The Durability of Products - Final Report', August 2015, 36.

by the presence on the market of another, more economically efficient and competitive good.[13] In this specific hypothesis, the older good, although still structurally intact and in the abstract suitable for its productive function, in concrete terms appears technically obsolete, in that it is typologically superseded by another capable of guaranteeing greater productive utility and lower costs.[14] Nonetheless, the difference between these hypotheses and planned obsolescence is immediately obvious; the latter is characterised by absolute functional deterioration of the asset, which will necessarily have to be replaced with another of the same type, which is not necessarily more technologically advanced.[15]

Hence, the practice of intentionally shortening the life cycle of products is of concern not only for the limitation of consumers' freedom of choice when they are called upon to bear greater costs (a concern that is beyond the scope of this discussion), but above all for the negative impact it has on the environment. Planned obsolescence, in fact, impacts the environment from a twofold point of view: that of the consumption of the raw materials needed to produce the new good, as well as that of the disposal of goods considered obsolete, presenting a surplus of waste that is difficult to manage, especially in the area of electronic products.[16]

II. Planned Obsolescence and the Environment. Towards Finding a Balance Point in a Circular Economy Perspective. From the Model of Planned Obsolescence to that Based on the Right to Repair.

Faced with a context such as the one just outlined – the result of an almost century-long process of affirmation and diffusion of strategies aimed at defining (or, in reality, planning) the life cycle of a product so as to limit its duration to a pre-established period – in recent years, timid signs are beginning to appear that seem to presage a reversal of direction. This reversal stems from heterogeneous needs ascribable to the spread of a new and increasing awareness of environmental

[13] See A. Bellizzi Di San Lorenzo, 'Obsolescenza programmata dei prodotti e dei dati personali' *Osservatorio sulle fonti*, I, 1 (2019).

[14] Think of the difference between a computer that can only read *floppy disks* and one, on the other hand, that is able to allow the use of more advanced *pen drives* via USB ports.

[15] For a framing also from a historical point of view of the development of consumerism and the so-called disposable, see S. Latouche, *Usa e getta* n 4 above, who, starting from the distinction between technical obsolescence (loss of value of equipment due to the appearance of more efficient models), planned obsolescence (intentional introduction of defects into products) and symbolic obsolescence (early downgrading of the object by advertising and fashion), states that 'the starting point of planned obsolescence is the dependence of our production system on growth. Our society has tied its fate to an organisation based on unlimited accumulation'.

[16] On the delicate issue of waste management see, as of now, C. Verde, 'Profili privatistici del trasporto transfrontaliero di rifiuti: un regime differenziata sulla scorta di un criterio tipologico' *Annali SISDiC,* IX, 1 (2022), who 'envisages a modern conception of the 'waste' phenomenon, investigating its place in the current legal system'; on this topic see G. Resta, 'I rifiuti come beni in senso giuridico' *Rivista critica del diritto privato*, 207 (2018).

issues (in their interrelation with business and consumption),[17] in a legal context that appears to be increasingly oriented towards environmental protection.[18]

In this regard, it is worth recalling that, following the entry into force of Constitutional Law no 1 of 11 February 2022, environmental protection also finds explicit recognition in the Italian Constitution, thanks to the amendment of Arts 9 and 41.[19] To be specific, the reform added a new third paragraph to Art 9 of the Constitution, according to which the Republic 'protects the environment, biodiversity and ecosystems, also in the interest of future generations', and amended Art41, second and third paras, of the Constitution, so that the current wording of the rule provides that

> 'private economic initiative [...] [n]ot be carried out in conflict with social utility or in such a way as to harm health, the environment, security, freedom and human dignity. The law determines the appropriate programmes and controls so that public and private economic activity can be directed and coordinated for social and environmental purposes'.[20]

And it is here that the issue of planned obsolescence is fully intertwined with that of sustainability,[21] a term that has now entered common parlance and which, as it is well known, finds its original definition in the 1987 Report of the World Commission on Environment and Development (*Brundtland* Report), which defines sustainable development as development that 'meets the needs of the present generation without compromising the ability of future generations to meet their own needs'.[22]

Today, the term 'sustainable development' refers to the virtuous balance

[17] See M. Cossu, 'Sostenibilità e mercati: la sostenibilità ambientale dell'impresa dai mercati reali ai mercati finanziari' *Banca Borsa Titoli di Credito*,IV, 558 (2023).

[18] P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, II, *Fonti e interpretazione* (Napoli: Edizioni Scientifiche Italiane, 2020), 49.

[19] Cf M. Del Frate, 'La tutela dell'ambiente nel riformato art. 41, secondo comma, Cost.: qualcosa di nuovo nell'aria?' *Diritto delle relazioni industriali*, III, 907 (2022).

[20] Recently on the subject, with a critical approach, F. Fimmanò, 'Articolo 41 della Costituzione e valori ESG: esiste davvero una responsabilità sociale dell'impresa?' *Giurisprudenza commerciale*, V, 777 (2023).

[21] On the three main areas of sustainability (environmental, social and economic) see S. Cosimato, *Sviluppo sostenibile e imprenditorialità. Competitività e innovazione nelle PMI*, (Napoli: Edizioni Scientifiche Italiane, 2015), 13.

[22] On the subject of sustainable development, with a careful approach to the protection of the human person, P. Perlingieri, 'I diritti umani come base dello sviluppo sostenibile. Aspetti giuridici e sociologici' *Rivista giuridica del Molise e del Sannio*, 11 (2000); in Id, *La persona e i suoi diritti. Problemi del diritto civile*, (Napoli: Edizioni Scientifiche Italiane, 2005), 73; and in Id, *Lezioni (1969-2019)*, I, (Napoli: Edizioni Scientifiche Italiane: 2020), 161. See, for interesting insights on the topic, also M. Pennasilico, 'Sviluppo sostenibile e "contratto ecologico": un altro modo di soddisfare i bisogni'*Rassegna di diritto civile*, IV, 1291 (2016). On sustainability, with reference to the current legal system, see E. Caterini, *Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale* (Napoli: Edizioni Scientifiche Italiane, 2018), *passim, who* appropriately identifies sustainability as a useful tool for the material and spiritual progress of society.

between the environmental, economic and social dimensions, as reflected in the 2030 Agenda adopted by the United Nations General Assembly in September 2015.

In the European context, sustainable development is regarded as a fundamental principle, as clearly outlined in the preamble and in Art 3(3) of the EU Treaty, which expressly states that the European Union

> '[s]trengthens the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment'.[23]

It is immediately evident, even after reading the above-mentioned article, how the principle of sustainable development implies real 'antinomian tensions',[24] since on the one hand it presupposes an evolution of society towards an ever greater level of well-being, but on the other hand it sets an insurmountable limit on growth, to be found in the protection of the environment and in the most rational use of resources.[25]

This need for sustainability undoubtedly calls for a reconsideration of the phenomenon of planned obsolescence, since the impact that the production of goods with a limited lifespan creates on the environment is clear to all. One thinks, as already mentioned, not only of the excessive consumption of natural resources required for production of the new good (destined to replace the 'obsolete' one) but also of the increase in waste due to the disposal of products considered (prematurely) obsolete. Add to this the extensive use of minerals, considered fundamental in advanced technology, which risk becoming potential weapons of blackmail in the hands of non-European mining countries.

It is evident that planned obsolescence represents a real ecological problem, requiring alternative solutions aimed sustainability and longevity of products in the context of a circular economy, which can be defined as an alternative development model to the linear economic approach that sequences production, use and disposal of goods.[26]

[23] Art 3 para 3 of the EU Treaty.

[24] The expression used is from M. Pennasilico, 'Sviluppo sostenibile' n 22 above.

[25] Cf M. Libertini, 'La responsabilità d'impresa e l'ambiente', in *La responsabilità dell'impresa, Convegno per i trent'anni di Giurisprudenza commerciale*, Bologna, 8-9 October 2004 (Milano: Giuffrè, 2006), 199-217, where the author defines sustainable development as 'a modernised formula to indicate the traditional criterion of the rational use of natural resources'.

[26] On the circular economy, the literature is now copious. Among the various authors, without any claim to exhaustiveness, see V. Cavanna, 'Economia verde, efficienza delle risorse ed economia circolare: il rapporto "Signals 2014" dell'Agenzia europea dell'Ambiente' *Rivista giuridica dell'ambiente*, 821 (2014); F. De Leonardis, 'Economia circolare: saggio sui suoi tre aspetti giuridici. Verso uno stato circolare?' *Diritto amministrativo*, 163 (2017); Id ed, *Studi in tema di economia circolare* (Macerata: Edizioni Università di Macerata, 2019); M. Meli, 'Oltre il principio chi inquina paga: verso un'economia circolare'*Rivista critica del diritto privato*, 63 (2017); R. Ferrara, 'Brown economy, green economy, blue economy: l'economia circolare e il dirittodell'ambiente'

The typical approach of the circular model, instead of creating products that will become waste at the end of their useful life, focuses on redesigning the production system to make materials continuously reusable and regenerable; in fact, products are designed to minimise the creation of waste and consequently pollution, avoiding the use of hazardous materials and ensuring that the objects created are easily disassembled, repairable, reusable and recyclable. The aim is to be able to extend the time and possibilities of use of products as much as possible through strategies of reuse, reconditioning and recycling, thus keeping material and energy resources within the economy as long as possible.[27]

The long-term goal of the circular economy is, therefore, to create a sustainable production system, capable of decreasing dependence on natural resources, while also contributing to climate change mitigation.[28]

III. Actions Taken by the European Legislator to Counter the Phenomenon of Premature Obsolescence of Products

The initiatives put in place in recent years by the European legislator to combat premature obsolescence and promote the durability, recyclability, reparability and accessibility of products, so as to enable the so-called green transition[29] are part of movement towards sustainability and a circular economy. More specifically, on 25 November 2020 the European Parliament adopted a Resolution aimed at encouraging production and consumption models compatible with sustainable development,[30] inviting the Commission

Diritto processuale amministrativo, 801 (2018); E. Scotti, 'Poteri pubblici, sviluppo sostenibile ed economia circolare' *Il Diritto dell'economia*, 493 (2019); S. Cavaliere, 'Economia circolare e intervento pubblico nell'economia: spunti di riflessione' *dirittifondamentali.it,* 922 (2020); M. Cocconi, 'Un diritto per l'economia circolare' *Il Diritto dell'economia*, 113 (2019); B. Pozzo, 'I Green claims, l'economia circolare e il ruolo dei consumatori nella protezione dell'ambiente: le nuove iniziative della Commissione europea' *Contratto e impresa*, 286 (2021).

[27] See F. Capra and U. Mattei, *The Ecology of Law. Toward a Legal System in Tune with Nature and Community* (Oakland: Berrett-Koehler Publishers, 2015), *passim*.

[28] On this topic, we would like to mention the 17th Conference of the Italian Society of Civil Law Scholars (S.I.S.Di.C.) entitled 'Climate Change, Sustainability and Civil Relations', held in Rome at La Sapienza University on 11, 12 and 13 January 2024, the proceedings of which are currently being published in the 'Atti Sisdic' series (Napoli: Edizioni Scientifiche Italiane, 2024).

[29] See, in this regard, point 3.1. under the heading 'Green Transition' of the 'New Consumer Agenda - Strengthening consumer resilience for sustainable recovery'. In doctrine, for an in-depth study of the subject, see L. Giurato, 'Il percorso della transizione energetica: da un'economia basata sull'energia pulita alla "rivoluzione verde e transizione ecologica)" del Recovery Plan' *ambientediritto.it*, 841 (2021).

[30]The reference is to the European Parliament resolution of 25 November 2020 on 'Towards a more sustainable single market for businesses and consumers' (2020/2021(INI). In doctrine, among various contributions, see: A. De Franceschi, 'Planned Obsolescence Challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy. The Apple and Samsung Cases' *Journal of European Consumer and Market Law,* VII, 217 (2018); D. Imbruglia, *Mercato unico sostenibile e diritto dei consumatori*, *Persona e Mercato*, 189-201.

> 'to develop, in consultation with stakeholders, a comprehensive strategy that includes measures that differentiate between product categories and take into account technological and market developments, in order to support businesses and consumers and promote sustainable production and consumption models'.[31]

The strategy proposed by the European legislator includes a series of information obligations relating not only to the expected life of the product (which must 'be expressed in years and/or cycles of use and be determined before the product is placed on the market by means of an objective and standardised methodology, based inter alia on actual conditions of use, differences in intensity of use and natural factors') but also to its reparability. The information should be provided to the consumer at the time of purchase, in a clear and comprehensible manner, by means of mandatory labelling;[32] the latter, together with the EU eco-label, should aim to raise the awareness of both consumers and producers towards ever greater environmental protection.

Among the objectives of the European legislator, with a view to the revision of Directive (EU) 2019/771 (referred to in this resolution),[33] is also to determine 'how to align the duration of the legal guarantee with the expected lifetime of a product category', as well as to assess the 'feasibility of strengthening the position of sellers *vis-à-vis* manufacturers by introducing a joint producer-seller liability mechanism within the framework of the legal guarantee regime'.[34]

Further, in order to combat premature obsolescence of products, the Resolution envisages the possibility of including among the practices listed in Annex I of Directive 2005/29/EC also those 'which effectively shorten the lifetime of a product in order to increase its replacement rate and unduly restrict the reparability of products, including software'; practices to be defined on the

[31] Resolution 25 November 2020.

[32] This labelling, developed with the involvement of all stakeholders, should in particular include information on the durability and reparability of the product, for example through a reparability score; the latter could take the form of an environmental performance index, taking into account different criteria over the entire life cycle of the product depending on its category.

[33] EU Directive 2019/771, adopted on 20 May 2019, and implemented by Legislative Decree No 170 of 4 November 2021 (in GU No 281 of 25 November 2021), repealed, as of 1 January 2022, Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. The implementation process has been quite troubled: Law No 53/2021, in force since 8 May 2021, better known as the European Delegation Law 2019-2020, had given the Italian Government the delegation of powers to transpose EU Directive 2019/771; subsequently, with the Government Act submitted for parliamentary opinion no. 270/2021, approved with observations on 5 October 2021, the draft legislative decree implementing the directive was prepared, replacing the entire Chapter I (Of the sale of consumer goods) of Title III of Part IV of the Consumer Code, including Arts 128 to 135. For more in-depth analysis, see S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della direttiva europea 2019/771' *Giurisprudenza italiana,* 271 (2020); F. Bertelli, 'L'armonizzazione massima della direttiva 2019/771 UE e le sorti del principio di maggiore tutela del consumatore' *Europa e diritto privato*,953 (2019).

[34] Resolution 25 November 2020.

basis of an objective and common definition, taking into account the assessment of all interested parties, including research institutes, consumers, businesses and environmental organisations.

Lastly, the Resolution envisages a series of strategies aimed at the repair[35] and reuse of products,[36] together with a 'digital strategy in the service of a sustainable market' and so called responsible advertising.

Less than two years after adopting this Resolution, the European Parliament has once again taken up the issue, approving a new Resolution,[37] in which it has asked the European Commission, in an even more decisive manner, to put in place legislation guaranteeing the durability of products through the provision of a real 'right to repair' (the invitation is to 'design products that last longer and can be repaired'), in order to reduce waste production. More specifically, the Resolution states that the aim is to 'enable consumers to choose repairable products', through clear information about the durability and reparability of the product they are about to buy, so as to allow them to choose between repair and replacement. The possibility of repair, although provided for by the directive on the sale of goods,[38] currently encounters a number of difficulties in its practical 'realisation', as after-sales services are often non-existent and, more often than not, the difficulty of finding information on how to repair a product leads people to prefer to replace it without the possibility of assessing the alternatives. This is why the Parliament

[35] In this respect, the Resolution expressly requires that 'the following information on the availability of spare parts, *software* updates and repairability of the product be made available in a clear and easily readable manner at the time of purchase: estimated period of availability from the date of purchase, average price of spare parts at the time of purchase, approximate recommended delivery and repair times, information on repair and maintenance services, where applicable; it also requires that this information be provided in the product documentation together with a summary of frequently encountered faults and ways to repair them'.

[36] More specifically, among other things, the Resolution 'stresses the importance of strengthening circular economy and sustainable business models, which will minimise product destruction and promote repair and reuse; calls on the Commission to encourage the use of such models while keeping them cost-effective and attractive and ensuring a high level of consumer protection, and to encourage Member States to raise awareness of such models through educational campaigns and training aimed at both consumers and businesses; stresses the importance of investment in research and development in this area'. Furthermore, it "stresses the need to create incentives for consumers to buy second-hand; points out that the transfer of the guarantee, in the event of resale of a good still covered by it, could increase consumer confidence in the second-hand market; calls on the Commission, in this connection, to examine the extent to which the guarantee of the first buyer could be transferred to each additional buyer in the event of subsequent sales, particularly in the context of a passport for digital products also asks the Commission to examine the need to revise the exception clause for second-hand products within the legal guarantee regime of Directive (EU) 2019/771 when revising the Directive, following an impact assessment of the possible effects on second-hand and reuse-based business models.

[37] European Parliament resolution of 7 April 2022 on the right to redress (2022/2515(RSP)), available at www.europal.europa.eu.

[38] See G. Toscano, n 10 above, 372, who analyses the impact on European contract law of new goods with digital elements in the light of the many innovative aspects of EU Directive 2019/771 and the problem of planned obsolescence in the sale of consumer goods between consumer protection and sustainable development.

Resolution calls on the Commission to introduce

> 'in all new product legislation and in the revision of the Ecodesign Directive, an obligation for manufacturers to provide: smart labelling tools such as QR codes and digital product passports[39] [...] through close cooperation with industry and stakeholders, taking into account in particular the principle of proportionality and paying special attention to the needs of SMEs'.[40]

The fight against planned obsolescence is also present in the Proposal for a Directive of the European Parliament and of the Council ('amending Directives 2005/29/EC[41] and 2011/83/EU[42] as regards empowering consumers for the green transition by improving protection against unfair practices and information')of 30 March 2022,[43] which outlines a real policy framework on sustainable products, fitting in with the initiatives of the new consumer agenda[44] and the action plan for the circular economy.[45]

The Proposal's objectives range from 'contributing to a circular, clean and green EU economy' to

> 'tackling unfair commercial practices that distract consumers from making sustainable consumption choices' and improving 'the quality and consistency of enforcement of EU consumer protection rules'.

In order to achieve these objectives, the Proposal provides incentives for greater consumer participation in the circular economy, in particular by providing consumers with more and more detailed information on the durability and reparability of certain products prior to the conclusion of the contract and by protecting them more effectively against unfair commercial practices that prevent, so to speak, sustainable purchases. With specific regard to the latter, the Proposal expressly refers to greenwashing practices (better known as misleading environmental claims), premature obsolescence practices (ie premature failure of goods), and the use of

[39] Regarding the so-called digital passport for products, it should be pointed out that it was already present in the proposal for a regulation establishing the framework for the setting of ecodesign requirements for sustainable products, presented on 30 March 2022.

[40] European Parliament resolution of 7 April 2022, n 37 above.

[41] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (O.J. L 149 of 11 June 2005, p 22).

[42] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22 November 2011, p. 64).

[43] COM (2022) 143 final of 31 March 2022.

[44] COM (2020) 696 final of 13 November 2020.

[45] COM (2020) 98 final of 11 March 2020.

unreliable and non-transparent sustainability labels and information tools.[46]

It is thus evident that the actions of the European legislator are destined to have a significant impact on domestic consumer legislation of the individual Member States, foreseeing (and advocating) a veritable re-education not only of consumers, but also of manufacturers and vendors. Under the current rules suppliers can limit themselves to providing consumers with information the main characteristics of the goods or services, such as the existence of the legal guarantee of conformity and other commercial guarantees; after the entry into force of the new rules they will also have to ensure correct and complete information also on the durability of the products.[47]

Completing the framework outlined above is European Union Regulation 2021/341[48] which, with the clear intention of combating environmental pollution

[46] The proposed Directive expressly establishes that 'information shall be provided on the existence and duration of a commercial manufacturer's durability guarantee for all types of goods, or on the absence of such a guarantee in the case of energy-using goods; information shall be provided on the availability of free software updates for all goods comprising digital elements, digital content and digital services; information is provided on the repairability of products, by means of a repairability index or other repair information, where available, for all types of goods; traders do not mislead consumers as to the environmental and social impacts, durability and repairability of products; the trader may present an environmental statement claiming future environmental performance only when this implies clear commitments the trader may not advertise as a benefit to consumers what is considered common practice in the relevant market; the trader may only compare products, including through a sustainability information tool, if it provides information on the method of comparison, the products and suppliers involved and the measures taken to keep the information up-to-date the display of a sustainability label that is not based on a certification scheme or is not established by public authorities is prohibited; the use of generic environmental claims in consumer marketing activities is prohibited, where the excellence of the environmental performance of the product or the trader is not demonstrable, depending on the claim, in accordance with Regulation (EC) No 66/2010 (EU Ecolabel), an officially recognised eco-label scheme in the Member States or other applicable Union legislation; the presentation of an environmental statement concerning the product as a whole when in fact it covers only a certain aspect is prohibited; the presentation of requirements imposed by law on the Union market for all products belonging to a given category as if they were a distinctive feature of the trader's offer is prohibited; certain practices related to the premature obsolescence of goods are prohibited'.

[47] In this regard it must be pointed out, however, that the directive does not expressly provide for consumers to be given information on the reparability of goods, it expressly requires that they be given information, for example, on after-sales services, which should facilitate consumers, should they decide to repair the good, thus contributing to the realisation of a circular economy. More generally, on the suitability of information as a juridical good, see P. Perlingieri, 'L'informazione come bene giuridico' *Rassegna di diritto civile*, II, 329 (1990), who aptly states how 'information is not configured as a unitary and monovalent good': as the fruit 'of the life of relations between subjects, it takes on a meaning and a role in the dynamics of human activities'. Therefore, the Master notes how 'information in itself' can represent a good in the legal sense, 'a point of reference and content of subjective situations' whenever it possesses a juridically relevant utility, inasmuch as it is susceptible of satisfying interests deemed worthy by the legal system.

[48] The reference is to Regulation EU 2021/341 of the European Commission of 23 February 2021 (entered into force on 1 March 2021) amending Regulations EU 2019/424, EU 2019/1781, EU 2019/2019, EU 2019/2020, EU 2019/2021, EU 2019/2022, EU 2019/2023 and EU 2019/2024 with regard to ecodesign requirements for servers and data storage products, electric motors and variable speed drives, refrigeration appliances, light sources and separate power supply units,

and resource waste, effectively obliges manufacturers of household appliances to make available spare parts that enable consumers to repair the product within a reasonable time frame raging between seven and ten years.[49] Unfortunately, the regulation excludes from its scope precisely those products that in today's consumer society lend themselves most to being designed as planned obsolescence goods, ie those in the electronics and technology sector (such as tablets, computers and smartphones); so that, although the regulation appears worthy in its intentions, it lends itself to a narrow scope of application.

IV. Concluding Remarks. Repairability of Products as a New Building Block of the Circular Economy. Sustainability Becomes a Tool for Evaluating the Interests Pursued.

The analysis conducted thus far allows us to draw certain conclusions which, although general in nature, we hope will be of some guidance to the interpreter.

In a scenario in which large companies and, more specifically, the so-called 'technology giants' continue to feed a market that insists on offering products with an ever-shorter lifespan,[50] the European legislator, with the measures in question, has openly taken sides in favour of the right to product repair, with a view to sustainability, contributing to providing the issue with an initial regulatory reference framework, able to act as a compass to guide the action of the institutions and Member States.[51] It would seem, therefore, that European legislative policy in economic matters is currently moving in the direction of asking businesses to adopt a sustainable economic approach, i.e. cooperative behaviour with a view to implementing general interest objectives such as the protection of the environment and the ecosystem.

However, many issues, in particular relating to the effectiveness of protection, continue to be left to the discretion of national legislators,[52] who are responsible

electronic displays, household dishwashers, household washing machines and washer-dryers, and refrigeration appliances with direct sales function.

[49] In more detail, and in continuity with EU Directive 2019/771, it is stated that 'with regard to the restoration of conformity of goods, the consumer should have the choice between repair and replacement. Allowing the consumer to request repair should encourage sustainable consumption and contribute to a greater durability of products'.

[50] Products destined to feed more and more the modern consumer society: this has been well highlighted for some time by P. Perlingieri, *Il diritto dei contratti tra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2002), 269.

[51] On the necessary functionalisation of economic interests with respect to the requirements of protection of the human person, which must necessarily guide the work of the European legislator, see P. Perlingieri, 'Il "diritto privato europeo" tra riduzionismo economico e dignità della persona' *Europa e diritto privato*,357(2010), and earlier Id, 'L'incidenza dell'interesse pubblico' *Rassegna di diritto civile*, 937 (1986).

[52] With specific regard to Directive 2019/771, S. Pagliantini, *Il diritto privato* n 67 above, 4, writes: 'any harmonisation, minimum or maximum, can in fact be full or partial: and 771/2019 is undoubtedly a directive that pursues, with respect to the conformity rule it regulates, a global

for deciding on a wide and heterogeneous range of profiles relating to the regulated cases.

In France, for example, planned obsolescence is currently considered a criminal offence and is punished with imprisonment of up to two years and a fine of three hundred thousand euros; a fine that can increase to five per cent of the turnover produced by the company.[53] In Spain, on the other hand, manufacturers are obliged to dispose of spare parts for a period of ten years,[54] so that consumers can decide whether they want a repair or a replacement in the event of problems with the durability of the purchased goods.

Italy still lacks such provisions. It is no coincidence that Bill No 615 of 2018 on Amendments to the Code referred to in Legislative Decree No 206 of 6 September 2005 and other provisions to combat the programmed obsolescence of consumer goods, which proposed not only to introduce a detailed definition of programmed obsolescence in our legal system, - including 'the use of software components or operating systems having the effect of worsening the general condition of the good and its operation' - remained a dead letter, as did the effort to novate Art 132 of the Consumer Code by raising the time limit set forth in the first paragraph from two 'to five years from the date of delivery of household appliances and small goods and within ten years from the date of delivery of household appliances and large goods'.

While being aware that the phenomenon of planned obsolescence also has positive aspects linked to technological progress and, more generally, to the (encouragement of) scientific research, we can only hope for a more incisive intervention by the national legislator, capable of providing concrete answers to the need for an overall rebalancing of the consumption system,[55] which are able to virtuously impact on the issues of environmental sustainability[56] and public

harmonisation of the provisions of the Member States, but it is not a directive that practices a complete harmonisation of the field of the seller's contractual liability towards a consumer purchaser'. See also Id, 'Eccezione (sostanziale) di risoluzione dintorni. Appunti per una nuova mappatura dei rimedi risolutori', in C. Perlingieri and L. Ruggieri, *L'incidenza della dottrina e della giurisprudenza nel diritto dei contratti* (Napoli: Edizioni Scientifiche Italiane, 2016), 337.

[53] The *loi* No 2015-992 of 17 August 2015 had inserted in the Consumer Code Article L 213-4-1, the rules of which were then repealed (by *Ordonnance* 2016-301 of 14 March 2016) and re-proposed in a new Article. L441-2, which prohibits this kind of entrepreneurial conduct ('Est interdite la pratique de l'obsolescence programmée qui se définit par le recours à des techniques par lesquelles le responsable de la mise sur le marché d'un produit vise à en réduire délibérément la durée de vie pour en augmenter le taux de remplacement'); the sanctions established by Art. L454-6, imprisonment, interdiction and fines, are decidedly severe.

[54] Initially, the period was five years.

[55] L. Mezzasoma, *Il percorso della meritevolezza nel sovraindebitamento del consumatore (from L. n. 3 of 2012 to L. n. 137 of 2020)* (Napoli: Edizioni Scientifiche Italiane, 2021), 77; Id, 'Consumatore e Costituzione' *Rassegna di diritto civile*, 311 (2015).

[56] He considers that incentivising a system of recycling goods could certainly be one of the possible solutions to protect the environment, M. Pennasilico, 'Sviluppo sostenibile, legalità costituzionale e analisi "ecologica" del contratto' *Persona e mercato*, 37 (2015) and Id, 'Contratto ecologico' n 22 above, 809.

spending,[57] especially with regard to the consumption of raw materials and the production of waste,[58] hopefully in a circular economy model.[59]

Now more than ever it is necessary to strike a balance between the different interests and values involved,[60] based on the criterion of reasonableness;[61] a balance that cannot disregard the proper consideration of the constitutional principle of solidarity, of which sustainability itself is considered a declination in application.[62]

From this perspective, '[s]ustainability becomes the yardstick of the worthiness of the interests pursued'.[63] It is on sustainability that the progress of society depends.[64]

[57] To the extent that consumer products and their obsolescence impact on the budgets of public administrations, as purchasers of those products. In this regard, it seems useful to recall that the reference to public expenditure is contained in the text of the hearing at the Senate of the Republic (Committee on Industry, Trade and Tourism) of the President of the Antitrust Authority, Dr Roberto Rustichelli, on 30 July 2019, regarding Ddl No 615 'Amendments to the Code referred to in Legislative Decree No 206 of 6 September 2005, and other provisions to combat planned obsolescence of consumer goods'.

[58] Cf P. Perlingieri, 'Formazione dei giudici e Scuola superiore della magistratura' *Giusto processo civile*, 313 (2017), who considers reasonableness and sustainability as 'hermeneutic canons, essential parts of any interpreter's cultural baggage', capable of contributing 'to the downsizing of old, die-hard bromides, such as *in claris non fit interpretatio* and *dura lex sed lex,* with a renewed focus on the practical consequences of the decision, which must not only not be absurd, but also in accordance with constitutional legality'. Cf VV. AA., 'Il problema dell'uomo nell'ambiente', in N. Lipari ed, *Tecniche giuridiche e sviluppo della persona* (Roma-Bari: Laterza, 1974), 73, where it is stated that man's death will come, 'alternately, either from the environment or from the impossibility of using it for those productive purposes that its protection excludes'.

[59] See *back* § 2, esp fn 26.

[60] In the balancing of patrimonial and non-patrimonial interests, as a rule, the latter must prevail if sustainability is to be guaranteed. In this perspective the myth of the legislator's omnipotence or the idea that the market can prevail over the individual falls (Thus G. Perlingieri, '"Sostenibilità", ordinamento giuridico e "retorica dei diritti". A margine di un recente libro' *Foro napoletano*, 106 (2020).

[61] On reasonableness, the writings of G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015) 35; Id, 'Ragionevolezza e bilanciamento nell'interpretazione recente della Corte costituzionale', in P. Perlingieri and S. Giova eds, *I rapporti civilistici nell'interpretazione della Corte costituzionale nel decennio 2006-2016*, Conference proceedings of the 12th S.I.S.Di.C. National Conference (Napoli: Edizioni Scientifiche Italiane, 2018), 283, now in *Rivista di diritto civile,* 716 (2018) (from which we quote); Id, 'Presentazione', in A. Fachechi ed, *Dialoghi su ragionevolezza, e proporzionalità* (Napoli: Edizioni Scientifiche Italiane, 2019), VII. See also A. Ruggeri, 'Interpretazione costituzionale e ragionevolezza', in VV. AA., *I rapporti civilistici nell'interpretazione della Corte costituzionale. La Corte costituzionale nella costruzione dell'ordinamento attuale. Principi fondamentali*, Proceedings of the 2nd S.I.S.Di.C. National Conference, Capri 18-19-20 April 2006, I (Napoli: Edizioni Scientifiche Italiane, 2007), 233.

[62] On the subject, recently, G. Alpa, *Solidarietà. Un principio normativo* (Padova: Primiceri editore, 2023), 275.

[63] Thus, verbatim, G. Perlingieri, n 60 above, 102.

[64] ibid 109.

Insights & Analyses

Choice, Workplace Flexibility and Care Needs in the Digital Age: A Comparison Between the German and Italian Legal Approaches

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Abstract

The aim of this paper is twofold: to highlight the potential and limitations of the new right to request flexible working arrangements for caring purposes, as established in Directive no 2019/1158, and to consider, through an overview of EU law, whether and to what extent this right can be interpreted in a manner that truly favours the interests of workers with care-related responsibilities over those of employers.

The paper analyses some examples of approaches taken regarding the implementation of the right to request flexible working arrangements in two different jurisdictions, such as Germany and Italy and compares the transposing choices made in the two different legal contexts. The author argues, also in light of this investigation, that the potential of the duty to provide flexible working arrangements could be, to a certain extent, enhanced through the application of the prohibition of indirect discrimination, from which a sort of duty of accommodation could be inferred. The duty to provide flexible working arrangements could constitute the procedural tool to apply and enhance the proportionality test and reasonable accommodation.

I. Introduction

The topic of reconciling family and professional life, commonly referred to as work-life balance, plays a pivotal role among the emerging challenges of our contemporary society. This longstanding issue, extensively debated in sociological analyses, can appear under various dimensions. One crucial perspective revolves around the organisation of working hours, which significantly influences not only private and family life but also the overall well-being and mental health of employees.

Since mid-1980s, driven by profound changes in the organisation of work, a debate has been going on regarding a new conceptualisation of working time. Many scholars emphasize that the notion of working time can no longer be understood as homogeneous, and the boundary between working and free time has become increasingly blurred.[1]

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[1] A. Supiot, 'Alla ricerca della concordanza dei tempi (le disavventure europee del "tempo di lavoro" ' *Lavoro e diritto*, 15 (1997). For an overview on the challenges labour law is facing *vis à vis* to digitalisation with regard also to working time see: M. Weiss, 'Challenges for Labour Law and Industrial Relationship', in Id ed, *A legal scholar without borders* (Modena: Adapt, 2023),

New working patterns are developed with the aim to provide greater schedule flexibility for workers, both by reducing working hours and by (yearly) modulating the working time, so to help them balance their work and non-work commitments.

Similar changes in working organisation are taking place today due to the introduction of new digital technologies in the workplace. The recent ILO report on working time shows the effects on work-life balance of a variety of working-time arrangements that currently exist in the global economy. Shift work, part-time work with predictable work schedules, flextime (flexible schedules), home-based telework (working from home) are only a few prominent examples of these working-time arrangements, whereby workers can be empowered to organise their own work schedules for their personal responsibilities and/or leisure,[2] leading to improved work-life balance.

Surveys also offer some evidence that the flexibilisation of working time shall not be addressed solely in line with business needs but it also serves other interests, and in particular, the needs and interests of the individual worker. The increasing demands to adapt and flexibilise working hours, particularly through non-standard schedules, can empower women (mothers) in the labour market by enhancing their autonomy and control over their working conditions.[3] Yet, the challenge today is how to guarantee that working-time flexibility can really help to combine paid work, family responsibilities and leisure time.[4]

In this regard, legal and cultural traditions (gender cultures) could represent

69: the distinction between work and private life 'more and more may fall apart due to digitalization of work. De-localised work and work without clear time limits more and more is intruding into private life, thereby eliminating to a bigger and bigger extent the demarcation line between the two spheres of human life'. On the different notions of working time see, for instance, R. De Luca Tamajo, 'Il tempo di lavoro e (il rapporto individuale di lavoro)', in *Il tempo di lavoro. Atti delle giornate di studio di diritto del lavoro* (Milano: Giuffrè 1987), 9; C. Cester, 'Lavoro e tempo libero nell'esperienza giuridica' *Quaderni di diritto del lavoro e delle relazioni industriali,* 10 (1995); F. Bano, ' "Tempo scelto" e diritto del lavoro: definizioni e problemi', in B. Veneziani and V. Bavaro eds, *Le dimensioni giuridiche dei tempi di lavoro* (Bari: Cacucci, 2009), 237, 244.

[2] According to 2022 ILO report *Working Time and Work-Life Balance Around The World*, available at https://tinyurl.com/mwx2bvum (last visited 30 September 2024), perhaps, flextime is the most common form of flexible working-time arrangement. In particular 'Basic flextime arrangements (also known as «flexible schedules» or «flexible hours») allow workers to choose when to start and finish work, based on their individual needs and preferences (within specified limits) and in some cases even the number of hours that they work in a particular week'.

[3] P. Ichino, 'Le conseguenze dell'innovazione tecnologica sul diritto del lavoro' *Rivista italiana di diritto del lavoro*, 525, 528 (2017); M. Tiraboschi, 'Il lavoro agile tra legge e contrattazione collettiva: la tortuosa via italiana verso la modernizzazione del diritto del lavoro' *Centre for the Study of European Labour Law "Massimo D'Antona"*, Working Paper 335/2017, 39.

[4] See eg S. Fredman, *Discrimination law* (Oxford: Oxford University Press, 2012), 45: 'Flexible working may seem the ideal forum for combining family responsabilities and paid work. However, the reason why employers tend to introduce flexible working is not to achieve 'family friendly' outcomes, but to reduce labour costs by adjusting labour inputs to meet fluctuations in demand'. See also S. Fredman, 'Women at Work: the Broken Promise of Flexicurity' 33 *Industrial Law Journal*, 299 (2004); M. Barbera and S. Borelli, 'Principio di uguaglianza e divieti di discriminazione' *Centre for the Study of European Labour Law "Massimo D'Antona"*, Working Paper 451/2022.

serious obstacles. For example, in Italy, the workplace demands and world are still strongly separated from those of the family, especially concerning the needs of childcare and relational aspects. Consequently, the male-breadwinner/female-carer model persists, with fathers often relieved of responsibilities for childcare, and mothers being underrepresented in the Italian labour market.[5]

Furthermore, while part-time work can encourage women's labour force participation, thus allowing some of them to remain in the job market after becoming parents or when caring for relatives, it may not always serve as an effective tool to facilitate work-life balance for parents and caregivers in Italy. The issue in Italy, where the percentage of women currently working part-time remains high, is that, in reality, employees have limited opportunities to autonomously determine reductions in working hours or the distribution of working time, even though, theoretically, part-time work could be a voluntary choice based on individual preferences.[6]

Similar concerns arise in relation to other forms of flexible working arrangements such as work-sharing, remote work, and agile work, which have gained specific attention during and after the Covid-19 pandemic. The expansion of the so-called 'third generation of telework' has become more evident than ever before, sparking an ongoing debate that also focuses on its implications as for the concept of working time[7] and work-life balance.

It may very well be doubted whether, and to what extent, telework can contribute to achieving a better work-life balance. Agile workers enjoy of an increased autonomy

[5] C. Saraceno, 'Ancora 50 anni per l'uguaglianza alle donne solo il 77% dei diritti' *La stampa* 3 March 2023, 25; Id, 'Childcare needs and childcare policies: A multidimensional issue' 59 *Current Sociology*, 78-96 (2011).

[6] See F. Bano, n 1 above, 246.Anyway, as all research in the field shows, the active participation of women with caregiving responsibilities in the employment market remains significantly lower compared to other EU countries. According to 2022 Inapp plus report, the birth of a child has led to the loss of employment for eighteen percent of mothers: Istituto nazionale per l'analisi delle politiche pubbliche 'Lavoro e formazione: L'Italia di fronte alle sfide del futuro', available at https://tinyurl.com/426vme5c (last visited 30 September 2024).

[7] The worker's greater 'autonomy' to decide how and when work is to be performed makes it necessary to ask whether traditional working time regulations are still suitable to face with the world of work digitalized. For instance, the problem arises of how the employer should provide adequate instruments to record working time and overtime work, especially in case of agile work. In fact, according to CJEU the Member States must require employers to set up an 'objective, reliable and accessible system' enabling the duration of time worked each day by each worker to be measured. This obligation aims at ensuring better protection of the safety and health of workers. For details see: V. Leccese, 'La misurazione dell'orario di lavoro e le sue sfide' *Labour & Law Issues*, 1-14 (2022); Id, 'Lavoro agile e misurazione della durata dell'orario per finalità di tutela della salute' *Rivista giuridica del lavoro e della previdenza sociale*, 428-442 (2020); regarding the obligation to record working time in the German system: F. Bayreuther, 'Arbeitszeiterfassung auf richterrechtlicher Basis' *Neue Zeitschrift für Arbeitsrecht*, 6-7 (2023); D. Benkert,'Pflicht zur Arbeitszeiterfassung – was bedeutet dies für Arbeitgeber?' *Neue Juristische Wochenschrift*, 50-51 (2023); Bundesarbeitsgericht (Federal Labour Court), Judgment of 13 September 2022, 1 ABR 22/21, available at https://tinyurl.com/ujpa5tfp (last visited 30 September 2024).

to determine when and where they carry out their duties[8] ('time sovereignty')[9] and, hence, they bear the responsibility of organizing their own time as long as they produce results. Consequently, while temporal flexibility can enhance workers' health and well-being, facilitating a more balanced integration of work and personal life and promoting gender equality by encouraging women's participation in the workforce, it can also result in a blending of paid working time and free time and private life ('time porosity').[10]

Generally speaking, Alan Supiot has long been arguing that

> 'Gender equality implies equal conditions for individual choice of time for paid work, unpaid work (family duties and training for oneself) and leisure time. That is to say, that such equality must not be separated from the right to respect private and family life, reflected in the European Convention on Safeguarding Human Rights and Fundamental Freedoms (Arts 8-1)'.[11]

The idea was to rethink working time regulation within a broader perspective, so to make the various aspects of each worker's life (primarily paid work, unpaid work, and leisure or rest) mutually compatible. This relates to a transformative

[8] In the era of digitalisation it has become very clear that the degree of autonomy in performing work makes it more and more problematic to identify the status (employment or self-employment) of the persons involved in such a work. On the erosion of subordinate contract of employment and main reform approaches that have emerged in recent years see, for instance, A. Perulli and T. Treu, *«In tutte le sue forme ed applicazioni». Per un nuovo Statuto del lavoro* (Torino: Giappichelli, 2022), 1-77; N. Contouris, *Defining and Regulating Work Relations for the Future of Work* (Geneve: International Labour Office, 2018); T. Treu, 'Introduzione', in A. Occhino ed*, Il lavoro e i suoi luoghi* (Milano: Giuffré, 2018), XIII; A. Zoppoli, *Prospettiva rimediale, fattispecie e sistema nel diritto del lavoro* (Napoli: Editoriale scientifica, 2022), 39; L. Zoppoli, 'I riders tra fattispecie e disciplina: dopo la sentenza della Cassazione n. 1663/2020' *Massimario di Giurisprudenza del lavoro*, 265 (2020).

[9] According to *Collins English Dictionary* 'time sovereignty' is the 'control by an employee of the use of his or her time, involving flexibility of working hours', available at https://tinyurl.com/ypdywjr4 (last visited 30 September 2024).

[10] See European Economic and Social Committee, *Teleworking and gender equality – conditions so that teleworking does not exacerbate the unequal distribution of unpaid care and domestic work between women and men and for it to be an engine for promoting gender equality*, 2021, available at https://tinyurl.com/4uy7jek3 (last visited 30 September 2024); European Institute for Gender Equality, *Gender equality and the socio-economic impact of the COVID-19 pandemic*, 2021, available at https://tinyurl.com/2j5fe97j (last visited 30 September 2024). See for example: E. Génin, 'Proposal for a theoretical framework for the analysis of time porosity' 32 *International Journal of Comparative Labour and Relations*, 280-300 (2016); F. Malzani, 'Il lavoro agile tra opportunità e nuovi rischi per il lavoratore' *Diritti Lavori Mercati*, 21 (2018); M. Peruzzi, 'Sicurezza e agilità: quale tutela per lo smart worker?' *Diritto della sicurezza sul lavoro*, 26 (2017); M. Weiss, 'Challenges for Labour Law' n 1 above, 73: 'in the digital economy there is the danger that working time never ends. Workers may be supposed to remain on line, to answer e-mails and phone calls also after normal working time as well as on holidays and on vacations. And even if the workers are not asked by the employer to do so, they might do it voluntarily'.

[11] A. Supiot et al eds, *Transformation of labour and future of labour law in Europe* (Bruxelles: European Commission - Employment & social affairs, 1998), 72, available at https://tinyurl.com/mr2eywuj (last visited 30 September 2024).

dimension of substantive equality: the aim should be to grant women an access to the paid labor force on equal terms, so to find a better balance between work and private life on the one hand, and a more flexible organisation of working time on the other.

As is well known, in the past, the European Parliament has exerted significant pressure to strengthen the protections on the issue of the organisation of working hours and their modification by taking into account the specific question of work-life balance.[12] However, the review process of the Working Time Directive has long been stalled.

The 2019 Work-life Balance Directive EU marks a turning point on this topic.[13] Even from its preamble it is evident that the EU legislator is aware that working-time flexibility is linked to gender equality, as it aids women in combining childcare with work.[14]

For this reason the 2019 Work-life Balance Directive introduces a new right for parents[15] and carers[16] to request flexible working arrangements for caring purposes (Art 9, para 1). The employer is obliged to 'consider' and respond to such requests within a reasonable time. If a request is declined, the employee is entitled to receive an explanation of the refusal or postponement of such arrangements (Art 9, para 2). Additionally, the Directive grants workers the right to return to their original working pattern at the end of the agreed period (reversibility), even before the agreed period ends, whenever a 'change in circumstances' justifies it (Art 9, para 3).

[12] See Resolution of 17 December 2008 on the Council common position for adopting a directive of the European Parliament and of the Council amending Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time (10597/2/2008 – C6-0324/2008 – 2004/0209(COD)).

[13] See L. Waddington and M. Bell, 'The right to request flexible working arrangements under the Work-life Balance Directive – A comparative perspective' 12 *European Labour Law Journal*, 508 (2021); M. Militello, *Conciliare vita e lavoro. Strategie e tecniche di regolazione* (Torino: Giappichelli, 2021), 23-24; E. Caracciolo di Torella, 'An emerging right to care in the EU: a «New Start to Support Work-Life Balance for Parents and Carers»' 18 *ERA Forum*, 10 (2017); S. Scarponi, ' "Work life balance" fra diritto Ue e diritto interno' *Centre for the Study of European Labour Law "Massimo D'Antona"*, Working Paper 156/2021.

[14] See Preamble no 10, European Parliament and of the Council Directive 2019/1158 of 20 June 2019: 'a major factor contributing to the underrepresentation of women in the labour market is the difficulty of balancing work and family obligations. When they have children, women are likely to work fewer hours in paid employment and to spend more time fulfilling unpaid caring responsibilities. Having a sick or dependent relative has also been shown to have a negative impact on women's employment and results in some women dropping out of the labour market entirely'.

[15] The right is conferred on parents of children of a specific age, which shall be at least eight years.

[16] Directive defines 'carers' as a 'worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason'. On the definition of carers in the Directive: E. Caracciolo di Torella and A. Masselot, *Caring Responsibilities in European Law and Policy – Who Cares?* (Abingdon: Routledge, 2020); C. Chieregato, 'A Work-Life Balance for All? Assessing the Inclusiveness of EU Directive 2019/1158' 36 *International Journal of Comparative Labour Law and Industrial Relations*, 59, 75 (2020). See also G. James, 'The Work and Families Act 2006: Legislation to Improve Choice and flexibility?' 35 *Industrial Law Journal*, 272 (2006).

The aim of this paper is both to point out the potential and limits of the new right to request flexible working arrangements for caring purposes, as established in Directive no 2019/1158, and to consider, through an overview of EU law, whether and to what extent this right can be interpreted in a one-sided manner that really favours the interests of workers who have care-related tasks, over those of employers. Concerning the employer's response, it is important to identify the relevant factors leading to the decision, whether to grant the request or not and to clarify the requirements to which employers are subject and whether it is possible to scrutinise the employer's reason for declining a request.

The second section of this article shows some examples of routes followed in respect of the implementation of the right to request flexible working arrangements in two different jurisdictions, Germany and Italy.[17] Regarding the Italian system, attention is also focused on agile work, as the legal system and, especially, social partners have particularly emphasized this tool to promote work-life balance. The aim of this section is to provide an overview to better understand the relationship between the right to request flexible working and anti-discrimination legislation. The question arises whether and how EU law might support an interpretation of Italian legislation that recognizes a positive duty upon employers, requiring proactive efforts to accommodate parents or carers who wish to work flexibly to combine care and work.

II. Flexible Working Arrangements, Careers and EU Law

To fully grasp the potential of the right to request flexible working arrangements as outlined in the Work-life Balance Directive, it is essential to contextualize it within the framework of other provisions of existing EU law that, either directly or indirectly, facilitate flexible working arrangements. This helps clarify the role it may play, considering its relationship with non-discrimination law.

The key question is the extent to which EU law restricts the employer's power in cases where the request is denied. There is no doubt that the employer's decision to reject a request must be objectively justifiable, and the employer is bound by various procedural requirements. According to the Work-Life Balance Directive, the employer has an obligation to provide an explanation for any refusal. Managerial decision-making appears to be subject to significant constraints regarding the acceptable reasons for declining such a request. The Directive specifies that

[17] The situations in which the employee can exercise such a right are many and the changes which can be requested are very broad: for instance, employee is entitled to request to reduce or increase the number of hours worked, to request a change to their place of work, including requesting to work from home, or to request a change to their working times. According to Art 3: ' "Flexible working arrangements" means the possibility for workers to adjust their working patterns, including through the use of remote working arrangements, flexible working schedules, or reduced working hours'.

> 'employers shall consider and respond to requests for flexible working arrangements (…), taking into account the needs of both the employer and the worker'.[18]

However, this cryptic and ambiguous phrasing fails to offer precise criteria for assessing the extent of the employer's discretion concerning the duty to accommodate the employee's individual requirements. Therefore, the question arises: is it possible, and, if yes, to what extent is it possible to subject the employer's refusal of the request to the judicial scrutiny and establish a justiciable standard to ensure compliance with EU law requirements?

Some labour law scholars have underscored the limitations of the new right to request flexible working arrangements as outlined in the Directive. The argument is straightforward. They have observed that, unlike other forms of leave also addressed in the Directive - such as paternity leave, parental leave, and carers' leave - employers are not obliged to grant the request. The Directive merely provides for a right to 'request' such arrangements, and the employer is required to seriously consider that request.[19]

This implies that there is no absolute right to receive flexible working arrangements for care-related reasons. As revealed in the Impact Assessment accompanying the Commission's legislative proposal, the idea of an absolute right was discarded 'as it would create serious restrictions on employers to determine how work is organised in a firm'.[20]

While this argument is supported by many scholars, it is not entirely convincing. It must be acknowledged that an absolute right to receive flexible working arrangements could indeed impose serious restrictions on the freedom to conduct a business, as recognised in Art 16 of the Charter. However, in my opinion, this perspective has underestimated the importance of procedural obligations that employers shall fulfil, including the obligation to discuss the request with the employee and provide him/her with an explanation for any refusal.

Under the Work-Life Balance Directive, the employer is not entitled to decline the request without justification. A refusal to grant a request to change an employee's working arrangements that is not based on 'reasonable grounds'

[18] Art 9(2).

[19] L. Waddington and M. Bell, n 13 above, 512; M. Militello, n 13 above, 150; C. Chieregato, n 16 above, 3. See also M. Weldon-Johns, 'EU work-family policies revisited: Finally challenging caring roles?' 12 *European Labour Law Journal* , 310, 317 (2021): 'The greatest limitation here is that this is only a right to request such a change and does not guarantee that working carers will be able to change their working arrangements'. For a dissimilar opinon see B. Graue, 'Auswirkungen der Richtlinie 2019/1158/EU zur Vereinbarkeit von Beruf und Privatleben für Eltern und pflegende Angehörige auf das deutsche Arbeitsrecht' *Zeitschrift für europäisches Sozial- und Arbeitsrecht*,available at https://tinyurl.com/ptdzwj3s (last visited 30 September 2024).

[20] Commission Staff Working Document, Executive Summary of the Impact Assessment, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM(2017) 253 final - SWD(2017) 202 final, 4.

cannot be challenged in court. The requirement for justification plays a crucial role, particularly when compared with similar obligations provided in existing Directives. For instance, the Directive on part-time work does not grant an absolute right to part-time work; instead, it obliges Member States to ensure that employers, 'as far as possible', consider the requests from workers to transfer from full-time to part-time work, when this becomes feasible in the company.

This means that, according to the rule, it is up to the employer to decide whether or not the employee can reduce his/her working time. Some scholars have pointed out that

> 'the CJEU has paid little attention to the duty employers are under to justify decisions to refuse to allow a worker to continue to work part-time, where this is needed for care reasons'.[21]

In the Work-Life Balance Directive, employers are not obliged to grant the request, but the employer's justification when refusing a request for flexible working arrangements shall meet more stringent requirements (it must be objectively justifiable). Two main policy goals served by Directive 2019/1158/EU (Art 9.2) can be identified: transparency and the balancing of (fundamental) interests of both workers and employers (as required in response to a request).

The first goal is reflected in the requirement for the employer to communicate a response to the worker's request for 'flexible working arrangements' within a reasonable timeframe. The duty to respond to the request aims to inform the worker about the decision on the adjustment of the work schedule and the business interest involved. Although the Directive does not explicitly impose such an obligation, the employer is required to discuss the request with the employee, so to make the scheduling decision at least in a manner that is respectful of the worker's interest and aimed at achieving a better balance between work and personal life (the so-called '*obbligo a trattare*').

The second goal is to give a more careful attention towards the effects of the scheduling choices that the employer has to make concerning parents and workers with caregiving responsibilities. The Directive makes it clear that a balancing of interests is required, 'taking into account the needs of both the employer and worker'.[22]

The obligation to justify the reasons for refusing requests is a crucial tool to ensure a fair balance between the care-related needs of the employee and the business interests of the employer. Generally, the employer has the discretion to reject employee requests, while combining the freedom of contract and the freedom to conduct a business recognized in Art 16 of the Charter.

[21] C. Hiessl, 'Caring for Balance? Legal Approaches to those who Struggle to Juggle Work and Adult Care' 36 *International Journal of Comparative Labour Law and Industrial Relations*, 107, 111 (2020).

[22] Art 9(2).

However, under EU law, this freedom is not unlimited. The freedom to conduct a business can come into conflict with fundamental social rights recognized at the EU level in certain provisions of the EU Charter of Fundamental Rights. These include Art 33 on family and professional life, Art 23 CFR on equality between women and men (referenced in the Preamble of the Work-life Balance Directive), and Art 21(1) CFR, which prohibits discrimination on various grounds, including sex.[23]

Even though Art 33 does not explicitly mention flexible working arrangements, the principle in this provision could be interpreted broadly. A key legal source for this provision is Art 27 of the Revised European Social Charter, stating that member States should take appropriate measures 'to enable workers with family responsibilities to enter and remain in employment' and 'to take account of their needs in terms of conditions of employment'.

Hence, the scope of protection under Art 33 can be interpreted as encompassing employees' entitlement to paid maternity leave, parental leave, and the right to flexible working arrangements. This perspective is reinforced by the European Pillar on Social Rights, although its provisions are not legally binding. Principle 9 on 'work-life balance' asserts that 'parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements, and access to care services'. Consequently, an unjustified refusal to provide flexible working arrangements (with insufficient justification under the Directive) would directly be in breach of the aforementioned EU fundamental rights provisions. These include the prohibition of discrimination on grounds of sex: a mandatory general principle of EU law articulated in Art 21 CFR.

The inherent conflict in fundamental rights between the freedom to conduct a business and freedom of contract on one side and the fundamental right to equality, non-discrimination, and the right to work-life balance on the other is to be solved through a balance of all circumstances, that is by employing a method known as *praktische Konkordanz* or practical concordance. This approach ensures that constitutionally protected legal values are harmonized when conflicting.[24]

The *praktische Konkordanz* necessitates that none of the conflicting constitutional values shall be realized at the expense of a competing constitutional value; instead, all legal positions are to be balanced as fairly as possible.[25] This method optimizes the values or principles in conflict, akin to *Pareto* optimality. In other words, the interference of the freedom to conduct a

[23] The second paragraph states: 'To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child'.

[24] See for example in Germany Federal Constitutional Court's: Bundesverfassungsgericht 9 May 2016, 2 BvR 2202/13. See too G. Zagrebelsky, *Il diritto mite. Legge, diritti, giustizia* (Milano: Einaudi, 1997), 170-171, who argues that 'the only formal rule one can speak of is that of the possible "optimisation" of all principles, but how to achieve this is an eminently practical and "material" matter'.

[25] R. Alexy, 'Constitutional Rights, Balancing, and Rationality' 16 *Ratio Juris*, 131-140 (2003).

business (and thus the freedom to refuse employee requests) with the right to work-life balance (and therefore the right to flexible working arrangements) should be minimized as much as possible without entirely disregarding the rights of either party.

III. The Fine Line Between the Duty to Consider the Request for Flexible Working Arrangements and the Duty to Provide a Reasonable Accommodation

Although European anti-discrimination law neither recognizes carers as a protected characteristic nor introduces a duty of reasonable adjustment for carers, as some scholars have clearly stated, a more thorough understanding of the potential of the Work-life Balance Directive 'can be found through a combined analysis of protections found in other instruments, especially EU equality law'.[26] The examples considered here show that the WLB Directive and the Equality Directives could intersect in their application.

First of all, it is important to compare the provisions of the WLB Directive with those found in the Parental Leave Directive, which the new Directive replaces. There is no doubt that the duty to consider a request for flexible working arrangements under the 2019 WLB Directive is more far-reaching than that found in the earlier provision. The procedural requirements linked to the former are more stringent than those found in the Parental Leave Directive. In the case of this Directive, there is no express obligation on the employer to give a definitive response to the request, nor is there an explicit requirement for the employer to justify any refusal of such a request.

However, under the WLB Directive the employer is expressly under a duty to take into account the needs of the worker when considering the request and is explicitly required to give a definitive response to the request. Recital 36 of the Directive also refers to some factors which should be taken into account to determine whether the request is to be refused, such as 'the duration of the flexible working arrangements requested and the employers' resources and operational capacity to offer such arrangements'.

But that's not all. Even though the employer is not obliged to grant the request, he/she must have sufficiently weighty reasons if the request is to be refused or only partially granted. As mentioned earlier, the decision of the employer to refuse a request can be subject to judicial scrutiny to establish that it meets the requirements set out in the EU law and it is up to the employer to prove the details of the business situation and the necessity for his/her decision.

Similarly, certain similarities can be highlighted with the rules governing the substance and procedure of administrative decision-making in many jurisdictions.

[26] L. Waddington and M. Bell, n 13 above, 513.

The legal duty to provide reasons in administrative decisions should be broadly interpreted: the administration has to represent carefully all the relevant factual grounds for the decision, but must also include a section stating the results of the investigative activity carried out and comparing the various interests identified, specifying which among them are considered worthy of protection.[27]

This means that a clear distinction can be made between the duty under the WLB Directive and those aimed solely at requiring the employer to bargain in good faith (eg to hear and consider the worker's request). In our case, EU law takes a step further. It requires that a refusal to grant flexible working arrangements be objectively justified by the employer, demanding a certain level of coherence in the employer's response

The employer has a duty to participate in the bargaining process triggered through the right to request. The managerial prerogative of the employer cannot be considered unlimited, as the WLB Directive permits judicial scrutiny of the employer's justification. If the employer rejects the request for flimsy or unconvincing reasons, there is a high risk of infringing upon the fundamental rights of the individual, as recognized at the EU level in the aforementioned provisions of the EU Charter of Fundamental Rights (see para 2).

However, given the close relationship between the WLB Directive and anti-discrimination law, it is important to consider the role that this directive and EU equality can play in ensuring adequate consideration of individual needs in the regulation of working hours.

As widely recognized, EU Framework Equality Directive 2000 creates an obligation to provide reasonable accomodation but this obligation, according to EU law, applies specifically in connection with discriminatory treatment on grounds of disability, not in respect of the other prohibited grounds of discrimination. According to prevailing opinion, it would be more consistent with the position adopted by EU legislation that employers refrain from applying the concept of reasonable accommodation to other forms of discrimination.[28]

In comparison to the duty of reasonable accomodation, Art 9 of the EU Work-life Balance (WLB) Directive is a less strong provision but it expressly imposes a positive duty to make adjustment to the current working conditions (working time, working hours and place of work) in order to enable workers to combine her work and childcare responsibilities.[29] If the term 'accommodation'

[27] See M.S. Giannini, 'Motivazione dell'atto amministrativo' *Enciclopedia del diritto* (Milano: Giuffrè,1977), XXVII, 258.

[28] According to Advocate-General Kokott the omission of the other grounds means that the concept of reasonable accommodation should not be applied beyond disability.

[29] Some differences between the two duties are pointed out by L. Waddington and M. Bell, n 13 above, 517-520. For example, they argue that 'while the duty for the employer to consider flexible working arrangements seems only to be triggered once a worker makes an explicit request, the Employment Equality Directive is not explicit in requiring a worker to request a reasonable accommodation before the duty is triggered'.

is used in its broadest and 'a-technical' sense, the right to request flexible working arrangements can be regarded as a right to request a specific type of accommodation. The ultimate aim of the duty to provide (*rectius*: to consider a request for) flexible working arrangements is to guarantee that persons with caregiving responsabilities needs are treated on an equal basis with others and obtain the same workplace opportunities that other persons automatically enjoy. Employers are required to consider appropriate measures to accommodate those who need adjustments to their working conditions to balance work and caregiving responsibilities.

The duty under the Work-Life Balance Directive and the duty to provide reasonable accommodation are similar in that they are focused on the individual worker's needs and both require balancing business needs with those of the individual. As a result, these duties are flexible and indefinite:[30] the employer is required to consider taking specific measures, such as differential treatment, to adapt the workplace as needed, taking into account the specific features of individuals in order to tackle barriers to participation in employment. These duties are not absolute, as the employer is relieved of them under certain conditions. However, the extent to which EU law constrains managerial decision-making is unclear.

Some labour scholars hold the view that a somewhat different test should be applied to refusing requests: while the duty under the WLB Directive requires only that the refusal of a request for flexible working arrangements be based on objective grounds (although EU law does not specify the types of reasons that may justify refusal), the duty to provide reasonable accommodation requires that the requested measures would impose a disproportionate burden.[31]

However, everything depends on the circumstances of the case at hand: there may be situations in which the worker exercising the right to request flexible working arrangements also benefits from the specific and far-reaching protection established by other sources, especially EU equality law. In these situations, the prohibition of indirect discrimination may serve the same purpose as a duty of reasonable accommodation, potentially enhancing the effectiveness of the duty to provide flexible working arrangements to a certain extent. As is well-known, indirect discrimination occurs when an apparently neutral provision, criterion, or practice would disadvantage persons of one sex compared to persons of the other sex, unless that provision, criterion, or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.[32]

[30] See Corte di Cassazione, 9 March 2021 no 6497.

[31] See L. Waddington, 'Reasonable Accommodation-Time to Extend the Duty to Accommodate Beyond Disability?' 186 *Nederlands Tijdschrift voor de Mensenrechten*, 192-193 (2011). The author argues that although some key distinctions can be drawn between the two duties 'there is often proximity between avoiding indirect discrimination and providing accommodation'.

[32] See for example Art 2(1)(b), European Parliament and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

In case law, national courts, when applying anti-discrimination law, have acknowledged that refusing to consider a request for flexible working arrangements by a woman with care-related needs may constitute a prohibited form of discrimination. Particularly, it may be considered a *prima facie* case of indirect sex discrimination, as this denial could disadvantage a group of people who are protected under equality law (based on sex). Therefore, domestic courts, in their case law, have shown sensitivity to the challenges faced by individuals in challenging the managerial prerogative to determine working arrangements, making it difficult for individuals to balance caregiving responsibilities with work commitments and, in some circumstances, to assert their right to work in a manner that allows them to effectively combine the two.

For instance, in a recent case,[33] the employer's decision to replace a single 'central' working shift with two alternating shifts for all employees made it more difficult for working parents to manage their childcare arrangements. Having determined that this adverse effect on parents disproportionately affected women, the Bologna Court upheld the appeal of the equality councillor. The court held that the employer could have implemented less harmful measures regarding caregiving needs. Therefore, the rule could not pass a strict test of justification and could not be regarded as a 'necessary' measure. Indeed, having a single central shift only for working mothers of young children or another schedule compatible with childcare would not have undermined 'the overall functional needs of the new warehouse organisation based on the double shift'.

The case law considered in the legal literature[34] provides the clearest evidence of the implications of the prohibition of indirect discrimination, which can lead to an obligation on the employer to consider adjustments to the existing working conditions or to justify a refusal to allow flexible working arrangements regarding working hours.[35]

[33] Tribunale di Bologna 31 December 2021, *Rivista Italiana di Diritto del Lavoro*, 247 (2022). See G. De Simone, 'Discriminazione', in M. Novella and P. Tullini, *Lavoro digitale* (Torino: Giappichelli, 2022), 127; also Tribunale di Firenze 22 October 2019, *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 309 (2020), with commentary by L. Santos Fernandez; G. Calvellini, 'Work-life balance e diritto antidiscriminatorio, oggi', in G. Calvellini and A. Loffredo eds, *Il tempo di lavoro tra scelta e imposizione* (Napoli: Editoriale Scientifica, 2023), 73.

[34] See the case-law cited from G. Calvellini, n 33 above, 75-77. See L. Waddington, n 31 above. The author argues that also CJEU case law (*Achbita* is the case in point) seems to support the idea that 'an employer should consider measures that could reconcile the worker's religious practice with the company's policies, at least prior to any decision to dismiss. Undoubtedly, this is a much weaker type of accommodation duty than that which applies in respect of persons with disabilities. Nevertheless, it indicates that the concept of accommodation plays a role when analysing the possible justifications for practices that otherwise constitute indirect discrimination'.

[35] See *London Underground Ltd* v *Edwards* (No 2) [1999] ICR 494 (CA). L. Waddington, n 31 above, 192-193. The author argues that the obligation not to indirectly discriminate – if interpreted dynamically – can also provide for a *de facto* accommodation duty; see also J. Conaghan, 'The Family-friendly Workplace in Labour Law Discourse: Some Reflections on London Underground Ltd v Edwards', in H. Collins et al eds, *Legal Regulation of the Employment Relation* (London: Kluwer Law International, 2001), 161-185. On the uncertainty about the meaning of the crucial

In making these observations, the courts appear to come close to a crossing the line between prohibiting unlawful discrimination and imposing *positive duties* on employers to act towards specific groups. It is worth acknowledging that a positive duty to accommodate can also be found within the prohibition to indirectly discriminate: although the test of justification in indirect discrimination is not expressly formulated by the law in terms of a proportionality test, this does not mean that it cannot be used to balance the rights of the parties and the correct way to manage the balancing process is the same as that applied in disability discrimination with regard to duty to reasonable accommodation.

Accordingly, if the worker falls within the scope of application of equality law, the duty to provide flexible working arrangements could constitute the procedural tool for applying the proportionality test and reasonable accomodation. This would ensure that interference with both rights at stake should be minimized as far as possible without totally eliminating respect for the rights of each party. The employer is not completely free to reject a request for flexible working arrangements but, on the contrary, he/she would have to demonstrate that a refusal to accept the request is necessary for the operation of the business and that there is no alternative that avoids discriminatory impact. This would entail 'a fair and detailed analysis of the working practices and business considerations involved':[36] the employer must, in principle, conduct adequate analysis aimed at determining ex-ante the measures to be taken in practice and inquire whether the care-related needs of the employee and the worker's right to work have been duly considered.

Although EU law confines the duty to accommodate only to people with disabilities, the WLB Directive also embraces a substantive concept of equality and an asymmetric and redistributive approach to equality, aiming to redress the disadvantage (even if this entails preferential treatment for carers). With its obligation to consider the request for flexible working arrangements, EU law draws on the well-known theoretical framework developed by Amartya Sen and Martha Nussbaum.[37] The so-called 'capabilities' theory highlights the importance of valuing individual diversities, considering the extent to which each individual is actually able to exercise the freedom to choose for himself or herself and achieve the goals

aspect of indirect discrimination see H. Collins, 'Justices for Foxes: Fundamental Rights and Justification of Indirect Discrimination', in Id and T. Khaitan eds, *Foundations of Indirect Discrimination Law* (Oxford: Hart Publishing, 2018), 249.

[36] See the English case of *Hardy and Hansons plc* v *Lax6* [2005] IRLR 726 (CA), where a female worker requested that she be permitted to transfer to part-time work or a job-share when she returned to work after a period of maternity leave.

[37] See A. Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999), 5: 'what people can achieve is influenced by economic opportunities, political liberties, social powers, and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives'. See also: A. Perulli and V. Speziale, *Dieci tesi sul diritto del lavoro* (Bologna: il Mulino, 2022), 67; R. Del Punta, 'Leggendo "The Idea of Justice" di Amartya Sen' *Giornale di diritto del lavoro e di relazioni industriali*, 197 (2013); Id, 'Labour Law and the Capability Approach' 32 *International Journal of Comparative Labour Law and Industrial Relations*, 383 (2016).

of his or her life aspirations.

IV. A Comparison Between German and Italian Cases

Shifting the focus towards the regulations transposing the directive on work-life balance in Germany and Italy, some substantial divergences can be highlighted regarding the regulatory choices made in the two countries under analysis as for the content and methods of exercising the right to request flexible working for caregiving needs of employees.

In Italy, the recent legislative implementation of Directive 2019/1158 clearly opts for a minimalist approach as it essentially leaves the existing framework unchanged and does not reinforce the tools available to implement time flexibility to facilitate work-life balance (see para 4.2 below) even though case law plays an important role, using the concept of indirect discrimination to create a duty to accomodate (see para 3). On the contrary, the German legislation for transposition dated November 22, 2022 partially reproduces the wording and content of the directive,[38] showing greater openness to the opportunities offered by EU law and the aim pursued by Directive 2019/1158 in Art 9.[39] Nevertheless, even in Germany, gaps, doubts, or ambiguities are left unsolved by the law.

1. Flexible Working for Care-Related Needs under German Law. A Half-Hearted Implementation of the Work-Life Balance Directive

Starting from the German model, it should be highlighted that in Germany any employee living together with a child and having custody of that child is explicitly entitled to request changes to his/her working arrangements to facilitate care-related tasks. German law specifically allows workers to request a reduction in the number of hours worked (*Verringerung*) or a change in their working times (*Verteilung*). According to the Act on Parental Benefit and Parental Time (*Bundeselterngeld- und Elternzeitgesetz* 'BEEG'), sec 15 para 5, new version, there are two types of flexible working arrangements. Similarly to the Work-life Balance Directive, there is no obligation on the employer to grant such a request.

As far as certain aspects related to flexible working arrangements are concerned, Germany has chosen to go beyond the minimum standards set by the Directive. While the Directive does not require employers to justify a refusal in writing or specify the deadline for employers to respond, the latest German

[38] The Act that transposes the Directive into domestic law passed the German Bundestag on 22 December 2022. The new Act only makes marginal adjustments to the Federal Parental Allowance Act (*Bundeselterngeld- und Elternzeitgesetz 'BEEG'*), the Caregiver Leave Act (*Pflegezeitgesetz 'PflegeZG'*), the Family Care Leave Act (*Familienpflegezeitgesetz 'FPfZG'*), and the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz 'AGG'*).

[39] W. Brose, 'Die Reform des PflegeZG. Eine halbherzige Umsetzung der Vereinbarkeitsrichtlinie 2019/1158/EU', *Zeitschrift für europäisches Sozial- und Arbeitsrecht*, 313 (2023).

provision clarifies that, if the employee's request is declined, the employer must provide a written response within four weeks, detailing the reasons for that refusal (sec 15 para 5 s 4, *BEEG*). These new provisions are applicable irrespective of the size of the company.

However, certain aspects remain contentious. For instance, in the circumstance where the changes that can be requested are narrower than those foreseen under the Directive, it is questionable whether the German system recognizes the right to request flexible working arrangements in a way that meets the minimum requirements set out in the Work-life Balance Directive. Firstly, sec 15 para 5 s 4 *BEEG* makes no reference to the request to change the place of work, including requesting to work from home. This choice could be considered consistent with the German system, which lacks any comprehensive legislation on telework and is characterized by the fact that some work agreements expressly state that the employer can refuse to accept telework without providing any reasons for that.[40]

However, this gap can, to a certain extent, be addressed within specific legal provisions already implemented in the past. Special legislative rules have established the right to request telework, in an aim to promote equal opportunities and fair employment practices for both men and women. An example of this is the Act of April 24, 2015 concerning gender equality in the federal administration and federal courts (para 16 (1) f 2 *BgleiG*). According to this act, employees – such as parents with young children or those caring for severely disabled individuals – have the entitlement to apply for a remote work arrangement to fulfil caregiving responsibilities.[41]

The employer has to grant the request in accordance with the employee's wishes, unless there are compelling service-related reasons (*dienstlichen Möglichkeiten*) justifying a refusal. Administrative entities have considerable discretion in determining what reasons can be considered as service-related under § 16 and whether the job can be performed remotely. However, the employer's decision to deny a request must be objectively justifiable and may be subject to

[40] Furthermore, the labour courts are rather sceptical as to whether an employee has a general right to request to perform his or her job remotely, because they argue that this right could interfere with the employer's freedom to conduct a business in case the employer should be obliged to set up additional home office workstations. No right to request for flexibility regarding the workplace can be derived from general regulations. Para 106 GewO is likely not sufficiently specific in this regard as to reliably guarantee such a right. In order to enable a caregiving family member to work from home via para 106 GewO, in each individual case, the employer's discretion would need to be reduced to zero, and furthermore, the employment contract should not be a hindrance. See Landesarbeitsgericht Rheinland-Pfalz18 December 2014, 5 Sa 378/14; Arbeitsgericht 7 May 2020, 3 Ga 9/20; Landesarbeitsgericht Berlin-Brandenburg 24 March 2021, 4 Sa 1243/20.

[41] Similar provisions for employees with family obligations can be found in two Acts regulating equal opportunities in employment relationships in the public sector: the Act for the Federal Administration and the Federal Courts (*Gleichstellungsdurchsetzungsgesetz*) of 2001 and the Act for the Public Service of the State of Baden-Württemberg (*Gesetz zur Verwirklichung der Chancengleichheit von Frauen und Männern im öffentlichen Dienst des Landes Baden-Württemberg*) of 2005.

judicial review. Employers cannot freely reject such a request without a substantial reason.[42]

The other critical point concerns an amendment to the Caregiving Leave Act (*Pflegezeitgesetz 'PflegeZG'*), which now grants employees in small businesses the right to request full or partial caregivers' leave for close relatives (sec 3 *PflegeZG*). It is surprising that under this Act, workers are *only* allowed to request an adjustment to their work schedule (including changing the time of work) as far as this concerns a reduction in working hours. As mentioned earlier, it may well be doubted whether this provision complies with EU law, as Art 9 of Directive 2019/1158 introduces the possibility for workers to utilize both a reduction in working hours and flexible work schedules. Failure to allow carers to request flexible working schedules may limit the ability of some carers to balance work and caregiving responsibilities. German scholars argue that the gap at the national level cannot be bridged by para 7 para 2 *TzBfG*; according to this provision, the employer must discuss the request with the employee who wishes to change the number of working hours or the place of work, but the employer is not required to provide any reasons for his/her decision. Neither a mandatory review of the request within a certain period nor a general obligation to provide reasons in case of rejection are provided for.[43]

As already mentioned with regard to *BEEG*, §3 *PflegeZG* makes no reference to the request to change the workplace either and, thus, does not meet the requirements established by the Directive according to which flexible working arrangements include «the use of remote working arrangements».

This is quite surprising. Of course, it is true that in Germany telework is voluntary, and the employee (or a caregiver), as a rule, does not have a right to telework. However, a number of exceptions apply, and some of them could also concern carers.

Under German law, severely disabled employees are entitled to be accommodated into an employment in such a way that they are able to fully develop and use their knowledge and skills. Sec 164, para 4, no 1 and 4 of *SGB* IX obliges the employer to tailor work to the needs of the individual and provide necessary and appropriate modifications and adjustments which do not imply a disproportionate or undue burden, where needed in a specific case, in order to ensure a workplace suitable for the persons with disabilities.

[42] Verwaltungsgericht Koblenz 18 February 2015, 2 K 719/14.KO Rn 27; see also Verwaltungsgericht Trier, 1 March 2011, 1 K 1202/10.TR Rn. 18. See C. Picker, 'Rechtsanspruch auf Homeoffice?' 50*Zeitschrift für Arbeitsrecht*, 269, 276 (2019).

[43] T. Klein, 'Flexible Arbeitsregelungen zur Förderung der Vereinbarkeit von Familien- und Berufsleben und die Grenzen des Arbeitszeitrechts' 38 *Neue Zeitschrift für Arbeitsrecht*, 474, 476 (2021). See also the statements by the Scientific Services of the Bundestags: Deutscher Bundestag - Wissenschaftliche Dienste, Titel: Zur Reichweite der Gesetzgebungskompetenz des Bundes bei einer Verankerung der Notfallversorgung, 11, 13, available at: https://tinyurl.com/4cpc3tb (last visited 30 September 2024).

This section is the legal basis of an important ruling by the Lower Saxony Regional Labour Court,[44] which takes the view that this provision aims to enable severely disabled persons to find an employment where their (residual) capabilities are optimally exploited. According to the *Lag*, this provision would not reach its purpose if the employer is completely free to reject a request to change the place of work to be submitted. The obligation to grant a change in working arrangements, as well as in the place of work, including the request to work from home, can be relieved (only) when such a measure is considered unreasonable (for example, a job cannot be performed flexibly and remotely; the employee's Internet connection in the home office is inadequate) or leads to a disproportionate burden.

The ruling is an attempt to interpret the provision in a manner compatible with the European directives, in particular, with the Employment Equality Directive of 2000, which established the obligation to provide 'reasonable accommodation' to disabled individuals (Art 5). There cannot be any doubt that remote working arrangements, along with other flexible working arrangements, can be considered *appropriate* measures to adapt the workplace to the disability and, thus, to meet the obligation to provide reasonable accommodations. According to the Preamble to the Framework Directive, the appropriateness of the employer's measures has to be assessed based on their effectiveness: even though remote working is not mentioned, recital 20 states that

> 'appropriate measures' are 'effective and practical measures to adapt the workplace to the disability, for example, modifying premises and equipment, patterns of working time, the distribution of tasks, or the provision of training'.

In the *HK Danmark* judgment, the CJEU develops the concept of 'reasonable accommodation', established by the UN Convention on the Rights of Persons with Disabilities, in a wider sense. The Court clarifies that

> 'a reduction in working hours could be regarded as an accommodation measure, in a case in which reduced working hours make it possible for the worker to continue employment'.[45]

The crucial question is whether the duty to provide a reasonable accommodations, expressly established by Art 5 in favour of persons with

[44] Landesarbeitsgericht Niedersachsen, 6 December, 2010 – 12 Sa 860/10.

[45] Case C-335/11 and C-337/1 *HK Danmark*, Judgment of 11 April 2013, no 56, available at www.eur-lex.europa.eu. See M. Aimo and D. Izzi, 'Disability and workers' well-being in collective agreements: practices and potential', in T. Treu and G. Casaleeds, *Transformations of Work: Challenges for the National Systems of Labour Law and Social Security*, XXII World Congress of the International Society for Labour and Social Security Law (Torino: Giappichelli, 2019), 41; C. Spinelli, 'Disability, Reasonable Accommodation and Smart Working: a virtuous matching?' ibid, 1309.

disabilities, can also be extended to workers who are carers.[46] This interpretation could be based on the wording and the purpose of principles and rules set forth under the EU equality law and the case law of the *CJEU*.

The CJEU holds in the *Coleman* judgment that the Employment Equality Directive, which prohibits employment-related discrimination on the grounds, *inter alia*, of disability, should be considered as applicable not 'only to people who are themselves disabled' but also to a person who is associated with an individual with a disability. The prohibition of discrimination on the ground of disability, therefore, can be extended to the detrimental treatment of a mother on the ground of her son's disability. The *CHEZ* judgment is also particularly important insofar as the Court confirms that discrimination by association is prohibited by EU equality law also in the context of indirect discrimination. According to some scholars

> 'this might mean that a carer who wishes to work flexibly to combine care and work and who is hampered in this by standard employment policies or working arrangements could argue that they are subject to indirect discrimination by reason of the disability or age of the person they care for'.[47]

The Work-life Balance Directive requires member States to take the necessary measures to prohibit less favourable treatment of workers on the ground, *inter alia*, that they have applied for, or that they have exercised the right to request flexible working arrangements (Art 11).

The critical point is that the German Act that transposes the Work-life Balance Directive into domestic law does not offer carers any possibilities to challenge work schedules and other arrangements, making it more difficult for them to combine care and work. Thus, it is very hard to argue that a duty to provide reasonable accommodation in favour of carers can be found in such provisions.

There seems to be an inconsistency within German Law. It is indeed rather curious that, while the German legislator extends the competence of the Equality body designated for the promotion, analysis, monitoring, and support of equal treatment of all persons without discrimination on grounds of sex, with regard to issues concerning discrimination and falling within the scope of the WLB Directive it does not explicitly prohibit discrimination on the ground of being a carer.[48] As it has also been pointed out, it surprises that in the accompanying

[46] Regarding the concept of reasonable accommodation with regard to disability see L. Waddington, n 31 above.

[47] L. Waddington and M. Bell, n 13 above, 515. On the so-called discrimination by association see, for instance, L. Waddington, n 31 above; C. Janda and H. Hermann, 'Die assoziierte Benachteiligung im Arbeitsrecht' 11 *Zeitschrift für europäisches Sozial- und Arbeitsrecht*, 455 (2023). Case C-83/14, *CHEZ Razpredelenie Bulgaria AD* v *Komisia za zashtita ot diskriminatsia*, Judgment of 16 July 2015, available at www.eur-lex.europa.eu.

[48] W. Brose, n 13 above, 316.

memorandum to the bill (so-called *Gesetzesbegründung*), it is stated that the Act expands the list of grounds on which EU provides for a prohibition of discrimination because parents and carers are now entitled to appeal to the Federal anti-discrimination agency to enforce the prohibition of discrimination. The German Act, as the Directive transposed by it, is not revolutionary, as it fails to recognize the status of caring as a protected characteristic within the anti-discrimination laws. The implication of this choice is simply that a right to care remains still reliant on pre-existing anti-sex discrimination legislation. While it is commendable that the German legislator focuses on the right to request flexible working, more would be needed to protect carers from discrimination and to promote carers' ability to perform in a paid workplace.

2. The Right to Request Flexible Working for Care-Related Needs Under Italian Law. The Example of the Agile Work

As far as the topic of flexible working hours tailored to care needs is concerned, the Italian regulatory framework resulting from the reforms that have been introduced over the years, appears quite heterogeneous. While recent and significant innovations can be identified in anti-discrimination law, particularly referring to Law no 162/2021, which includes 'changes in the organisation of working conditions and hours' within the notion of discrimination, other domestic regulations intersecting with this topic suffer from some delays. For example, in the field of working time, as already anticipated above, the regulatory framework has been focusing more extensively on the company's interest in flexibility, without providing adequate space for the worker's self-determination in order to suit his or her lifestyle and to reconcile work and family life.

The implementation of European legislation provides a valuable opportunity to reconsider the standard approach, by placing greater importance on the individual choices of workers, parents, or caregivers as for the organisation of a schedule that allows for the combination of work and caregiving. However, the implementation of the directive through Legislative Decree no 105/2022 falls short in this regard. In contrast to the German system, the Italian legislator entirely neglects instruments designed to facilitate a more adaptable work organisation and the structuring of working hours for the purpose of reconciliation. Additionally, the transposition decree does not address, at least explicitly, the flexible working methods mentioned in Directive no 1158, as discussed earlier.[49]

According to what can be inferred from European regulations, one of the types of contract where the worker's interest in 'choosing' (controlling) working

[49] O. Bonardi, 'Il diritto di assistere. L'implementazione nazionale delle previsioni a favore dei caregivers della direttiva 2019/1158 in materia di conciliazione', in C. Alessi et al, *Diritto di conciliazione. Prospettive e limiti della trasposizione della dir. 2019/1158/UE* (Napoli: Editoriale Scientifica, 2023), 103; C. Alessi, 'La flessibilità del lavoro per la conciliazione nella direttiva 2019/1158/UE e nel d.lgs. 30 giugno 2022 n. 105', ibid, 85.

time – and, in general, flexibility aimed at satisfying the needs and interests of the worker – is concretely met seems to be that of remote work, which, unlike part-time,[50] is explicitly mentioned in Directive no 1158, Art 9.

Italian legislator, at least based on what intentionally declared, heads towards this direction when, in 2017, it chooses to promote agile work through its legislative recognition: this instrument, qualified as 'a mode of execution of the subordinate employment relationship' (Art 18, para 1, Law no 81/2017), is indeed conceived with the double purpose of 'increasing the competitiveness of companies and facilitating employees' work-life balance'.

In this way, the legislator shows awareness towards the evolution of working methods and the production induced by the advent of new digital technologies: in brief, by signing an agreement, the employee is granted greater 'organisational' freedom, that is, broader freedom to decide - albeit within certain limits- when and where to perform the work ('time sovereignty').[51]

The agile work performance is characterized by flexibility in time and space of its execution, which means that an agile worker is entitled to carry it out 'without strict time and place constraints'. An important feature of the agile work provisions is that part of the work is performed outside the company premises, without a fixed location. The duration of work time, the timing of work time, and space flexibility are crucial factors in employees' ability to balance their work and personal lives. Thus, it is not surprising that agile work is generally considered a work-life balance tool, enabling parents to share the care of their children. This point of view was also upheld by the 2019 budget law (Law No 145/2018) which required

> 'the employer to give *priority* to requests for performing agile work from women within three years after the end of maternity leave, as well as from workers who are parents of disabled children' (Art 1, para 3-*bis* Law no 81/2017).[52]

However, 'all that glitters is not gold' in this respect. Law no 81/2017 and

[50] In this regard see V. Ferrante, 'Lavoro a tempo parziale' *Enciclopedia giuridica* (Roma: Treccani, 2008), 1; C. Alessi, *Flessibilità del lavoro e potere organizzativo* (Torino: Giappichelli, 2012), 69; Id et al, 'Per una trasposizione responsabile della dir. 2019/1158/UE relativa all'equilibrio tra attività professionale e vita familiare per i genitori e i prestatori di assistenza' *Rivista Giuridica del Lavoro*, 111 (2022).

[51] See, for example: M. Tufo, *Il lavoro digitale a distanza* (Napoli: Editoriale Scientifica, 2021); S. Cairoli, *Tempi e luoghi di lavoro nell'era del capitalismo cognitivo e dell'impresa digitale* (Napoli: Jovene, 2020); G. Calvellini, *La funzione del part-time: tempi della persona e vincoli di sistema* (Napoli: Edizioni Scientifiche Italiane, 2020), 15, 75; E. Dagnino, *Dalla fisica all'algoritmo: una prospettiva di analisi giuslavoristica* (Modena: Adapt, 2019); C. Spinelli, *Tecnologie digitali e lavoro agile* (Bari: Cacucci, 2018); see also A. Occhino eds, *Il lavoro e i suoi luoghi* (Milano: Vita e pensiero, 2018).

[52] I. Senatori and C. Spinelli, '(Re-)Regulating Remote Work in the Post-pandemic scenario: Lessons from the Italian experience' 14 *Italian Labour Law e-Journal* (2021).

subsequent legislative interventions can be criticized for at least two reasons.

First, considering the legislator's intention to pursue the goal of work-life balance, it is highly questionable whether it is appropriate to leave the power to regulate a wide range of working conditions within the contractual autonomy of the parties to the employment contract. Under the employment contract (and also in case of agile work), the individual position of the worker *vis-à-vis* the employer is too weak to counteract the dominant position and reach an agreement that can balance the paid work and caring responsibilities. The legislator adopted a formalistic approach: the freedom of contract of the contracting parties was not significantly restricted, notwithstanding the unequal bargaining powers they enjoy.[53] The Italian Act only requires that parties comply with the rules on maximum weekly and daily working time established by statutory law and collective bargaining. The matter is governed by collective agreements, which are empowered to set the maximum weekly working hours.

Secondly, criticisms are also directed to the legislative intervention of 2018, where the Italian legislator discards the idea of introducing a statutory right to agile work for caring purposes and – contrary to what is found in other more advanced foreign experiences – it only requires employers to recognize a 'priority' to requests for performing agile work coming from the above-mentioned persons (Art 1, para 3-*bis*).[54]

The legal framework is now, in general terms,[55]confirmed by Legislative Decree No 105 of 2022, which, instead of bringing national legislation in line with Dir 1158, merely extends this right to parents with children up to 12 years old, as well as to disabled workers and caregivers (see the modifications made to Art 18, para 3-*bis*, Law no 81/17).

One would expect the national legislator to be particularly careful in establishing employment rules aimed at accommodating the needs of employees with broader caregiving responsibilities, thus seizing the opportunity to clarify and

[53] ibid: 'The overestimated role recognised to the individual agreements implies some risks, concerning first of all how ascertain that the worker's consent is true, but also how to avoid discrimination when defining working conditions'.

[54] See for example V. Maio, 'Il lavoro da remoto tra diritti di connessione e disconnessione', in M. Martone ed, *Il lavoro da remoto. Per una riforma dello smart working oltre l'emergenza* (Roma: La Tribuna, 2020), 85-100. On the topic see also M. Brollo et al, *Lavoro agile e smart working nella società post- pandemica* (Modena: Adapt, 2022).

[55] A statutory 'right' to agile work has been introduced in response to the Covid-19 pandemic, referred to as 'Pandemic agile work'. This special form of agile work is limited to specific groups of workers, such as those facing heightened health risks or increased caregiving responsibilities, including disabled workers and parents of children under the age of 14 affected by school closures. However according to I. Senatori and C. Spinelli, n 52 above, 240: 'This special form has been qualified as a "right", insofar as the employer is obliged to accept every request coming from an eligible worker. However, the employer's position is mitigated by the condition that the remotisation needs to be compatible with the inherent characteristics of the job and with the needs of the organisation: which brings to doubt about the possibility to qualify the worker's position as a "right" in a strict sense'.

strengthen measures that may assist those opting for remote work and outlining limitations regarding the employer's acceptable reasons for refusing such a request. However, this is not the case. A clear distinction can be made between the right to request flexible working arrangements under EU law and the 'priority right' that parents and caregivers are entitled to exercise under Italian law to perform their jobs remotely (Art 4, Legislative Decree no 105/2022).[56]

EU law provides the worker with an entitlement to request certain arrangements, thus triggering a statutory obligation for the employer to consider that request – a sort of duty to negotiate – and to make every effort to reach an agreement on flexible working arrangements with the worker. Under EU law, the employer is required to discuss and assess the adoption of the most suitable measures to balance two conflicting interests, thus being compelled to investigate and implement an accommodation.

Conversely, under domestic regulation the employer has no obligation to discuss flexible work arrangements with the worker, as the provision only refers to a 'priority right', which appears to be triggered at a later stage of the decision-making process when are requests for comparable job positions are available. This implies that the procedural obligations an employer must comply with, upon receiving such a request, are less stringent than those found in the Directive.

Nevertheless, in Italian jurisdiction, the right to request flexible working arrangements can fully realize its potential through the aforementioned case law of some national courts, especially through the protections found in EU and national equality law. Numerous decisions show that workers exercising the right to request flexible working arrangements can also fall within the scope of anti-discrimination law, which grants them an enhanced protection. It was worthless that in 2021 the Italian legislator indirectly codified this case law under the new Art 25(2 *bis*) of the Code for Equal Opportunities (Act No 162 of 5 November 2021), which came into effect on 3 December 2021.

While the wording may not be entirely clear, the legislator appears to include the status of caregivers among one of the grounds for protection against discrimination under the Equality Law.[57] On the one hand, it modifies the concept of discrimination by adding a reference to all «changes at the organisational level and in working arrangements and working schedules at the workplace» which may disadvantage individuals with protected characteristics such as age, *care duties*, pregnancy or motherhood/fatherhood (including adoption), or taking up related rights. On the other hand, this provision aims to prevent such disadvantages that

[56] See O. Bonardi, n 49 above and C. Alessi, n 49 above; E. Dagnino, 'Priorità per l'accesso al lavoro agile e ad altre forme di lavoro flessibile', in D. Garofalo et al, *Trasparenza e attività di cura nei contratti di lavoro. Commentario ai decreti legislativi n. 104 e n. 105 del 2022* (Modena: Adapt, 2022), 602 and R. Casillo, 'Permessi e agevolazioni per i lavoratori caregivers familiari (art. 3, comma 1, lett. B, d.lgs. n. 105/2022)' ibid, 568.

[57] See, for instance, R. Santagata de Castro, 'Discriminazione diretta e indiretta. Una distinzione da ripensare?' *Lavoro e Diritto*, 509 (2022).

could hinder their participation in life or career.

The concept of gender equality is closely linked to work-life balance, and this could allow for the interpretation of national legislation in the light of the objectives enshrined in EU law, thus highlighting the employees' right and the concept of working-time flexibility in this context.[58] Act no 162 of 2021 could help address gaps left open by the legislator in 2022. The new Art 25(2 *bis*) could represent a crucial step towards protecting the right to care. It is evident that the protection and promotion of Work-life Balance involve various tools and legal instruments, especially non-discrimination law, which can play a decisive role; the legislator's intention is to restrict the managerial prerogative of the employer concerning the organisation of working time.[59]

This amendment to the law on discrimination introduces certain constraints to the exercise of managerial powers, specifically limiting the employer's freedom to change or reject a request for flexible working arrangements. The employer is now obliged to justify a refusal to provide flexible working arrangements. Consequently, the employee is required to demonstrate the disadvantage resulting from changes in working arrangements and schedules, particularly affecting those with caregiving roles. The challenge is to establish that the rule or practice interferes with the employee's rights, such as the right to work. The burden then falls on the employer to demonstrate that the purpose of the rule or practice was to achieve a legitimate goal, and the employer's right to change or reject working arrangements and schedules outweighs any unavoidable interference with the employee's right. Therefore, the employer's defence should prevail, if the change is genuinely relevant to business needs.

The protection against indirect sex discrimination and discrimination based on being a parent or caregiver, explicitly set forth under Italian law, plays a similar role as that of a reasonable accommodation duty and already provides for a *de facto* accommodation duty: indeed, a positive duty to accommodate can also be found within the prohibition to indirectly discriminate (see para 3). Moreover, as the principle of non-discrimination based on being a carer is linked to the principle of non-discrimination based on sex - considered a general principle of EU law - and considered that the national rules set forth under Leg Decree no 105/2022 fall under EU law, a national court hearing a dispute concerning the principle of non-discrimination related to care is entitled to ensure the full effectiveness of EU law, setting aside any provision of national law that may conflict with it, specifically the one regarding the priority right, to be interpreted as the right to submit a request.

[58] For the idea that a right to care a right to care requires that the status of carer is recognised as a protected characteristic see N. Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford: Oxford University Press, 2011), 182.

[59] G. Calvellini, n 33 above.

* The articles in the section ‘Insights and Analyses’ are accepted by the Editors-in-Chief without peer-review.